



# IMPLEMENTING THE OECD ANTI-BRIBERY CONVENTION



## PHASE 4 REPORT: **United Kingdom**

This document and any map included herein are without prejudice to the status of or sovereignty over any territory, to the delimitation of international frontiers and boundaries and to the name of any territory, city or area.

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## EXECUTIVE SUMMARY

This Phase 4 report by the OECD Working Group on Bribery in International Business Transactions evaluates and makes recommendations on the United Kingdom's (UK) implementation of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and related instruments. The report details the UK's particular achievements and challenges in this regard, including with respect to enforcement of anti-foreign bribery laws, as well as the progress the UK has made since its Phase 3 evaluation of March 2012.

The UK has taken significant steps since Phase 3 to increase enforcement of the foreign bribery offence and is now one of the major enforcers among the Working Group countries. Since its last evaluation, the UK has concluded nine additional foreign bribery cases involving criminal liability of ten individuals and six companies, imposed civil remedies in three cases, and administrative sanctions in a further two foreign bribery-related cases. A number of foreign bribery prosecutions and pre-charge investigations are also underway. Important legislative reforms, including the introduction of deferred prosecution agreements, and high-level political commitments, such as those made at the May 2016 London Anti-Corruption Summit, have supported these enforcement efforts, and the UK has further restated its continued commitment to fighting foreign bribery. The Working Group hopes the UK will achieve even greater enforcement in the future, building on this momentum. Nevertheless, the Working Group identifies in this report some key issues that may undermine the effective enforcement of foreign bribery laws in the UK. In particular, Scotland's practices and frameworks for foreign bribery enforcement could be brought in line with those in place in England and Wales; there is also scope to improve communication between law enforcement authorities from England and Wales and those in Scotland. Furthermore, the persistent uncertainty about the SFO's existence and budget is harmful, especially given the SFO's prioritisation of foreign bribery cases and its demonstrated expertise in such cases. The Working Group calls for the UK to maintain the role of the SFO in foreign bribery cases, to further improve interagency cooperation, and to ensure effective measures are in place to safeguard the independence of investigations and prosecutions.

The UK has also taken significant steps to enhance its detection capabilities, including through intelligence analysis by the SFO, improved whistleblowing channels, and mobilisation of some of its government agencies. Nevertheless, other sources remain under-exploited. In particular, anti-money laundering measures should be enhanced to improve detection of foreign bribery, including adopting the Criminal Finances Bill. The Working Group also urges the tax administration to conduct as a matter of priority a comprehensive review of its methods and capacity to detect and report foreign bribery. The UK's Crown Dependencies and Overseas Territories also have the potential to play a stronger role in detecting and enforcing foreign bribery.

The report and its recommendations reflect the findings of experts from Norway and South Africa and were adopted by the Working Group on [16 March 2017]. The report is based on legislation, data and other materials provided by the UK and research conducted by the evaluation team. The report is also based on information obtained by the evaluation team during its on-site visit to London in October 2016, during which the team met representatives of the UK's public and private sectors, media, and civil society. The UK will submit a written report to the Working Group in two years on the implementation of all recommendations and its enforcement efforts.

# INTRODUCTION

1. In March 2017, the Working Group on Bribery in International Business Transactions (Working Group or WGB) completed its fourth evaluation of the United Kingdom’s implementation of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (the Convention), the 2009 Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions (2009 Recommendation) and related instruments.

## Previous evaluations of the United Kingdom by the Working Group on Bribery

2. Monitoring implementation and enforcement of the Convention and related instruments takes place in successive phases through a rigorous peer-review monitoring system. The monitoring process is subject to specific agreed-upon principles. The process is compulsory for all Parties and provides for on-site visits (as of Phase 2), including meetings with non-government actors, and reports are systematically published. The evaluated country has no right to veto the final report and recommendations. All of the OECD Working Group on Bribery evaluation reports and recommendations are made public on the OECD website.

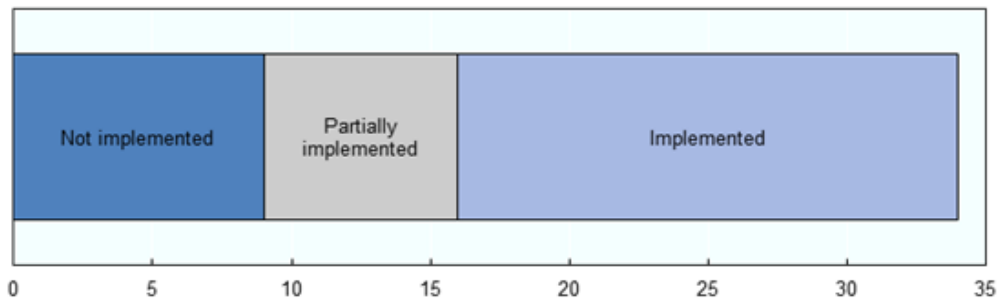
**Box 1. Previous WGB evaluations of the United Kingdom**

- 2014 [Follow-up to Phase 3 report](#)
- 2012 [Phase 3 report](#)
- 2011 [Follow-up to Phase 2bis report](#)
- 2010 [Phase 1ter report](#)
- 2008 [Phase 2bis report](#)
- 2007 [Follow-up to Phase 2 report](#)
- 2005 [Phase 2 report](#)
- 2003 [Phase 1bis report](#)
- 1999 [Phase 1 report](#)

3. The UK’s previous full evaluation – Phase 3 – dates back to March 2012. The Working Group evaluated the UK’s level of implementation of its Phase 3 recommendations in 2014. At that time, the Working Group concluded that 18 of the UK’s 34 Phase 3 recommendations had been implemented, 7 were partially implemented, and 9 were not (see Figure 1).<sup>1</sup>

**Figure 1. Implementation by the UK of Phase 3 Recommendations**

(2014 - Two-year follow-up)



<sup>1</sup> See Annex 1 for a list of the UK’s Phase 3 recommendations and the Working Group’s assessment of their implementation, based on [United Kingdom: Follow-up to the Phase 3 report and recommendations](#)

## Phase 4 process and on-site visit

4. Phase 4 evaluations focus on three key cross-cutting issues – enforcement, detection and corporate liability – also addressing progress made in implementing outstanding recommendations from previous phases, as well as any issues raised by changes to domestic legislation or the institutional framework.<sup>2</sup> Phase 4 takes a tailor-based approach, considering each country’s unique situation and challenges, and reflecting positive achievements. For this reason, issues which were not deemed problematic in previous phases may not be reflected in this report. Previous reports (Phases 1–3) by the WGB contain detailed description and analysis on all topics covered under the Convention and 2009 Recommendation. See Box on previous evaluations of the UK.

5. The evaluation team for this Phase 4 evaluation of the United Kingdom (UK) was composed of lead examiners from Norway and South Africa, as well as members of the OECD Anti-Corruption Division.<sup>3</sup> Pursuant to the Phase 4 process, after receiving the UK’s responses to the Phase 4 questionnaire and supplementary questions, the evaluation team conducted an on-site visit to London on 11-14 October 2016. The team met with representatives of the UK government, law enforcement authorities and the judiciary, the private sector, including business organisations, companies, banks, lawyers, and external auditors, representatives of UK Crown Dependencies and Overseas Territories, civil society, including non-governmental organisations (NGOs), academia and the media.<sup>4</sup> The evaluation team expresses its appreciation to the participants for their openness during discussions. In particular, the evaluation team welcomes the high level of engagement and the major contribution of UK NGOs, a group of which prepared a “Submission to the OECD Working Group on Bribery Review team” covering a broad range of topics under evaluation.<sup>5</sup> The evaluation team is also grateful to the UK, in particular the Joint Anti-Corruption Unit in the Cabinet Office and the Serious Fraud Office, for the high degree of cooperation throughout the evaluation, the organisation of a well-attended on-site visit, and the provision of additional information following the on-site visit.

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<sup>2</sup> See Phase 4 evaluation procedures: <http://www.oecd.org/daf/anti-bribery/Phase-4-Monitoring-Resources-ENG.pdf>.

<sup>3</sup> Norway was represented by **Mr. Atle Roaldsøy**, Policy Director, International Section, Ministry of Justice and Public Security and **Ms. Sissel Gørrissen**, Special Investigator, Anti-Corruption Team, ØKOKRIM (National Authority for Investigation and Prosecution of Economic and Environmental Crime). South Africa was represented by **Adv. Lebogang Dineo Baloyi**, Senior Deputy Director of Public Prosecutions, Specialised Commercial Crime Unit, National Prosecuting Authority and **Adv. Malini Nadasen-Govender**, Deputy Director of Public Prosecutions, Regional Head: Western Cape, Cape Town, Special Commercial Crimes Unit, National Prosecuting Authority. The OECD was represented by: **Ms. France Chain**, Coordinator of the Phase 4 Evaluation of the UK and Senior Legal Analyst, **Ms. Catherine Marty**, Legal Analyst, and **Mr. Graeme Gunn**, Legal Analyst, all from the Anti-Corruption Division, Directorate for Financial and Enterprise Affairs.

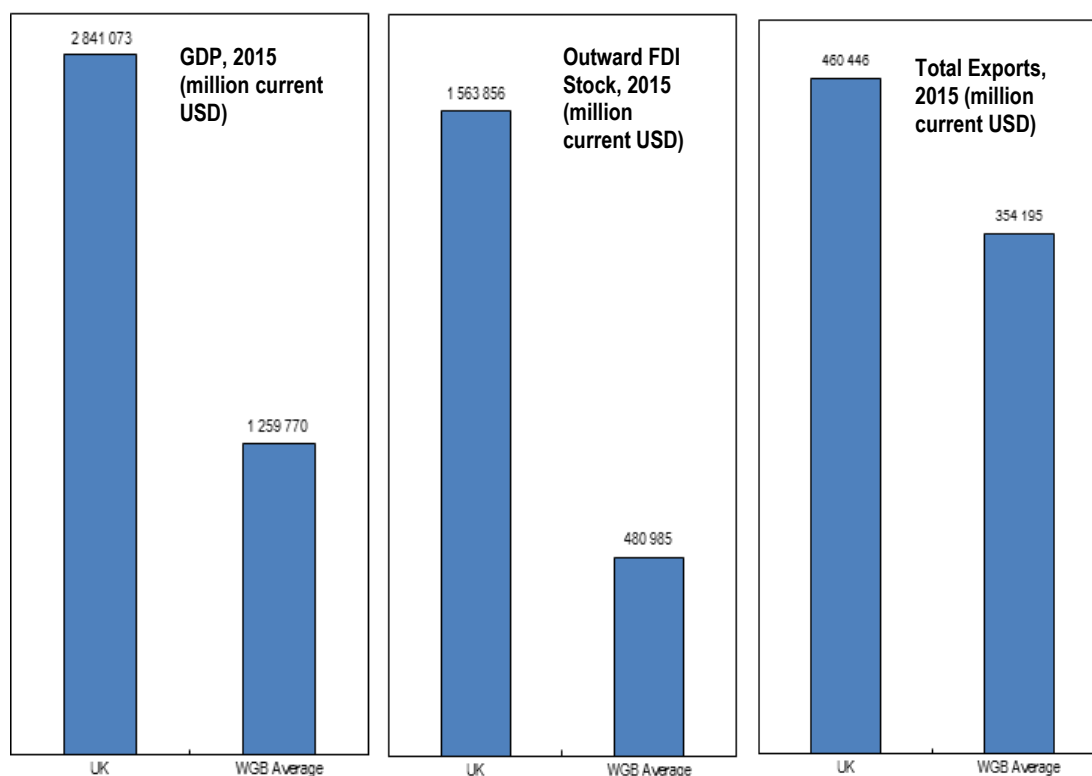
<sup>4</sup> See Annex 2 for a list of participants.

<sup>5</sup> This Submission by the BOND Anti-Corruption Group – a collective of UK NGOs – is publicly available. See <http://www.cw-uk.org/wp-content/uploads/2016/10/BOND-Anticorruption-group-submission-to-OECD-Phase-4-visit.docx>.

## The UK's economic situation and foreign bribery risks

6. The UK economy occupies a central position in the broader world economy, and foreign bribery risks are undoubtedly present. The UK ranks 4<sup>th</sup> among Working Group members in terms of real gross domestic product (GDP),<sup>6</sup> 3<sup>rd</sup> in terms of 2015 exports at current prices,<sup>7</sup> and has the 2<sup>nd</sup> highest stock of outward foreign direct investment at current prices (FDI) among the 41 Working Group members.<sup>8</sup>

**Figure 2. Comparison of the UK's Economic Data against WGB Average**



7. The UK's export sector serves a diversified set of importing countries, including certain higher corruption-risk jurisdictions. Major exports from the UK include certain high-risk industries such as fuels and mining, pharmaceuticals, and aircraft and spacecraft (see Table 1 below).<sup>9</sup> In Scotland, oil and gas represents a major part of the economy. The UK is also the third biggest defence exporter in the world, with a share of the global defence export market estimated at 12% for 2015.<sup>10</sup>

<sup>6</sup> Source: <http://unctadstat.unctad.org/wds/TableViewer/tableView.aspx?ReportId=96>. GDP is measured in constant USD and at constant prices.

<sup>7</sup> Source: <http://unctadstat.unctad.org/wds/ReportFolders/reportFolders.aspx>

<sup>8</sup> Ibid.

<sup>9</sup> Based on the OECD (2014) [Foreign Bribery Report](#), high risk industries include: extractive; construction; transportations and storage; information and communications; manufacturing; human health; and electricity and gas.

<sup>10</sup> See UK Defence and Security Export Statistics for 2015, published by UK Trade and Investment: [www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/541330/20160727 - Official Statistics - UKTI DSO Core Slides for 2015 - Final Version.pdf](http://www.gov.uk/government/uploads/system/uploads/attachment_data/file/541330/20160727_-_Official_Statistics_-_UKTI_DSO_Core_Slides_for_2015_-_Final_Version.pdf).



As the UK authorities themselves acknowledge, corruption in the defence industry represents a risk and can undermine the integrity of major contracts.<sup>11</sup>

**Table 1. UK Trade Partners and Sectors**

Exports		Outward FDI	
Export partners – Top 5	European Union (47.3%) USA (12.6%) Switzerland (6.9%) China (5.1%) Hong Kong/China (2.4%)	Outward FDI partners – Top 5	USA (26%) Netherlands (12%) Luxembourg (11%) France (4%) Ireland (4%)
Export commodities	Manufactures (69.4%) Fuels and mining (15.6%) Agricultural products (7.1%)		

Source: [WTO Trade Profiles 2015](#) – United Kingdom, and OECD Foreign Direct Investment statistics database. FDI positions [Main aggregates](#).

8. The UK business sector is diverse and dynamic. Small and medium-sized enterprises (SMEs) play a significant role in the UK economy, although slightly less than in many other European economies.<sup>12</sup> Roughly 40% of all SMEs are exporters.<sup>13</sup> The UK is also the “home economy” (place of headquarters) of 17 of the top 100 non-financial multinational enterprises in such sectors as extractive industries, consumer goods, telecommunications, pharmaceuticals, and engineering, which are seen as prone to foreign bribery risks.<sup>14</sup>

9. The UK further remains the world’s leading global financial services centre, accounting for 17% of the total global value of international bank lending and 41% of global foreign exchange trading.<sup>15</sup> The attractiveness of its financial sector, combined with close links to offshore centres, expose the UK to significant risks of corruption and foreign bribery-related money laundering, as recognised by both government and law enforcement agencies. Money laundering and corruption have been identified as high priority threats in the National Crime Agency’s (NCA) national control strategy, the UK Government’s strategic defence and security review, its National Risk Assessment of Money Laundering and Terrorist Financing, and its overseas development aid strategy. Misuse of corporate vehicles, trusts and foundations registered in the Crown Dependencies (CDs) and Overseas Territories (OTs) is another risk feature. UK law enforcement agencies have acknowledged that the opacity of current beneficial ownership arrangements of these vehicles is a significant barrier to tackling money laundering, corruption and successfully recovering stolen assets. Likewise, the controversial Limited Partnership status, or so-called “shell” companies, in Scotland appears to be vulnerable for misuse in money laundering and corruption schemes. This has prompted Scottish politicians to suggest that the murky nature of such arrangements is undermining Scotland’s reputation as a place to do legitimate business.<sup>16</sup>

<sup>11</sup> See [2014 UK Anti-Corruption Plan](#).

<sup>12</sup> 53% of full time employment and half of gross value added in the UK is accounted for by SMEs (the EU-28 averages are 67% and 58%, respectively). Source: Eurostat “[Number of enterprises, persons employed and gross value added \(GVA\) and the share of SMEs](#)” 2012 data.

<sup>13</sup> Source: [UK Office for National Statistics Annual Business Survey Exporters and Importers in Great Britain, 2014](#).

<sup>14</sup> Source: 2016 UNCTAD [World Investment Report](#).

<sup>15</sup> Source: [UK Action Plan for anti-money laundering and counter-terrorist finance of April 2016](#).

<sup>16</sup> See Scottish Financial News, 18 August 2016, “[Fresh calls to close SLP loophole as Scots firm named in fresh corruption case](#)”.

10. These features of the UK economy could also affect certain aspects of implementation of the Convention. The capacity of the UK to deliver MLA where its CDs and OTs are concerned has been noted as an area of concern by the Working Group in previous assessments. Accessing information held by the financial sectors in the CDs and OTs may in particular impact foreign bribery investigations in the UK and other jurisdictions. In addition, weaknesses in the UK's anti-money laundering system make it vulnerable to corrupt money flowing into the economy, and also cause problems in terms of detection, freezing, seizure and repatriation of corruptly-obtained assets.

11. The Brexit vote has further raised concern that the fight against corruption and bribery in the UK could be set back, as expressed by a number of media and NGOs.<sup>17</sup> Some of these concerns are linked directly to leaving the European Union (EU): they range from questions about future applicability of EU rules in respect of money laundering and sanctions, to questions concerning international cooperation currently facilitated by EU mechanisms such as Europol and Eurojust. But leaving the EU may also indirectly impact UK foreign bribery enforcement. A tightening of the economy could result in significant strain on public resources, including for law enforcement, and in pressure to weaken the Bribery Act or its enforcement to attract business. Finally, practically speaking, leaving the EU may well clog up the executive and legislative timetable and delay announced initiatives that could facilitate investigation and prosecution of economic crime.

12. Fortunately, the UK is not oblivious to these risks and has taken some significant steps to address some of these issues, positioning itself as one of the countries at the forefront of global anti-bribery efforts. Notably, the previous UK Prime Minister, Mr David Cameron, made combating corruption a key objective in his mandate. This commitment was most publicly visible in the organisation of the London Anti-Corruption Summit in May 2016. Among the Summit commitments, the UK committed to developing the first ever national Anti-Corruption Strategy, to be published in 2017. With respect to the Anti-Bribery Convention specifically, the UK indicated, in its responses to the phase 4 questionnaire, that the Strategy will "reaffirm the UK's commitment to the OECD Anti-Bribery Convention and will explore the scope to address any areas of concern in relation to domestic implementation. Internationally the strategy is likely to maintain the UK's strong commitment to encouraging new countries to join the convention and existing members to fully implement the Convention." Other specific commitments made by the UK on the occasion of the Summit may also positively impact the prevention, detection and prosecution of foreign bribery. These include beneficial ownership initiatives that may facilitate investigation of the complex web of financial structures commonly associated with foreign bribery cases, and agreements that such initiatives could be extended in the CDs and OTs, as well as increased transparency and information sharing in other areas, which should make it easier to detect foreign bribery cases and act as a deterrent.

13. Although the recent changes to the government raised questions among UK stakeholders about the UK's continued commitment to the fight against corruption and bribery, events in the period since Prime Minister Theresa May's appointment in July 2016 and the time of this evaluation appear reassuring. The Anti-Corruption Unit within the Cabinet Office of the Prime Minister has been maintained, and major legislation which could facilitate enforcement of economic and financial crimes is moving forward. The Criminal Finances Bill was introduced before Parliament in October 2016, and aims to improve the law enforcement framework to tackle money laundering and corruption,

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<sup>17</sup>

See, *inter alia*:

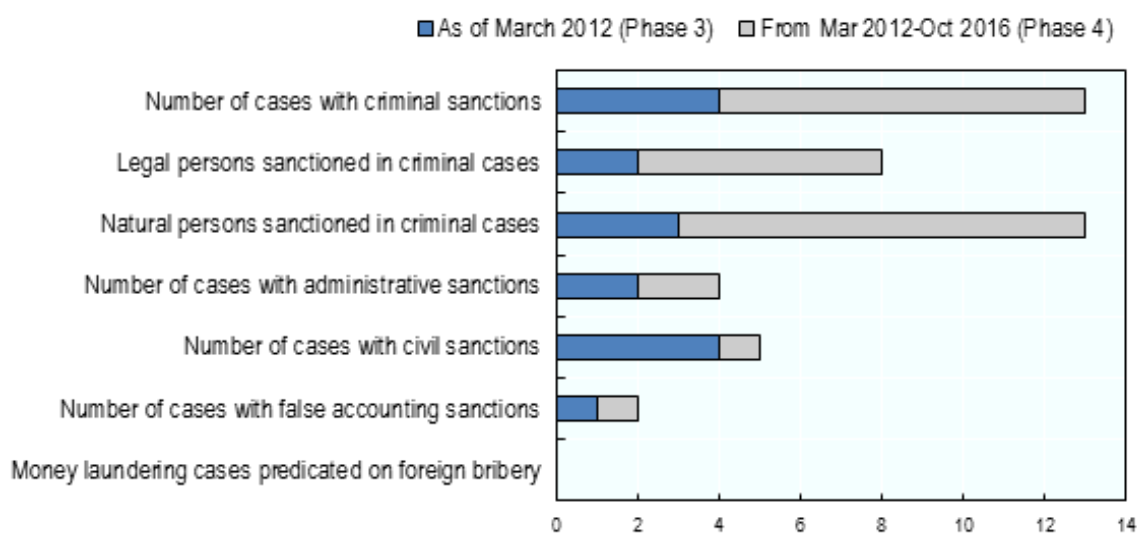
- <http://www.transparency.org.uk/what-does-brexit-mean-for-the-uks-fight-against-corruption/>
- <http://www.cw-uk.org/2016/07/05/brexit-what-next-for-the-anti-corruption-movement-in-the-uk/>
- <http://www.lexology.com/library/detail.aspx?g=1416d3a5-bb9d-4824-8d00-fa33ada34362>
- <http://blogs.lse.ac.uk/europpblog/2016/07/25/anti-corruption-after-brexit/>

recover the proceeds of crime, and counter-terrorist financing.<sup>18</sup> The Attorney General also confirmed in September 2016 the government’s intention to consult the public on extending the scope of the offence of failing to prevent bribery to other economic crimes, such as money laundering, false accounting and fraud.<sup>19</sup> The UK published a public call for evidence on corporate criminal liability for economic crime on 13 January 2017, and will consider the responses received following closure of the call in March in determining the case for reform and the nature of any resulting proposals.

## Foreign bribery cases

14. The level of foreign bribery enforcement by the UK has increased since the Phase 3 evaluation report was adopted in March 2012. At that time, the UK had concluded 4 foreign bribery cases.<sup>20</sup> As of January 2017, the UK had concluded 9 additional cases involving criminal liability of 10 natural persons and 6 legal persons. The UK has also imposed civil remedies in 1 case and administrative sanctions in a further 2 cases since Phase 3. Concluded cases, including those involving acquittals, are also discussed in section B.5.

**Figure 3. Comparison between concluded foreign bribery cases in Phases 3 and 4**



15. The foreign bribery cases concluded since Phase 3 in which sanctions have been imposed are as follows (see Section B.4.d for details of the sanctions imposed in each case and Annex 3 for information about ongoing investigations):

### a. Criminal cases

- *Alexander Capelson* – The COLP investigation found that in 2009 Mr Capelson paid a bribe valued at USD 200 000 to an official of the European Bank for Reconstruction and

<sup>18</sup> Updates on the status of the Bill can be accessed at <http://services.parliament.uk/bills/2016-17/criminalfinances.html>

<sup>19</sup> See [Attorney General Jeremy Wright speech to the Cambridge Symposium on Economic Crime](#), 5 September 2016.

<sup>20</sup> At the time of Phase 3, three natural persons (Tobiasen, Dougall and Messent) and two legal persons (Mabey & Johnson and Innospec) had been sanctioned by the UK for foreign bribery.

Development (EBRD) in return for an EBRD loan worth USD 60 000 000. Mr Capelson was charged under pre-Bribery Act legislation and prosecuted by the CPS. He pleaded guilty and was sentenced to one year of imprisonment by the court. The case was detected by COLP and EBRD while investigating another case.

- *Innospec* – As noted in Phase 3, Innospec was sanctioned in 2010 for the payment of bribes valued at USD 8 000 000 in the period 2002-2006 to officials in Indonesia and Iraq to win contracts for the provision of fuel additives worth up to USD 160 000 000. The SFO also charged 4 natural persons in connection with the case under pre-Bribery Act legislation. In 2012, 2 natural persons (a former CEO and a former business director) pleaded guilty and were sanctioned by the court. In 2014, 2 natural persons (a former chief executive and a former regional sales director) who had pleaded not guilty were found guilty after a contested trial and sanctioned by the court. The natural persons were each sentenced to terms of imprisonment, ranging from 16 months suspended to 3 years of imprisonment. The case was detected by the UK through a subpoena from a US law enforcement agency.
- *Innovia / Securrency* – The SFO investigated and charged under the pre-Bribery Act legislation two UK nationals, Mr Lowther and Mr Chapman, who were former employees of polymer bank note producer Securrency Ltd. The company was at the time part owned by the Reserve Bank of Australia and a UK manufacturing firm Innovia Films, and is the subject of proceedings in Australia. The UK nationals were alleged to have made bribe payments of approximately USD 250 000 to win contracts to provide polymer for banknote printing in Nigeria. In 2011, a jury acquitted Mr Lowther after a contested trial. Mr Chapman, the manager of Securrency's Africa office, was arrested at Heathrow Airport in April 2015, having been extradited from Brazil. In 2016, a jury convicted Mr Chapman after a contested trial and the court imposed a term of 30 months of imprisonment. The case broke in Australia by a whistleblower.
- *Mondial* – The COLP investigation found that two former directors of a defence company, Mondial Defence Systems, paid USD 200 000 to a US official to secure contracts in Afghanistan and Iraq worth over USD 5 000 0000. They were charged under pre-Bribery Act legislation and prosecuted by the CPS. Both pleaded guilty. The court sentenced one director to 11 months of imprisonment and the other to 2 years of imprisonment. The UK detected the case through a joint investigation with the US FBI and authorities in Afghanistan.
- *Rolls-Royce* – The SFO investigation found that from 1989 to 2013, two entities now ultimately owned by Rolls-Royce Holdings plc – namely Rolls-Royce plc and its United States incorporated subsidiary, Rolls-Royce Energy Systems Inc – were connected to corrupt payments in excess of USD 50 000 000. These payments occurred in the context of various separate corruption schemes in the civil aerospace, defence aerospace and energy businesses of Rolls-Royce. The payments were made to public officials in China, India, Indonesia, Malaysia, Nigeria, Thailand and Russia. The misconduct generated gross profits of GBP 258 000 000 and it is by far the largest foreign bribery case in UK history. The draft indictments include 11 counts covering multiple counts of conspiracy to corrupt under the pre-Bribery Act legislation, false accounting, and failure to prevent bribery under section 7 of the Bribery Act. Financial penalties of approximately GBP 510 000 000 were imposed pursuant to a court-sanctioned DPA approved on 17 January 2017 (after the onsite visit). The UK DPA is part of a global settlement involving a separate DPA with the US Department of Justice and a Leniency Agreement with the Brazilian Ministério Público Federal. The case was initially brought to the SFO's attention by a whistleblower. Additional misconduct was reported by the companies after the whistleblower's report.
- *Smith & Ouzman* – The SFO investigation found that from 2006-2010 officers of Smith & Ouzman paid bribes valued at GBP 395 074 to public officials in Kenya and Mauritania to influence the award of printing contracts. In return, the company won contracts worth

approximately GBP 2 000 0000 with gross profit of approximately GBP 440 000. The company and four of its agents were charged under the pre-Bribery Act legislation and all pleaded not guilty. The company and two directors were found guilty by a jury and the other two less-senior employees were found not guilty. The court imposed financial penalties of GBP 2 200 000 on the legal person. One director was sentenced to three years of imprisonment and the other to an 18 month suspended sentence plus 250 hours of unpaid work. The case was detected by a member of the public.

- *Standard Bank* – The SFO investigation found that in 2013 Stanbic Bank Tanzania (SBT), a company related to Standard Bank, made payments valued at USD 6 000 000 with the intention to induce members of the Government of Tanzania to show favour to SBT and Standard Bank. The benefit from the bribery was transaction fees of USD 8 400 000 shared by SBT and Standard Bank. The company was charged under section 7 of the Bribery Act for failing to prevent bribery and penalties totalling GBP 33 000 000 were imposed pursuant to a court-sanctioned DPA. The case was detected through the company’s self-report.
- *Sweett Group* – The SFO investigation found that from 2012-2014 Sweet Group paid bribes valued at GBP 500 000 to an official of the United Arab Emirates to win a contract valued at GBP 1 500 000 to project manage the construction of a hotel in Dubai. The company was charged under section 7 of the Bribery Act and pleaded guilty. The court imposed financial sanctions of GBP 2 250 000. In connection with the SFO’s investigation into this case, Mr. Richard Kingston was convicted of concealing, destroying or otherwise disposing of two mobile telephones, knowing or suspecting that the data stored on those phones would be relevant to the SFO’s inquiries. The foreign bribery aspect of the case was detected through a regulatory report by the company.
- *XYZ Ltd* – The SFO investigation found that from 2004-2012 a UK SME, referred to as XYZ Ltd in the court documents, paid bribes valued at GBP 500 000 to secure contracts from which it gained gross profit of GBP 6 500 000. The name of the company, location of the payments, and other details have been withheld until the litigation against natural persons involved is finalised. The company was charged under the pre-Bribery Act legislation and section 7 of the Bribery Act. Financial sanctions of GBP 6 500 000 were imposed pursuant to a court-sanctioned DPA. The case was detected through the company’s self-report.

**b. *Civil cases***

- *Oxford Publishing Limited* – The SFO investigation revealed that between 2007-2010 the publishing company Oxford Publishing Limited (OPL) received approximately GBP 1 900 000 in income generated through bribery committed by its subsidiaries incorporated in Tanzania and Kenya. OPL promptly investigated the matter when it came to light and voluntarily reported the allegations to UK authorities and the World Bank. The civil recovery order, made under section 276 of the Proceeds of Crime Act, disgorged the gross profit of GBP 1 900 000 from OPL. A consent order in this case entered by the UK High Court. The case was detected through the company’s self-report.

**c. *Administrative cases – for failure to guard against bribery under the Financial Services and Markets Act 2000***

- *Besso Ltd* – In 2014, the FCA fined Besso Limited GBP 315 000 for a failure in the period 2005-2011 to take reasonable care to establish and maintain effective systems and controls for countering the risks of bribery and corruption. The fine was imposed directly by the FCA and did not involve the courts. No actual bribery by the company or its employees has been identified.

- *JLT Speciality* – In 2013, the FCA fined JLT Speciality Ltd GBP 1 800 000 for a failure in the period 2009-2012 to have in place appropriate checks and controls to guard against the risk of bribery or corruption when making payments to overseas third parties. The fine was imposed directly by the FCA and did not involve the courts. No actual bribery by the company or its employees has been identified.

16. Overall, the UK has demonstrated active enforcement of its foreign bribery laws. From the date of entry into force of the Convention in the UK in February 1999 to October 2016, over 100 allegations of foreign bribery have surfaced with a connection to the UK. As shown in Figure 4 below, these allegations have resulted in 50 case investigations (including concluded and ongoing investigations), at least 26 ongoing preliminary assessments, and at least 34 allegations being assessed and closed.

17. In relation to the 50 case investigations, the UK has imposed sanctions in 23 of these cases, including 13 cases of criminal liability involving 13 natural and 8 legal persons. Criminal prosecutions are ongoing in 6 of these cases, involving at least 18 natural persons and 4 legal persons. A number of additional cases are under investigation (see Annex 3).

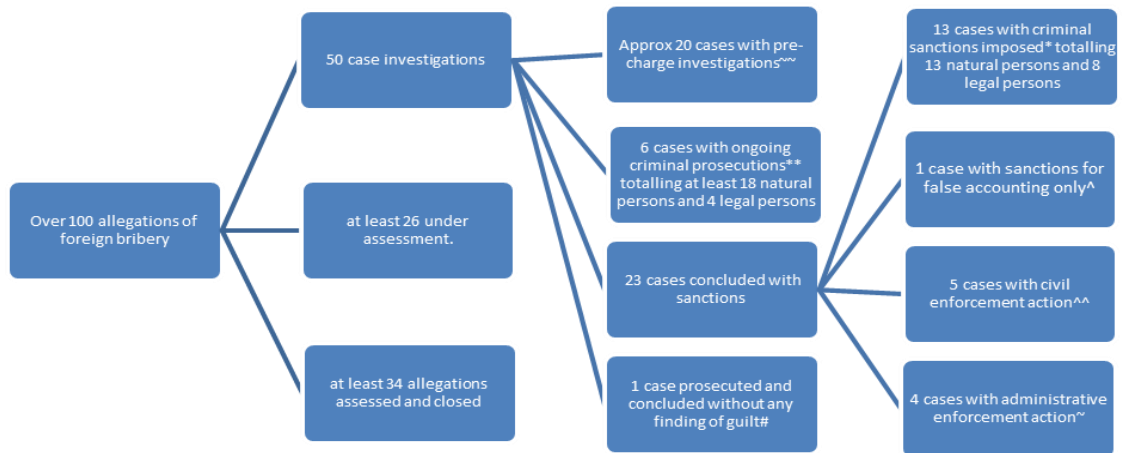
18. The examiners were only made aware after the on-site visit of the number of cases under preliminary assessment and the allegations that have been assessed and closed since Phase 3. The examiners relied on the WGB's case matrix to seek further information from the UK about these allegations.<sup>21</sup> After the on-site visit, the UK indicated that at least 26 allegations are under assessment by UK law enforcement agencies through the Clearing House – a mechanism which allows relevant law enforcement agencies to discuss leads and decide on case allocation (see also section. B.2.). While it is reassuring that the UK is assessing these allegations, it is nevertheless concerning that several of these cases came to light years ago, for example some allegations were raised in media reports in 2010. It is unclear why the assessment process has not yet been completed for these older cases.

19. In relation to the 34 allegations that have been subject to a preliminary assessment by UK law enforcement authorities and closed, most appear to have been closed for entirely valid reasons but some decisions raise questions. The vast majority of cases were closed by the UK because the assessment found insufficient evidence of an offence or no jurisdiction in the matter. A small number were closed because alternative charges to foreign bribery were more appropriate in the circumstances or double jeopardy principles would have precluded further enforcement activity. In relation to several of these closed cases, particularly where the UK does not have jurisdiction or double jeopardy issues arise, the UK explains it is providing bilateral support to the country taking enforcement action. These reasons seem valid, however, there are also several cases where the UK would otherwise have jurisdiction but is relying on another country's investigation. This is not problematic *per se*, but it is unclear whether the UK routinely keeps such matters under review should it become necessary for the UK to conduct its own investigation. Furthermore, it is unclear whether the UK routinely alerts the foreign jurisdiction about the suspicion of criminality when an assessment or investigation is closed.

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<sup>21</sup> The matrix is a collation of allegations of foreign bribery prepared by the OECD Secretariat based on public sources. It is used by the WGB to track case progress. It is sometimes used as a source of detection by member countries, but it should not be relied on as the sole or even primary detection source because countries are expected to maintain their own proactive detection efforts.

**Figure 4. UK foreign bribery cases since 1999**



**Commentary**

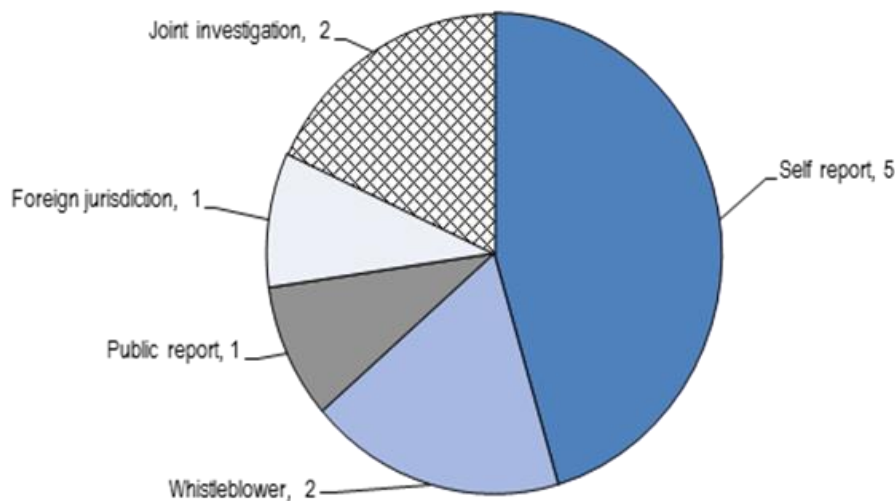
*The lead examiners commend the UK for its increased enforcement of foreign bribery laws since Phase 3. The lead examiners consider that while the UK has demonstrated solid progress, the total number of finalised and ongoing cases relative to the UK economy remains low and efforts must be sustained to improve detection of foreign bribery and achieve stronger enforcement of its anti-bribery legislation.*

*The lead examiners encourage the UK to ensure that all allegations of foreign bribery are fully assessed in a timely manner and that, where another country leads the investigation or prosecution of a case connected with the UK, the UK keeps the matter under review.*

## A. DETECTION OF THE FOREIGN BRIBERY OFFENCE

20. As concerns effective detection sources in foreign bribery cases, the SFO reports that the most common sources in ongoing foreign bribery investigations are: (1) company self-referrals; (2) members of the public; victims or witnesses; (3) UK government agencies; such as referrals from British Embassies through the Foreign and Commonwealth Office (FCO) to the SFO; (4) other UK law enforcement agencies; including joint intelligence development with the National Crime Agency (NCA) and (5) whistleblowers or ex-employees of a suspect corporate. The SFO did not mention reports from foreign law enforcement as a possible source for initiating foreign bribery investigations, although this has occurred in practice in at least one finalised foreign bribery case (*Innospec*). The SFO also reports that it proactively identifies criminality through strategic and tactical intelligence analysis across certain sectors and regions of interest.

**Figure 5. Detection sources for concluded criminal and civil foreign bribery cases**



### A.1. Self-reporting by companies

21. The UK authorities point to company self-reporting as a major source of detection of foreign bribery. Indeed, a large proportion of the finalised foreign bribery cases, as well as ongoing investigations, have been triggered by corporate self-reports. Incentives to self-report have been bolstered through the introduction of deferred prosecution agreements (DPAs) in England and Wales, and by the use of settlement agreements in Scotland. A suspect corporate must generally provide significant cooperation with law enforcement, including proactive self-reporting, to be entitled to seek a DPA or other settlement. For example, the SFO offered DPAs in the *Standard Bank* and *XYZ* cases on the basis of the companies' self-reports, and a one-third sentence reduction was granted to Standard Bank for its self-report.

22. The resolution of the *Rolls-Royce* case by DPA represents an interesting exception to the rule that a self-report is a precondition for a DPA, and the generous reduction in sentence granted by the Court raises a question about incentives for self-reporting. In the *Rolls-Royce* case, a DPA was offered even though the SFO investigation was initially triggered by internet postings by a whistleblower. The "extraordinary" level of cooperation provided by *Rolls-Royce* and the fact that what *Rolls-Royce* ultimately reported was "far more extensive (and of a different order)" than what



may have been uncovered without the cooperation, were key considerations in the SFO's decision to offer a DPA.<sup>22</sup> Civil society group, Corruption Watch, has criticised this approach for potentially undermining incentives to self-report; noting companies can fail to disclose but still receive a DPA if they cooperate.<sup>23</sup> Nevertheless, self-reporting appears to remain a more certain path to a DPA and it is important to recognise that other factors also weighed in favour of Rolls-Royce receiving a DPA, including that the senior management involved in the misconduct has been replaced. What may be more concerning is that the Court also granted Rolls-Royce a 50 percent reduction in its sentence (to reflect judicial indication in the *XYZ case*) despite the company's failure to self-report. This generous reduction contrasts with the 25 per cent reduction offered by the US Department of Justice in the context of its separate DPA.<sup>24</sup> This poses the question whether this large reduction in the absence of a self-report may undermine the incentive for corporates to self-report in future (see also discussion under section B.5 below).

23. In addition, the other side of the coin is proactive detection. For self-reporting to be effectively incentivised, the risk of detection must be real and present. To this end, the SFO has ramped up its intelligence capability for foreign bribery offending. Such proactive detection must continue to receive adequate resources to ensure proactive detection as well as to continue inciting companies to self-report. Proactive detection is even more important if the SFO pursues the policy of offering DPAs in the absence of self-reporting (see also engagement with the private sector in Part C).

## A.2. Whistleblower protection

24. The SFO indicates that whistleblower reports are a valuable source of information relating to foreign bribery and that the volume of referrals from whistleblowers has increased in the past three years. The SFO explains the increase in volume of referrals as a direct result of the launch of a new website and new reporting mechanism, "Make a Report", on 27 January 2016. The choice of revised approach was informed by the difficulties faced following the launch of the old reporting mechanism, "SFO Confidential". The revised reporting form on the SFO's new website asks a series of questions to try and establish at the outset whether information is best supplied to the SFO through the form, or whether the referrer should contact Action Fraud or others. The SFO points out that this has had the desired effect: while the total number of referrals decreased, bona fide whistleblower reports have increased. The SFO further underlines that while information providers can retain their anonymity if they so choose, many choose not to.

25. SFO representatives note that a great deal of these reports relate to tax fraud and are duly rerouted to tax authorities, but also highlight that the quality of the reports is increasing. This could in turn lead to an increasing number of foreign bribery investigations being opened on the basis of a whistleblower report. To date, two finalised foreign bribery cases (*Innovia/Securrency* and *Rolls Royce*) were initially triggered by whistleblower reports. A significant number of ongoing foreign bribery investigations and prosecutions also originated from whistleblower reports. According to the SFO, the increase in quantity and quality of whistleblower reports may be attributed to the growing volume of information available on the Bribery Act 2010 and/or recent prosecutorial successes. The

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<sup>22</sup> Judgment of Sir Brian Leveson, 17 January 2017, *Serious Fraud Office and Rolls-Royce Plc & Anor*, para. 22, available at <<https://www.sfo.gov.uk/cases/rolls-royce-plc/>>.

<sup>23</sup> Corruption Watch, undated, "A failure of nerve: SFO's settlement with Rolls-Royce", available at <http://www.cw-uk.org/2017/01/19/a-failure-of-nerve-the-sfos-settlement-with-rolls-royce/>.

<sup>24</sup> US Department of Justice, 17 January 2017, *Rolls-Royce plc Agrees to Pay \$170 Million Criminal Penalty to Resolve Foreign Corrupt Practices Act Case*, available at <<https://www.justice.gov/opa/pr/rolls-royce-plc-agrees-pay-170-million-criminal-penalty-resolve-foreign-corrupt-practices-act>>.

SFO has also conducted statistical profiling on whistleblowers based on incoming reports and found that the rationale for reporting usually stems from a legal obligation or a moral or ethical reason.

26. To encourage whistleblowers to come forward, good protections need to be provided both under the law and in practice. In addition, these protections need to be made known to the public, in particular to targeted audiences where foreign bribery is concerned, and reporting channels must be made available and publicised. It could also give confidence to potential whistleblowers if law enforcement were to publicise the importance and usefulness of whistleblower reports in concrete cases, especially once such cases have been finalised.

*a. PIDA: model whistleblower legislation or room for improvement?*

27. In the UK, protection of whistleblowers is ensured under the UK's Public Interest Disclosure Act 1998 (PIDA), which protects employees from detrimental treatment for disclosing misconduct, including foreign bribery. PIDA classifies disclosures into three tiers depending to whom the disclosure is made, with increasing thresholds for protection to be afforded. Disclosures made to the SFO, including concerning foreign bribery, are considered Tier 2 "regulatory disclosures".<sup>25</sup>

28. PIDA arguably contains important elements that would constitute good practices in terms of protection of whistleblowers. In particular, PIDA:

- Covers most UK workers, except those working for the armed forces and national security sectors;
- Defines wrongdoing broadly to include disclosures about corruption or any other crime, civil offences, miscarriages of justice, etc., and, importantly, a cover-up of any of these. The worker therefore does not need to qualify the offence himself. The worker also does not have to prove the wrongdoing;
- Protects concerns raised internally with an employer (or to the Minister responsible in appropriate cases), and externally, to certain listed regulatory bodies, such as the SFO in foreign bribery cases;
- Compensates for dismissal and detriment (i.e. victimisation) short of dismissal. Those found to have been unfairly dismissed for blowing the whistle are compensated for their full financial losses (uncapped).

29. In 2013, a notable and positive amendment was passed by the Enterprise and Regulatory Reform Bill. The Bill amended certain PIDA provisions notably to remove the test of good faith (i.e. motive) as a pre-requisite to a claim, replacing it with a less onerous public interest test, and thus shifting the focus of the legislation "from the messenger to the message".<sup>26</sup>

30. In spite of these positive aspects, PIDA has nevertheless come under recent criticism by NGOs, which consider that its application in practice falls short of its intentions. They argue 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.<sup>27</sup> Critics notably point to the following concerns:

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<sup>25</sup> Prior to the Working Group's Phase 2 recommendations, whistleblowing of foreign bribery was only governed by Tier 3. See Phase 3 report, paras 197-198 for descriptions of Tiers 1 through 3.

<sup>26</sup> It may be noted that whistleblowing in "bad faith" may nevertheless reduce compensation by 25%.

<sup>27</sup> See, *inter alia*:

- PIDA does not protect a whistleblower from retaliation before it occurs – it instead relies on compensation after the fact (which is usually inadequate, and too late.)
- The Employment Tribunal system is neither an informal, nor a low-cost solution to resolve PIDA disputes. Costs are high, waiting times are long, and it remains a domain for expensive lawyers in this area.
- There is no administrative (regulatory) alternative to the Employment Tribunal system, where a whistleblower can seek protection before retaliation occurs.
- Legal principles have been imported to PIDA from other areas of law, leading to unintended consequences and interpretations that diminish protection and fails to provide proper or adequate remedies for whistleblowers. The chief culprits identified are compensation reduction principles and confusing or contradictory burdens of proof to establish liability.
- PIDA contains no direct civil or criminal penalties to stop, prevent, or discourage bullying, victimisation or harassment.

31. During on-site discussions, some representatives from law enforcement indicated that PIDA may be insufficient to ensure adequate protection given the risks taken by the whistleblower and the stigma which continues to be attached to whistleblowers, who often find themselves blacklisted in certain industries.

32. The WGB had also expressed concern at the time of Phase 3 that PIDA did not protect expatriate workers of UK companies who are based abroad unless there are “strong connections with Great Britain and British employment law”, as illustrated by the 2011 *Foxley* case.<sup>28</sup> This state of affairs effectively excludes many foreign-based employees who are most proximate to – and thus most likely to report – acts of foreign bribery. The Working Group thus considered that Phase 4 should follow up on “whistleblower protection in the UK to determine if whistleblowers who report in good faith and on reasonable grounds are protected under PIDA.”

33. The UK government has responded to criticism of PIDA by indicating it would consider reforms to the UK whistleblowing framework in the broader context of its anticorruption efforts. In particular, the December 2014 UK Anti-Corruption Action Plan states, on the issue of whistleblowing, that the Home Office and the Department for Business, Innovation and Skills (BIS) (now part of the new Department for Business, Energy and Industrial Strategy (BEIS)) will “consider what more can be done to incentivise and support whistleblowers in cases of bribery and corruption” by October 2015, and that BEIS will further “evaluate the implementation of whistleblowing provisions introduced through the Enterprise and Regulatory Reform Act 2013” as part of a five-year plan to be concluded by 2018.<sup>29</sup> Unfortunately, discussions at the on-site visit with representatives of the Ministries in charge of this area of law indicated limited progress on this front. Civil society also

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- The Whistleblowing Commission established by NGO Public Concern at Work, and its *Report on the effectiveness of existing arrangements for workplace whistleblowing in the UK*: <http://www.pcaw.co.uk/law-policy/whistleblowing-commission/overview>
  - The report published by the international NGO Blueprint for Free Speech and the Thomson Reuters Foundation on *Protecting whistleblowers in the UK: A new blueprint* <https://blueprintforfreespeech.net/wp-content/uploads/2016/05/Report-Protecting-Whistleblowers-In-The-UK.pdf>

<sup>28</sup> Phase 3 report, paras 199-200 and follow-up issue 14(e).

<sup>29</sup> [www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/388894/UKantiCorruptionPlan.pdf](http://www.gov.uk/government/uploads/system/uploads/attachment_data/file/388894/UKantiCorruptionPlan.pdf)

regretted that “the UK Government have so far resisted calls for reform of the law in this area.”<sup>30</sup> However, following the on-site visit the UK announced that it would look at this issue again in the context of its Anti-Corruption Strategy to be published in 2017.

***b. Encouraging whistleblowing of suspected foreign bribery***

34. Awareness of legal protection afforded to whistleblowers has somewhat improved since Phase 3 but remains low. 67% of respondents to a 2015 survey of UK workers were either unaware or believed there was no whistleblowing protection in the UK,<sup>31</sup> a limited step up from the 77% rate at the time of Phase 3. NGOs noted there had not been any government activity in increasing awareness of PIDA since the Phase 3 review. Following the on-site visit, BEIS provided illustrations of some steps already taken to strengthen the whistleblowing framework. In particular, prescribed persons (i.e. those bodies to which people blow the whistle such as the SFO) will be required as of April 2017 to publish aggregate reports on the representations they have received and the actions taken. BEIS further indicated its intention to continue to raise public awareness through public information initiatives.

35. Nevertheless, some initiatives have developed specifically in relation to reporting of foreign bribery and other serious fraud. The SFO has issued Guidelines on Making a Public Interest Disclosure relating to any economic crime to the SFO, which in particular provide the contact information of the confidential Online reporting portal.<sup>32</sup> As noted above, this has been effective in increasing the number of whistleblower reports that reach the SFO.

36. There has also been some promotion of whistleblowing arrangements within corporations in relation to the passing of the Bribery Act. The 2011 Ministry of Justice Guidance to Commercial Organisations (GCO) recommends that adequate procedures put in place by companies to prevent and detect bribery include the establishment of “speak-up” and whistleblower reporting mechanisms.<sup>33</sup>

37. Civil society suggested that more could be done to encourage or require companies to set up internal whistleblowing mechanisms, as has been done in the financial sector. As of October 2015, the Financial Conduct Authority (FCA), alongside the Prudential Regulation Authority (PRA), requires the banks to put in place mechanisms to allow their employees to raise concerns internally (i.e., to ‘blow the whistle’) and to appoint a senior person to take responsibility for the effectiveness of these arrangements.

***Commentary***

***The lead examiners note that the UK was at the forefront in developing model whistleblower protection legislation in the 1990s, and consider that some elements of the Public Interest Disclosure Act 1998 (PIDA) continue to constitute good practices in this field. Nevertheless, having considered some of the criticism put forward by law enforcement and civil society on the inefficiencies of PIDA, they recommend that the UK proceed with its intention expressed in the 2014 Anti-Corruption Action Plan to evaluate implementation of whistleblowing provisions with a view to possibly amending and improving them.***

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<sup>30</sup> See Bond Anti-Corruption Group [Submission to the OECD Working Group on Bribery Review team](#).

<sup>31</sup> P.g. 31 of the *Whistleblowing: Time for Change*, Public Concern at Work, 2016.

<sup>32</sup> SFO Guidelines on Making a Public Interest Disclosure, available at: [www.sfo.gov.uk/about-us/our-policies-and-publications/guidelines-to-making-public-interest-disclosure.aspx](http://www.sfo.gov.uk/about-us/our-policies-and-publications/guidelines-to-making-public-interest-disclosure.aspx)

<sup>33</sup> See <https://www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdf> pp. 22-23.

*As concerns whistleblowing in practice, the lead examiners welcome the SFO efforts to develop and publicise a reporting portal enabling people to refer matters anonymously or to treat them as confidential sources of information. They note that these efforts have been effective in increasing the volume of reports from whistleblowers in foreign bribery cases and encourage the SFO to pursue these. The lead examiners further encourage UK law enforcement to continue to raise public awareness of whistleblower reports and their usefulness in specific cases, especially once these cases have been finalised, with a view to bolstering confidence of potential whistleblowers in the value of their report.*

### **A.3. Detection through anti-money laundering**

38. The Working Group made no recommendation to the UK in the Phase 3 evaluation on money laundering matters. There is however a need to review several topical issues in this area, including the UK's capacity to detect foreign bribery via its anti-money laundering (AML) framework. As highlighted in the Introduction, the UK has significant exposure to corruption and foreign bribery-related money laundering.

39. An effective system designed to detect and deter money laundering may uncover underlying predicate offences such as foreign bribery and trigger investigations, as confirmed by the SFO. With the support of the UK Financial Intelligence Unit (UKFIU) the SFO can access Suspicious Activity reports (SARs). The SFO may use, in an appropriately sanitised format, the information contained within SARs to begin an intelligence operation or to corroborate and support the development of existing intelligence. However, in practice, there is no record of any SFO foreign bribery investigation generated by information provided by the UKFIU.

40. The UK's AML framework consists of primary and secondary legislation and industry guidance. Primary legislation consists of the Proceeds of Crime Act 2002 (POCA). Secondary legislation is the Money Laundering Regulations (MLRs) which supports the primary legislative objectives. The reporting obligations in POCA are central to the UK's AML structures. POCA requires persons in the regulated sector to report to the UKFIU where there are reasonable grounds to know or suspect that another person is engaged in money laundering. In 2014/2015, the UKFIU received more than 380 000 SARs which form part of a database of more than 2 million SARs. The vast majority of these reports are 'open' records, available to any accredited financial investigator or intelligence officer in UK law enforcement, including within the SFO and the HMRC. The remaining SARs that relate to suspicion of terrorist financing, or integrity and corruption are secured. They are forwarded by the UKFIU to the appropriate law enforcement bodies for investigation. SARs have the potential to be a critical intelligence resource, and on a daily basis, the UKFIU performs a series of keyword and glossary code searches against all incoming SARs. In relation to PEPS, bribery and corruption, there are around 100 keywords with additional derivatives that are analysed daily. Any SAR found that includes those terms is fully reviewed, and those that are found to relate to suspicion of bribery and corruption or international PEPs are forwarded to the NCA. From June 2015 to October 2016, the UKFIU referred 130 bribery-specific SARs to the NCA ICU. No information is available on the number of SARs sent to the SFO.

41. In recent years, both law enforcement agencies and the private sector have expressed increasing concerns about the effectiveness of the SARs regime.<sup>34</sup> Several reports highlight in

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<sup>34</sup> The Home Office launched a review of the SARs regime in February 2015. This review identified a series of concerns, including regarding the phrasing of the requirement to report suspicious transactions that drives to a significant level of defensive reporting; the inadequacy of the technical infrastructure and the resources of U.K.FIU and the consent regime (that allows reporting entities a defence against a money laundering offence by seeking the consent of the U.K.FIU) that causes delays and implementation difficulties.

particular the poor participation of some professionals in detecting and reporting money laundering and related crimes, including professional enablers such as lawyers, accountants and company-formation agents who knowingly or unwittingly assist in the layering and integration phases.

42. In October 2015, the UK published its national risk assessment which identified and assessed the money laundering (and terrorist financing risks) faced by the UK.<sup>35</sup> In April 2016, the government published an [Action Plan on anti-money laundering and counter-terrorist finance](#) setting out the steps it will take to address the threats identified. As noted above, the [Criminal Finances Bill](#) was introduced in Parliament on 13 October 2016 with a view in particular to improving the government's ability to tackle money laundering and corruption. The UK indicates that, under the Bill, the UKFIU should be able to direct regulated bodies to disclose additional information on the basis of a SAR (from them or any other body) or following a request from a foreign FIU. However the Bill does not foresee the reform of the SARs regime called for in the Action Plan, and the reform of the supervisory regime was still under consideration at the time of drafting this report.<sup>36</sup>

43. As part of the UK's determination to enhance efforts to tackle corruption and money laundering and to further enhance transparency and law enforcement cooperation within the financial services sector, it is worth mentioning the recent commitments made by all of the UK Overseas Territories (OTs) with financial services industries. They committed to hold adequate, accurate and current beneficial ownership information on companies incorporated in their jurisdictions in a secure central register or similarly effective system, and to grant UK and OTs law enforcement authorities the automatic right to access the provision of beneficial ownership information (for law enforcement purposes and on a reciprocal basis). The UK and OTs have agreed to meet the June 2017 deadline for implementation of the new arrangements and to continue to provide the highest levels of law enforcement cooperation possible before this date.

### **Commentary**

*The absence of detection of foreign bribery cases by the UKFIU is a source of great concern, considering the money laundering and bribery risks in the UK and the volume of information generated by the SARs regime. This is a further demonstration of the lack of effectiveness of the reporting regime as it stands. The lead examiners welcome in this respect the introduction of the Criminal Finances Bill that seeks to give more powers to the UKFIU. They call upon the UK to respond to the concerns voiced on the effectiveness of the SARs regime as it relates to foreign bribery detection, and to adopt further reforms of the UKFIU and the reporting regime, including with the view to improve detection of foreign bribery through SARs. The lead examiners also recommend that the UK raise awareness about the red flags which may indicate foreign bribery among the professions, including non-financial professions, subject to the requirement to report suspicious transactions.*

*Finally, the lead examiners recommend that the Working Group follow up on the implementation by the UK Overseas Territories of registers that aim to hold adequate, accurate and current beneficial ownership information on companies incorporated in their jurisdictions, and to grant UK and Overseas Territories law enforcement authorities the automatic right to access them, with a view to improving detection and enforcement of foreign bribery laws.*

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<sup>35</sup> The assessment focused on 3 priorities: (i) a more robust law enforcement response; (ii) reforming the supervisory regime and (iii) increasing the U.K.'s international reach.

<sup>36</sup> There are 26 active supervisors for the anti-money laundering regime and the regime of supervision is largely contracted out to the private sector. Some commentators, including Transparency International UK, have called for a radical overhaul of the UK's supervisory regime (<https://www.publications.parliament.uk/pa/cm201617/cmpublic/CriminalFinances/memo/CFB03.htm>)

#### **A.4. Increasing the use of other potential sources**

##### ***a. Detection by other government agencies: mixed signals***

44. Since 2013 the SFO has received approximately 30 reports of bribery and corruption from a number of government agencies, which can be useful in practice as a source in foreign bribery investigations. For the greater part (75%), these have come from the Foreign and Commonwealth Office, although reports have also come through other agencies such as the Department for Business, Innovation and Skills, the Department for International Development, the Department of Trade and Investment, Insolvency Service, NHS Protect and UKEF.

45. The Foreign and Commonwealth Office (FCO) has designed a toolkit available to all staff overseas in order to inform and give advice regarding the obligations placed on staff as a result of the Bribery Act. As part of this response, the SFO is responsible for managing a dedicated reporting channel for embassy and consulate staff overseas, enabling them to report allegations of acts of bribery committed by UK nationals, companies or other incorporated bodies. The information reported to the SFO through this mechanism is recorded, analysed and developed where appropriate, in line with other sources of information.

46. UK Export Finance (UKEF), the UK's export credit agency, has developed advanced policies to prohibit bribery, which may also help it detect foreign bribery. This may in part explain why one of the ongoing SFO investigations has been triggered by UKEF, following self-reporting by the company. However, UKEF may be able to apply its detection mechanisms more proactively to further increase its detection capacities (See further discussion of UKEF's role and policies in section D.2.)

47. Detection by the tax authorities is probably one of the main areas for improvement in terms of detection by government agencies, alongside the AML framework. Indeed, the functions of Her Majesty's Revenues and Customs imply exposure to foreign bribery allegations and therefore a potential to regularly detect and report. This issue is explored in greater detail in section D.1 below.

##### ***b. Foreign jurisdictions: a significant detection source***

48. The UK has experience in commencing domestic investigations based on information provided by foreign law enforcement authorities through MLA channels or less formally. According to UK authorities, this has been the case in particular with the US Securities Exchange Commission and ØKOKRIM (Norway), as well as with the World Bank and the European Bank for Reconstruction and Development (EBRD). In some circumstances, MLA requests received by the UK may identify criminality in the UK, and may, following discussion with the originator of the request, lead to the instigation of a domestic criminal investigation or civil recovery investigation. The UK reports that three of the finalised foreign bribery cases were detected through foreign jurisdictions or joint investigations. (See also section B.6. below on international cooperation)

##### ***c. UK Crown Dependencies and Overseas Territories could better detect foreign bribery***

49. The UK has a number of Crown Dependencies (CDs) and Overseas Territories (OTs) (see section B.1. below on criminalisation of foreign bribery in the CDs and OTs). HM Treasury recognises that the financial services industry is one of the main contributors to the economies of Bermuda, the Cayman Islands, the British Virgin Islands and Gibraltar and, to a lesser extent Anguilla, the Turks and Caicos Islands and Montserrat. Six OTs (Anguilla, Bermuda, the British Virgin Islands,

the Cayman Islands, Gibraltar and the Turks and Caicos Islands) are considered offshore financial centres that take a significant part in global financial flows.<sup>37</sup> As such, they may face an enhanced threat of being used as a conduit for facilitating foreign bribery or laundering its proceeds. Both CDs and OTs represent a great potential for detection, including money laundering predicated on foreign bribery. However, this potential has not been sufficiently used by the UK authorities, and no foreign bribery cases have originated from these jurisdictions, although they have contributed intelligence in some cases.

***d. Investigative journalism: a strong feature of the UK media***

50. Several foreign bribery allegations involving UK companies have been raised by investigative journalists, and the UK press has engaged for many years in serious, vigorous and high profile reporting about the investigation of foreign bribery issues in the UK. This active reporting has revealed numerous facts and allegations about cases themselves and about issues in the investigative process in the UK, such as particular challenges encountered by the SFO, or controversial debates around the UK's institutional framework for law enforcement in serious fraud cases (see relevant sections of this report). This type of reporting is facilitated by the UK's legal framework which provides for freedom of the press, and the government's general respect of this right in practice. To the knowledge of the evaluation team, media reports have not been the sources of detection in any of the finalised foreign bribery cases and investigations since Phase 3.

51. The WGB matrix also keeps track of foreign bribery allegations in Working Group countries, including those involving UK companies, based on open source media information. Unfortunately, as stated above, these allegations are not systematically used as a source of detection. This leaves some allegations of foreign bribery potentially unexplored or at least the assessment delayed.

***Commentary***

***The lead examiners welcome steps taken by FCO, jointly with the SFO, to enhance reporting mechanisms from British embassies. They recommend that the UK similarly mobilise other agencies with particular potential for detecting foreign bribery (see also commentary regarding the UKFIU and HMRC). The lead examiners also recommend that the UK rely on its historical links with the Crown Dependencies and Overseas Territories and the information held in these territories to better detect foreign bribery, including money laundering predicated on foreign bribery. Further, the lead examiners recommend that the UK ensure that existing sources of foreign bribery allegations (including in the media and the WGB matrix) are properly exploited in due time by the competent authorities.***

***These efforts to increase detection will further require improving existing mechanisms for systematically gathering information on the sources of detection, especially within the SFO.***

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As an example, the Cayman Islands are the world's sixth biggest banking centre, with banking assets worth USD 1.4 trillion in June 2014; and it hosts over 11,000 mutual and other funds with a net asset value of USD 2.1 trillion. It has 200 banks; over 140 trust companies and over 95,000 registered companies (source: Financial Secrecy Index).



## B. ENFORCEMENT OF THE FOREIGN BRIBERY OFFENCE

### B.1. The foreign bribery offence

#### a. *In the UK*

52. The foreign bribery offences in the Bribery Act have not been amended nor the subject of judicial interpretation since Phase 3. Under the Bribery Act, section 6 is a specific offence of foreign bribery, sections 1 and 2 are general bribery offences that cover bribery of domestic and foreign officials, and section 7 is an offence of failure of a commercial organisation to prevent bribery.<sup>38</sup> The Bribery Act entered into force on 1 July 2011 replacing the previous patchwork of offences.<sup>39</sup> Accordingly, different laws apply to offending that occurred prior to the entry into force of the Bribery Act, which means liability, particularly for legal persons, is founded on different legal bases depending on when the crime occurred. In particular, prior to the Bribery Act there was no offence of failure of a commercial organisation to prevent bribery. Previous evaluations found the Bribery Act meets the requirement of the Convention, which previous bribery legislation did not, in particular with respect to liability of legal persons.<sup>40</sup>

53. For the purposes of Phase 4, the outstanding follow-up issues regarding the bribery offence relate to the Guidance to Commercial Organisations (GCO), the issue of facilitation payments, the definition of “associated persons” under section 7 of the Bribery Act, and the written law exception under Section 6 of the Bribery Act.<sup>41</sup> Because these matters primarily relate to legal persons, they are considered in detail in section C.1 below on corporate liability.

#### b. *Criminalisation of foreign bribery in Crown Dependencies and Overseas Territories*

##### i. *Status of ratification of the Convention in the Territories*

54. The Working Group has recommended since 1999 that the UK extend the Convention to its CDs and OTs.<sup>42</sup> The UK’s position on the procedure for doing so has remained largely unchanged. The UK Government is responsible for the CDs and OTs internationally, and thus it alone has the authority to ratify conventions on their behalf. Nevertheless, the general practice has been for the CDs and OTs to decide to which treaties they wish to become Party. Likewise, responsibility for implementation, such as ensuring local (OT, CD) law is compliant with the conventions and is delivered in practice, is for individual OT and CD Governments. When asking for a convention to be extended, the Territories have to complete a transposition table that shows how they believe they have implemented/fulfilled the obligations of the convention. As indicated by the UK in its responses to the Phase 4 questionnaire, that table is sent to the relevant UK Government department to assess.

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<sup>38</sup> Phase 1ter paras. 5-47.

<sup>39</sup> Phase 1bis.

<sup>40</sup> Phase 1ter and Phase 3.

<sup>41</sup> WGB 2010 Phase 1ter <http://www.oecd.org/daf/anti-bribery/anti-briberyconvention/46883138.pdf> para. 80. The Phase 1ter was conducted when the Bribery Act had been passed but not yet entered into force.

<sup>42</sup> Phase 1 p. 28; Phase 2 recommendation 6(b); Phase 2bis recommendation 5(d), and Phase 3 recommendation 9(a).

55. Since Phase 3, the UK has extended the Convention to the British Virgin Islands and Gibraltar and prepared a roadmap for extension to four other OTs.

**Table 2. Criminalisation of foreign bribery in the CDs and OTs**

Crown Dependencies (CDs) where and when the OECD Convention has been ratified
<ul style="list-style-type: none"> <li>• Isle of Man (2001)</li> <li>• Guernsey (2009)</li> <li>• Jersey (2009)</li> </ul>
Overseas Territories (OTs) where and when the OECD Convention has been ratified
<ul style="list-style-type: none"> <li>• Cayman Islands (2010)</li> <li>• Gibraltar (2013)</li> <li>• The British Virgin Islands (2013)</li> </ul>
Situation in other OTs
<ul style="list-style-type: none"> <li>• <b>Bermuda:</b> the Bermuda Attorney General and Minister of Legal Affairs wrote to His Excellency the Governor on 23 May 2016 seeking the extension of the OECD Convention to Bermuda, together with the UN Convention Against Corruption. Bermuda is in the process of implementing domestic bribery legislation modelled on the UK's Bribery Act. The target timeline for the submission of the transposition table to the UK Authorities was October 2016.</li> <li>• <b>Anguilla and Montserrat:</b> these territories recognise the value and importance of seeking extension but further work is needed before these Territories will be in a position to request extension. The UK Government has funded an evaluation of Anguilla to assess both its existing and intended legislative measures aimed at securing compliance with the UNCAC in 2010. Anguilla has since been successful in securing extension of UNCAC but many legislative deficiencies remain as concerns compliance with the Convention. The UK is considering how to support these Territories through additional legal drafting support.</li> <li>• <b>Turks and Caicos Islands:</b> the FCO funded the Ministry of Justice to provide expert advice to Turks &amp; Caicos Islands (TCI) in 2015. Officials visited the Islands and offered detailed guidance about the bribery requirements of the OECD Bribery Convention and UNCAC. MoJ officials have prepared a draft bribery ordinance for TCI which would improve the domestic law and add a foreign bribery offence. As of the time of this review, this work was still ongoing.</li> <li>• <b>In the smaller Territories in the Southern Oceans</b> the same capacity constraints apply and the extension of the Convention is not a high priority owing to the absence of a financial services sector, their small populations and the size of their local economies.</li> </ul>

Note: Situation as at October 2016. Some of the Territories had criminalised foreign bribery before the ratification of the Convention.

56. The UK has taken a more proactive approach in the past few years to extend the Convention to the OTs. Part of the approach has been to deliver technical assistance and capacity building for OTs. However, despite continuous pressure from the WGB, some OTs which are significant offshore financial centres (such as Bermuda and the Turks and Caicos Islands) have not yet ratified the Convention. Some positive developments are nevertheless worth mentioning. All the CDs and several OTs (BVI, Cayman Islands and Gibraltar) actively participated in the on-site visit – a first occurrence since the beginning of on-site visits to the UK in Phase 2 – and also extensively responded to requests for information afterwards. Such unprecedented mobilisation is an important and encouraging move which the UK should build on. At the [Joint Ministerial Council on 1-2 November 2016](#), UK Ministers and OTs leaders committed to prioritise collaborative work to enable extension to the Territories of the Convention where extension had not yet been sought, and to make progress to resolve outstanding issues where the response to requests for extension was pending.<sup>43</sup>

57. One Phase 3 recommendation remains not implemented from the Phase 3 review. Recommendation 9(b), which recommended the UK extend jurisdiction of the Bribery Act to legal persons incorporated in the CDs and OTs. No further steps have been taken to implement this

<sup>43</sup> On this occasion, Bermuda committed to seek extension of the OECD Anti-Bribery Convention and the UN Convention Against Corruption (UNCAC) by December 2016.

recommendation since Phase 3. Under both the Bribery Act and its predecessor legislation, the UK does not have nationality jurisdiction to prosecute legal persons incorporated in the CDs or OTs for foreign bribery. It does, however, have nationality jurisdiction over natural citizens of the CDs and OTs. Thus, the Working Group had recommended that the UK extend the jurisdiction of the Bribery Act to legal persons incorporated in the CDs and OTs. In previous evaluations, the UK considered that this was constitutionally impractical. In the Phase 4 Questionnaire Responses, the authorities state that the UK would not extend the Bribery Act to legal persons incorporated in the CDs and OTs and that the Act does not contain a clause which would enable such an extension. They add that the offences set out in the Bribery Act do, however, have extra-territorial application over persons with “a close connection” to the UK.<sup>44</sup> This would include most natural persons in the OTs and CDs by reason of their status, such as British citizens, British overseas territories citizens etc. During the on-site visit, the UK authorities confirmed that the issue is to be left to the Territories to address. All three CD Governments assert that extending the jurisdiction of the Bribery Act to legal persons incorporated in the CDs and OTs could also raise some constitutional issues.

58. The arguments above do not support previous statements by the UK. In particular, some legislation is already in place (e.g. anti-terrorism law) that regulates the extraterritorial actions of companies incorporated in the OTs. As stated previously by the Working Group, there is no legal impediment for the UK to extend the jurisdiction of the Bribery Act to legal persons incorporated in the CDs and OTs, and this should be done as a matter of priority.

ii. *Enforcement of the Convention in the Territories in practice*

59. A number of CDs and OTs are offshore financial centres which may face an enhanced threat of being used as a conduit for facilitating foreign bribery or laundering its proceeds. During this evaluation, two CDs (Guernsey and Jersey) provided examples of criminal investigations and prosecutions involving the laundering of the proceeds of bribery in their jurisdictions. However, no investigations or prosecutions of foreign bribery or related offences were reported in the OTs.

60. The implementation of the Convention in the CDs and OTs is of major importance to the fight against foreign bribery for the UK and more globally. The UK has a key role to play, in collaboration with the CDs and OTs, to ensure not only extension of the Convention to these Territories but also proper enforcement of the latter, once ratified. Although the scope of this evaluation does not allow for an evaluation of each Territory’s enforcement of the Convention in practice, it seems important for the Working Group to get some reassurance that the UK is not only monitoring implementation by the CDs and OTs of the Convention in law and in practice, at least to a certain degree, but that it also provides some assistance to create the conditions for proper enforcement, including in terms of resources, expertise and capacity to investigate and prosecute foreign bribery and related offences. Some of the smaller OTs have extremely limited regulatory and law enforcement capacity. This makes it difficult for them to address foreign bribery and related money laundering risks effectively. In order to identify and coordinate training priorities with the OTs, one UK prosecutor has been posted in Miami, which is a positive step.

*Commentary*

***The lead examiners welcome the more proactive approach taken by the UK in the past few years to extend the Convention to the OTs. The active involvement and participation of the CDs and some OTs in the Phase 4 evaluation process is also very encouraging. The lead examiners are of the view that the UK should build on this momentum to accelerate and finalise the extension of the Convention to the OTs that have not yet ratified it.***

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<sup>44</sup> Section 12 of the Bribery Act.

*The lead examiners note with satisfaction that Jersey and Guernsey are able to report investigations and prosecutions of money laundering cases predicated on foreign bribery. They are however concerned by the absence of any investigation and prosecution of foreign bribery or related offence in the other territories and recommend that the UK work closely with them to ensure effective enforcement of the Convention.*

*The lead examiners further recommend that the UK ensure, by any appropriate means and in collaboration with all CDs and OTs, that the CDs and OTs that have ratified the Convention have appropriate resources, training, expertise and capacity to investigate and prosecute foreign bribery and related offences. The UK should also regularly review the status of enforcement of the foreign bribery and related offences in the CDs and OTs, and work with them to promote any corrective measures or actions, where necessary.*

*Finally, the lead examiners consider that Phase 2bis Recommendation 3(b) and Phase 3 Recommendation 9(b) are still not implemented. They therefore reiterate this recommendation and recommend that the UK, as a matter of priority, extend the jurisdiction of the Bribery Act to legal persons incorporated in the CDs and OTs, or ensure in any other way that legal persons incorporated in the CDs and OTs can be held liable for foreign bribery.*

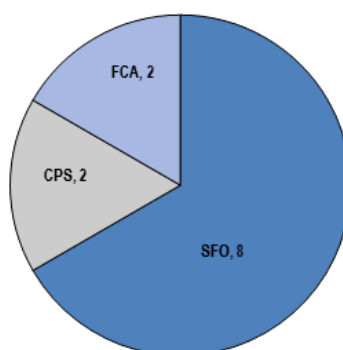
## **B.2. Investigative and prosecutorial framework**

### **a. Interagency cooperation and attribution of cases**

*i. A plethora of law enforcement agencies with potential competence in foreign bribery cases, but one essential actor: the SFO*

61. According to the UK Government Anti-Corruption plan published in December 2014, a range of agencies are involved in the law enforcement response to corruption. The National Crime Agency (NCA) was established in October 2013 and oversees the law enforcement response to bribery and corruption. It works closely with law enforcement and criminal justice partners, including the SFO, regional Organised Crime Units and local police forces, both of which deal with domestic corruption cases (except law enforcement corruption), Crown Prosecution Service, Police Scotland and the Police Service of Northern Ireland, as well as financial regulators, such as the Financial Conduct Authority (FCA).

**Figure 6. UK prosecuting authorities' case attribution – concluded foreign bribery and related cases**



62. Serious Fraud Office (SFO) – As of approximately April 2004 the SFO has informally been given an expanded role in prosecuting (as well as investigating) foreign bribery cases. SFO case teams are multi-disciplinary, bringing together investigators and prosecutors. This integrated approach affords the SFO a broad range of investigative tools necessary in foreign bribery investigations. . A

case team is led by a case controller who oversees lawyers, investigators, forensic accountants, and other specialists, as well as instructing counsel from the outset. This structure is known as the ‘Roskill’ model. According to the SFO itself, as well as civil society, academia and the private bar, the Roskill model, with its multi-disciplinary approach and the broad legislative powers it entails, is highly effective in effectively tackling complex fraud cases, including foreign bribery.

63. In practice, the SFO is clearly the lead agency in terms of foreign bribery enforcement with responsibility for 8 of the 12 foreign bribery and related cases finalised since Phase 3 (see Figure 6). The SFO is responsible for five of the six ongoing prosecutions and has a number of cases under investigation, which, according to the SFO, represent about half of all SFO investigations (see Annex 3). At the on-site visit, the SFO indicated its intention to proactively and autonomously identify other cases in the near future. It pointed in particular to the strategic and tactical intelligence analysis across certain sectors and regions of interest carried out by its intelligence section, which has grown significantly in recent years from 6 to 21 persons between 2013 and 2016.

64. Crown Prosecution Service (CPS) – Where the SFO declines to take on a case, the case would be prosecuted (if at all) by other agencies. The Crown Prosecution Service (“CPS”) is the main prosecutorial authority in England and Wales and prosecutes all cases from the police, HMRC and other special designated departments. The CPS has a Specialist Fraud Division in place to handle such cases, including foreign bribery, as well as an International Team (including prosecutors based overseas) to assist matters of international cooperation where required. The CPS relies essentially on the National Crime Agency (NCA) International Corruption Unit (ICU) to carry out its investigations where foreign bribery is concerned, which may limit its geographical scope of action (see below on NCA ICU). Since Phase 3, the CPS has had responsibility for two finalised foreign bribery cases (*Alexander Capelson* and *Mondial*). The CPS is also involved in two ongoing foreign bribery investigations with the NCA ICU in one case, and the City of London Police (COLP) in the other.

65. National Crime Agency (NCA) International Corruption Unit (ICU) – As part of the 2014 UK Anti-Corruption Plan, in May 2015, the remit of the Metropolitan Police Service Proceeds of Corruption Unit, COLP Overseas Anti-Corruption Unit and NCA Kleptocracy Investigation Unit transferred into the newly established NCA ICU. The COLP Overseas Anti-Corruption Unit will remain in place until completion of the few remaining investigations, including one on foreign bribery, still underway at the time the NCA ICU overtook its functions (*Vessels* case – see Annex 3). The NCA ICU is a police body, and its role is to:

- Investigate money laundering in the UK resulting from grand corruption overseas;
- Trace and recover the proceeds of international grand corruption;
- Support foreign law enforcement agencies with international anti-corruption investigations;
- Investigate bribery involving UK-based entities which have an international element and other cross-border bribery with a UK nexus, where the predominant operational requirement is the NCA’s specialist capabilities.

66. Although the description of its functions is broad, the NCA ICU’s geographical focus is restrained by its funding model. As it is largely financed by the Department for International Development (DFID), the NCA ICU’s primary focus is bribery and corruption affecting DFID priority countries (see also section D.3). Where foreign bribery is concerned, this means the ICU can bring investigative support essentially where the foreign bribery took place in developing countries. The ICU is generally perceived by outside observers to be focusing on the passive bribery aspects of bribery and on politically exposed persons, than on active foreign bribery. The ICU confirmed it has no dedicated foreign bribery investigators, and that it finds it more flexible to have its investigators be able to adjust to different types of investigations. Approximately 45 persons within the ICU are dedicated to corruption work globally, with 30 of those frontline investigators. A positive feature of

the NCA ICU is that officials from the SFO and FCA are embedded into it, allowing for better flow of information between the different law enforcement authorities with responsibility for enforcement of economic and financial crime. Given its recent establishment, the NCA ICU has not worked on any finalised foreign bribery case yet. It does however report one ongoing investigation, in coordination with the CPS, concerning primarily money laundering, but with possible foreign bribery implications (*Money laundering case – see Annex 3*).

67. NCA ICU representatives at the on-site visit demonstrated a high level of engagement and interest in discussions throughout several panels. They acknowledged that they are recent arrivals in the foreign bribery enforcement arena, that NCA ICU's expertise originally lies more in organised crime, and that the ICU's funding model restricts their geographical scope of investigation. Nevertheless, they are hopeful that the ICU's intelligence unit, which is starting to develop some strategic and technical knowledge, will be helpful in uncovering proactively foreign bribery leads.

68. Financial Conduct Authority (FCA) – In April 2013, the FSA split into the Prudential Regulation Authority (PRA) and the FCA. The FCA has taken over the FSA's financial crime remit.<sup>45</sup> The FCA requires firms authorised under the Financial Services and Markets Act 2000 (FSMA) to put in place and maintain policies and processes to prevent bribery and corruption. This is in addition to obligations imposed under the Bribery Act 2010, which the FCA does not directly enforce. Since Phase 3, the FCA has imposed sanctions in two foreign bribery-related cases for failure to guard against bribery under the FSMA (*Besso Ltd* and *JLT Speciality*). At the time of the on-site visit, the FCA was liaising with the NCA in the *Money laundering* case investigation (see above), which may have foreign bribery implications. Discussions at the on-site visit indicated a limited level of mobilisation in the FCA in relation to foreign bribery-related offences. This is almost the reverse of the situation in Phase 3, when the Working Group was concerned that the SFO declined to take up cases because it felt that the FSA's actions were sufficient and its sanctioning powers more effective. At the time, the Working Group had recommended that the two authorities conduct co-ordinated enforcement actions.<sup>46</sup> Following the on-site visit, the FCA indicated it had opened two foreign bribery-related investigations, in November and December 2016.

69. Ministry of Defence Police (MDP) – The MDP, a civilian police force regulated by the Ministry of Defence Police Act 1987, provides support if a foreign bribery case involves employees of the Ministry of Defence (MOD) or defence contracts to which the MOD is party.<sup>47</sup> The Defence Crime Board, set up in 2011, was replaced in 2013 by the Defence Counter Fraud and Corruption Board. The MDP has not enforced any foreign bribery cases since Phase 3, nor is it involved in any ongoing foreign bribery investigation or prosecution as of the time of this review. See section 3.b.(iv) below for further discussion on the role of the MDP.

70. Joint Financial Analytical Centre (JFAC) – The JFAC has as its founding members the SFO, the NCA, HMRC and the FCA. Staff from all agencies were embedded into JFAC on the 25 July 2016. Although this is a nascent body predicated on information obtained from Mossack Fonseca known as the 'Panama Papers', it is hoped that it will become a useful intelligence forum for identifying and developing bribery and corruption cases.<sup>48</sup> This mandate has since been widened to

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<sup>45</sup> Phase 3, paras. 74-75 and 90-92.

<sup>46</sup> Phase 3 recommendation 4(b).

<sup>47</sup> Phase 3, paras 86-88.

<sup>48</sup> The initial mandate was: "to facilitate joint working by the Participants where there are circumstances suggesting any tax non-compliance, avoidance and evasion, economic crimes or regulatory breaches and/or misconduct linked to the Panama Papers may have taken place."

include all elements of economic and financial crime and civil and regulatory offences, using a range of bulk data sources.

71. Scotland<sup>49</sup> – The Crown Office and Procurator Fiscal Service (COPFS) is responsible for prosecuting Bribery Act offences in Scotland. Since the entry into force of the Bribery Act in 2010, serious bribery and corruption has come within the remit of the Specialist Casework Unit within the Serious and Organised Crime Division. The Unit is made up of specialist prosecutors (including experienced fraud, money laundering and bribery lawyers), forensic accountants, and financial analysts, and includes an International Cooperation Unit. This has enabled the Crown to take a multidisciplinary approach to foreign bribery cases. Another positive development is the housing of all law enforcement officials since 2014 in the Scottish Crime Campus in Glasgow. This building brings together not only police and prosecutors, but also houses HMRC, forensics, and about 20 other agencies. According to Scottish officials, this has encouraged case agency working notably on economic crime cases. In spite of these positive developments, Scottish law enforcement officials appeared to have limited involvement and expertise on foreign bribery issues. They were not aware of the MOU which regulates foreign bribery case attributions, even though COPFS is a party to it, or of the regular meetings to discuss cases (see below on MOU and Clearing House). This lack of awareness of Scottish law enforcement authorities and their absence in the Clearing House discussions is regrettable, particularly given that Scotland has a growing economic presence and Scottish industries operate internationally in industrial sectors sensitive to corruption, such as mining, and oil and gas.

72. The “Guidance on the approach of the COPFS to reporting by businesses of bribery offences” adopted in June 2016 sets out rules for assigning self-reports to either the COPFS or the SFO. If the SFO is presented with a report from a business which clearly relates to “*conduct in, or predominantly in, Scotland*” they will refer the company to COPFS. The same will apply in reverse where COPFS receives a report which appears to disclose circumstances more appropriately dealt with by the SFO. This procedure has yet to be applied in practice. Scotland has not completed a successful foreign bribery case, but in one case has charged individuals and is investigating the legal person (*LA Recruitment* – see Annex 3).

ii. *Progress in coordination since Phase 3, but some improvements may still be warranted*

### **The 2014 Memorandum of Understanding (MOU)**

73. At the time of Phase 3, the assignment and attribution of foreign bribery cases was governed by a 2008 MOU. The SFO acted as the central focal point, maintained a register of all foreign bribery allegations and decided which agency should lead the case. However, the MOU had become out of date. It did not cover cases that fall under the Bribery Act’s expanded jurisdiction. Further, the rules for assigning cases to Scotland and MDP were inconsistent with other policy documents.

74. In 2014, an MOU was signed between various law enforcement bodies to replace the 2008 MOU. Parties to the 2014 MOU are the COLP, COPFS, CPS, FCA, MDP, NCA, and SFO. Tax authorities and the UKFIU are not parties to this MOU, which can be regretted as these agencies could be helpful in proactive detection of foreign bribery. The 2014 MOU established new rules for assigning foreign bribery cases, including in cases under the Bribery Act’s expanded jurisdiction.

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<sup>49</sup> Scotland has a separate criminal legal system from England and Wales. The Lord Advocate is the chief legal officer of the Scottish Government and the Crown in Scotland for matters that fall within the devolved powers of the Scottish Parliament. Nevertheless, the Bribery Act and the Guidance to Commercial Organisations both apply to Scotland.

Under this new arrangement, the SFO is no longer the central focal point, and the NCA has responsibility for maintaining the Register of foreign bribery allegations.

75. Annexed to the 2014 MOU was a second MOU signed in May 2014 between the SFO and the Scottish prosecuting authorities. This MOU sets out further rules for co-ordination and co-operation between the two bodies. Representatives of the Scottish police and prosecuting authorities were unfortunately not aware of the existence of the 2014 MOUs and how they affect the attribution of foreign bribery cases between the SFO and Scottish authorities.

76. At the on-site visit, the evaluation team was informed that a new MOU was under preparation, notably to take into account the new ICU within the NCA. Following the on-site visit, the UK explained that no agency would be designated as the ‘lead focal point’, although the NCA would continue to have responsibility for maintaining the register of cases (see below). Authorities express the view that it is not necessary to appoint a lead focal point as the remit of each agency, as detailed in the ‘roles and responsibilities’ grid and the draft MOU, is well understood by all. In addition to the original parties to the 2014 MOU, HMRC has been invited to join, and the UKFIU is present under the NCA banner. COPFS (who have power of Police Scotland) are also a party to the new MOU. As of February 2017, the MOU was under consideration between the parties involved.

### **Case assignments through the Clearing House**

77. Foreign bribery case assignment is decided at meetings of all parties to the 2014 MOU – the Bribery Intelligence Clearing House – which take place every month. These are hosted by the NCA, which maintains a central register of all foreign bribery cases, and attended by the SFO Intelligence Unit. These meetings are held to “deconflict” foreign bribery cases and to ensure there is not a duplication of effort. Authorities report that “this provides a productive environment to raise awareness of ongoing cases and determining which agency should take a particular operation forward.” Nevertheless, certain law enforcement officials acknowledged during on-site discussions that it may be necessary to have a look at the Clearing House to ensure the right people are meeting there, and at the right level. They acknowledged that participation of agencies such as HMRC and the UKFIU in the Clearing House meetings could be beneficial in improving exchange of intelligence and generating greater cooperation between law enforcement and those agencies which should play a greater role in detecting foreign bribery through their respective areas of expertise (see also discussions on anti- money laundering and tax in sections B.3 and D.1.). The lead examiners welcomed as a positive sign that, following the onsite visit, HMRC and the UKFIU (under the NCA banner) were included in the MOU under consideration at the time of this report.

#### *iii. Confirming the role of the SFO in criminal enforcement of foreign bribery*

78. The multiplicity of law enforcement agencies in the UK and the uncertainty over the SFO’s role as the lead agency for foreign bribery enforcement have been long-standing concerns in the Working Group. To briefly retrace the narrative in the successive Working Group evaluations:

- In Phase 2, the WGB found that the very large number of investigative and prosecutorial authorities was hindering effective treatment of the foreign bribery offence.
- At the time of the Phase 2 Written Follow-Up, the UK was found to have made substantial progress in giving a central role to the SFO in foreign bribery cases, generally recognised as the key agency with regard to such matters, notably through a MOU. However, there was no change in the applicable law with regard to jurisdiction over foreign bribery investigations and the rules for how the SFO attributes cases to other agencies remained unclear.
- In Phase 3, the WGB considered that the significant increase in foreign bribery enforcement could be attributed to the 2004 decision to designate the SFO as the lead criminal law



enforcement agency for foreign bribery. As a result, concern was expressed at the UK government's intention to create the NCA to improve the response to serious and organised crime. The UK was recommended to maintain the SFO's lead role in criminal foreign bribery investigations and prosecutions.<sup>50</sup>

- In 2014, at the time of the UK's Phase 3 Written Follow-Up, the UK indicated that the NCA would work closely with law enforcement partners including the SFO, which would remain the lead agency for investigating large and complex cases of corporate bribery and corruption, and enforcing the Bribery Act in respect of overseas corruption by British businesses.

79. The 2014 MOU, which shifted responsibility to the NCA to maintain a central register for foreign bribery cases – a role previously held by the SFO – and the creation of the ICU bring once again to the forefront questions about recognition of the SFO's role in foreign bribery enforcement. Several press articles and civil society representatives have voiced their concern about ongoing uncertainty over the future of the SFO regarding its role vis-à-vis other law enforcement agencies, coupled with questioning on the stability of SFO funding (see below for discussion on resources).<sup>51</sup> In 2011 and 2014, concerns arose that the SFO might be dismantled and its responsibilities folded into the NCA. There were also suggestions in early 2016 that the NCA would be given a power of direction over the SFO.<sup>52</sup> These views were echoed at the on-site visit by civil society representatives and private sector lawyers. They underlined the added value of the SFO's operating model that allows it to both investigate and prosecute complex economic crime cases, and expressed concern about the SFO's independence if it came under the umbrella of the NCA, as the NCA functions under the Home Office. They further highlighted that recurring interrogations over the SFO's existence could be damaging to the investigation and enforcement of foreign bribery, as this could act as an unnecessary distraction. On 5 December 2016, the Home Secretary said in Parliament "the Cabinet Office will look at the UK's response to economic crime more broadly. This will include looking at the effectiveness of our organisational framework, and the capabilities, resources and powers available to the organisations that tackle economic crime." This statement reignited concerns among the private sector lawyers, civil society and the press that the SFO may be folded into the NCA.<sup>53</sup>

### *Commentary*

*The lead examiners note that, in spite of the many law enforcement agencies with potential responsibility for foreign bribery enforcement in the UK, the SFO is in practice the leading agency in terms of number of foreign bribery cases and expertise in this field. They further consider that the integrated approach, or so-called "Roskill model", which brings together prosecutors, investigators and other specialists, constitutes a positive achievement which has proven very effective in bringing foreign bribery cases forward. For these reasons, the lead examiners recommend that the UK maintain the SFO's role in criminal foreign bribery-related investigations and prosecutions as a priority. The UK could, in particular, use the current revision of the MOU on assignment and attribution of foreign bribery cases, as well as the development of the UK Anti-Corruption Action Plan, as an opportunity for such clarification.*

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<sup>50</sup> Phase 3 recommendation 7(a).

<sup>51</sup> See for instance: <http://blogs.wsj.com/riskandcompliance/2016/07/22/brexit-secures-future-of-serious-fraud-office/>

<sup>52</sup> See BOND Anti-Corruption Group [Submission to the OECD Working Group on Bribery Review team](#) and [www.ft.com/cms/s/0/daa673be-d0da-11e5-831d-09f7778e7377.html#axzz4M1WQ6xxr](http://www.ft.com/cms/s/0/daa673be-d0da-11e5-831d-09f7778e7377.html#axzz4M1WQ6xxr)

<sup>53</sup> See Financial Times, 12 March 2017 at <https://www.ft.com/content/cee98dde-05b0-11e7-aa5b-6bb07f5c8e12> and The Times, 13 March 2017 at <http://www.thetimes.co.uk/article/sfo-should-stay-in-place-lawyers-warn-vhb267zgf>

*Regarding the new MOU under consideration, the lead examiners welcome the steps taken by the UK to include agencies such as HMRC and the UKFIU as parties, with a view to enhancing exchange of intelligence.*

*Given the importance of the financial industry in the UK, the lead examiners recommend that, where appropriate, the FCA consider the opportunity of conducting co-ordinated enforcement actions with the SFO, and consider imposing administrative sanctions for failure to guard against bribery under the FSMA.*

*As concerns Scotland, the lead examiners consider that the UK should take measures to improve communication between law enforcement authorities from England and Wales and those in Scotland. As a positive note, the lead examiners welcome the regrouping of law enforcement and technical functions, as well as other agencies, in one building, which should facilitate communication and benefit enforcement, including in foreign bribery cases.*

*Finally, the lead examiners recommend that the Working Group follow up on the possible role of JFAC in foreign bribery enforcement.*

*The lead examiners believe that, taken together, the measures above should ensure that less foreign bribery cases “fall through the cracks” of the UK patchwork of law enforcement agencies, and could further enhance the overall level of foreign bribery enforcement in the UK.*

**b. Uncertainty over SFO resources for foreign bribery enforcement**

80. The issue of resources available for foreign bribery enforcement in the UK, and to the SFO in particular, has also been a long-standing concern of the WGB, linked to the above-mentioned issues of case attribution, and the multiplicity of law enforcement agencies. Of concern at the time of Phase 3 was that the SFO could not properly investigate foreign bribery cases as a result of inadequate resources. The SFO’s budget had decreased and staff turnover was high. As a result, the SFO indicated that it did not have the resources to investigate every allegation and had to take a balanced approach. Police resources available to the SFO through the COLP Anti-corruption Unit (OACU) had also decreased. In any case, the OACU was only available in foreign bribery cases when the bribed official was from a developing country (linked to the financing of this unit by DFID). In 2014, at the time of the UK’s Written Follow-Up, the strongest reason for the Working Group’s concern about the SFO’s resources was that its foreign bribery enforcement levels had decreased appreciably since the Phase 3 Report. Budget levels were similar for the SFO, but had risen for the police forces.

81. *SFO budget* – The 2013-14 core budget (i.e. at the time of the UK’s Phase 3 Written Follow-Up) for the SFO was GBP 29.6 million. This has increased since, with the figure reaching GBP 33.8 million in 2015-16, although this has not gone back to the GBP 35.1 million budget in 2009-10 (see also table below). Figures provided by the UK in its Phase 4 responses appear to indicate a slight decrease in the SFO’s funding in the coming years with Resource Departmental Expenditure Limit (DEL) funding dropping from GBP 35.7 million in 2016-17 to GBP 33.5 million in 2019-20.

**Table 3. SFO budget 2009 - 2016**

Year	2009-10	2010-11	2011-12	2012-13	2013-14	2014-15	2015-16
Core funding	GBP 35.1m	GBP 34.1m	GBP 33.9m	GBP 33.4m	GBP 29.6m	GBP 33.2m	GBP 33.8m

Source: <https://www.sfo.gov.uk/about-us/>.

82. Overall, the SFO’s budget remains around Phase 3 levels and concerns over the adequacy of the budget remain. This has been noted by civil society, which considers that “resources for the SFO are still inadequate and its funding model problematic”, and suggest that “an increased permanent budget for the SFO (in the region of around GBP 75 million annually) would send a clear signal from the UK government as to its intention to drive out corporate irresponsibility and hold companies to

account for financial crime.”<sup>54</sup> Private sector lawyers concurred with this view, stating that the current budget is clearly not enough to carry out the SFO’s work.

83. *Blockbuster funding* is also still available, a process whereby the SFO may have access to HM Treasury Reserve funding to finance the costs of investigating very large and complex cases. This financing is agreed with HM Treasury on a case by case and year by year basis. This type of funding has attracted criticism as it gives the impression that HM Treasury could in effect make a political decision as to whether to deny funding for a particular case, thus interfering in the exercise of the SFO’s discretion (see also section 3 below on independence).<sup>55</sup> In a February 2014 communication with the Parliamentary Justice Committee, the SFO Director, David Green, expressed his concern over this type of funding and “is keen that an ‘appropriate and more certain funding model can be agreed by all those with an interest.’”<sup>56</sup> The HM Crown Prosecution Services Inspectorate itself found in May 2016 that the blockbuster funding model was preventing the SFO from building expertise and capacity as it encouraged the SFO to rely on temporary staff.<sup>57</sup> Views expressed by the SFO at the on-site visit were more nuanced. SFO officials explained that reliance on blockbuster funding allows for a level of flexibility so that staff levels may be adjusted when a particularly large case necessitates it, and that it could be pointless to have “all that money permanently sitting around with no cases.” This should be balanced with the findings that a number of foreign bribery allegations seem to be going through the assessment process years after they come to light (see Introduction section 4 on foreign bribery cases), which begs the question whether the SFO could use extra resources to take on a greater number of cases. Private sector lawyers present at the on-site visit further pointed out that the mere fact of having to ask for blockbuster funding on specific cases that should be adequately funded in the first place was an unnecessary bureaucratic hurdle.

84. *Staff turnover* – In terms of staff turnover, the situation under the new SFO Director appears much improved from Phase 3. The SFO indicates that the staff turnover rate for the 12 months prior to the on-site visit was 12.9%, below the industry average of 13.6%.<sup>58</sup> In response to questions from the evaluation team about the impact of blockbuster funding on retention of skilled and experienced staff, the SFO provided the figures below on average length of service according to the different staff categories. The SFO further indicated that, of all the staff that had left in the previous 12 months (excluding any who were dismissed), the average length of service was 4.2 years, with the shorter terms usually among the lower grades. Overall, the SFO has approximately 500 members of staff, approximately 85% of which are engaged on casework covering the full range of SFO responsibilities (including intelligence development, international assistance and asset recovery).

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<sup>54</sup> See BOND Anti-Corruption Group [Submission to the OECD Working Group on Bribery Review team and](#) The Independent (23 April 2013), “[Revealed: George Osborne’s secret veto on fraud inquiries](#)”.

<sup>55</sup> See *ibid*, and The Independent (23 April 2013), “[Revealed: George Osborne’s secret veto on fraud inquiries](#)”.

<sup>56</sup> Justice Committee (28 February 2014), “[Serious Fraud Office Supplementary Estimate 2013-14](#)”.

<sup>57</sup> <https://www.justiceinspectorates.gov.uk/hmcpsi/inspections/sfo-governance-arrangements/>

<sup>58</sup> As identified by the Chartered Institute of Personnel and Development on median labour turnover in the UK carried out in 2014-15.

## Commentary

*The lead examiners note with concern that budget levels at the SFO remain around Phase 3 levels, which had prompted the Working Group's concerns then. They also note that foreign bribery allegations are not always picked up in due time, and query whether this could also be linked to available resources. The lead examiners further consider that blockbuster funding may lead to perceived, if not real, influence of the executive over law enforcement decisions. For these reasons, the lead examiners recommend that the UK ensure the SFO's core budget is sufficient to allow the SFO to adequately and independently carry out its role.*

*The lead examiners further recommend that specialised foreign bribery training and adequate resources be provided to the NCA so that it may effectively support foreign bribery prosecutions conducted by the CPS (i.e. those not picked up by the SFO), including where these concern foreign bribery occurring outside developing countries.*

### B.3. Undue influence on foreign bribery investigations and prosecutions

85. The Working Group raised in the past several concerns about implementation of Article 5 of the Convention in the UK and possible undue influence on foreign bribery investigations and prosecutions. In Phase 3, the WGB made two recommendations in this regard which were assessed as not implemented at the time of the Written Follow-up Report in 2014 (recommendations 8(a) and 8(b) – see Annex 3).

#### *a. Legal status of Article 5 in UK domestic law and its application to relevant actors and stages of foreign bribery investigations and prosecutions*

86. An overriding issue is that international conventions to which the UK is party do not automatically form part of the UK's domestic legal order and they must be implemented at the national level. Thus, Article 5 does not have binding force directly in UK law. This has been a longstanding issue since Phase 2bis, when the Working Group noted that Article 5 needs “to be clearly binding in the UK domestic sphere (although not necessarily through legislation)”.<sup>59</sup> In Phase 3, the Working Group reiterated its concerns.<sup>60</sup>

87. The May 2014 MOU states that the Convention “establish[es] legally binding standards to criminalise [foreign bribery]”. However, this indicates that the Convention is binding under international law on the UK as a State but falls short of stating that it is also binding on individual prosecutors and investigators. The MOU also only applies to law enforcement bodies that are signatories. It does not apply to the Attorney General or other relevant parts of the government. As stated in the Phase 3 Report, compliance with the OECD recommendation is not solved under the 2009 [Protocol between the Attorney General and the Prosecuting Departments, the Code for Crown Prosecutors](#), the [Corporate Prosecutions Guidance](#) or the [Bribery Act 2010: Joint Prosecution Guidance of the Director of the Serious Fraud Office and the Director of Public Prosecutions](#).<sup>61</sup> UK authorities expressed the view that the language in the Joint Prosecution Guidance is sufficient to address WGB concerns.

88. The SFO is responsible for making an early assessment of the viability of an investigation. At this stage, SFO prosecutors are bound to consider the Corporate Prosecutions Guidance and Joint

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<sup>59</sup> Phase 2bis Report, para. 99.

<sup>60</sup> Phase 3 Report, paras 120-123.

<sup>61</sup> Scotland and Northern Ireland being separate legal jurisdictions, this guidance does not apply to decisions about prosecutions in those jurisdictions.

Prosecution Guidance (JPG). However, these two documents contain language that does not strictly in law prohibit a prosecutor from being influenced by Article 5 factors. They state that: “Prosecutors dealing with bribery cases are *reminded* of the UK’s commitment to abide by Article 5” (emphasis added). It is thus debatable whether a prosecutor who does not consider Article 5 factors would be in breach of the Guidance. A further shortcoming is that the prosecutorial guidance documents apply only to prosecutors. They do not apply directly to the police, such as the City of London Police or the Ministry of Defence Police. The UK states that the police have been informed through training that prosecutors would apply the JPG. Nonetheless, in some circumstances the police may investigate foreign bribery cases independently without the supervision of a prosecutor.<sup>62</sup> The guidance also does not apply to the Attorney General (AG). While the AG is no longer required to consent to foreign bribery prosecutions under the Bribery Act, he retains the power to direct specific cases (including foreign bribery) where necessary to safeguard national security, as well as power to consent to prosecutions for foreign bribery offences pre-dating the Bribery Act.

89. A further concern relates to the Code for Crown Prosecutors. According to the Code, one public interest factor that tends against prosecution is where “a prosecution may require details to be made public that could harm [...] *international relations* [...]”. In Phase 2 and Phase 3, the Working Group has expressed concerns that this provision may be read to be inconsistent with Article 5 and thus recommended that the Code be amended. The UK has not done so. According to the UK, the Code applies to all criminal offences and hence there is no need for it to refer to Article 5.<sup>63</sup>

90. In their Phase 4 responses, the UK authorities state that the application of Article 5 to relevant law enforcement bodies is raised in conferences, seminars and workshops.<sup>64</sup> Although this is a step in the right direction, such initiatives are unlikely to suffice to ensure that “all relevant parts of the government are fully aware of their duty to respect the principles in Article 5, so that they can assist investigators and prosecutors to act in accordance with that Article”.<sup>65</sup> In particular, this issue should be addressed in writing, e.g. in professional guidance targeting all relevant investigators and prosecutors.

## ***b. Issue of undue influence in foreign bribery investigations and prosecutions***

### ***i. Superintendence, prosecutorial consent over foreign bribery cases and Shawcross exercises***

91. The SFO’s current caseload includes investigations into Barclays, GlaxoSmithKline, Tesco, G4S and Serco. These are major UK companies that wield real power and influence in the City and British society. As underlined by the SFO, it is vital in that context that the investigator/prosecutor has visible and demonstrable independence from government: traditional operational independence may not be enough. As noted in their Phase 4 responses, the UK authorities believe that the model of continuous ownership through investigation and prosecution stages is a fundamental characteristic of

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<sup>62</sup> In such a case and according to the authorities, the police would usually seek early investigative advice from the CPS.

<sup>63</sup> Phase 3 report, para. 123.

<sup>64</sup> E.g. the workshop organised in November 2015 by the NCA ICU and attended by the majority of ICU members that addressed the question of the independence. The issue is also something the SFO managers clearly refer to in conferences (e.g. speech in November 2014 from Stuart Alford QC, SFO Joint Head of Fraud at the ‘Anti-Corruption in Oil & Gas Conference 2014’).

<sup>65</sup> Phase 3 recommendation 8(b).

the SFO (see section 2.a. above in relation to the Roskill model), together with its visible and demonstrable independence.

92. Investigations and prosecutions of foreign bribery cases are usually carried out by the SFO and CPS. The SFO and CPS are headed up by the Director of the SFO and Director of Public Prosecutions (DPP) respectively. The decision whether or not to prosecute, (or in the case of the SFO, to investigate and, if appropriate, prosecute) and, if so, for what offence, or whether to use a settlement procedure, is a decision for an independent prosecutor which requires the evaluation of the strength of the evidence and also a judgment about whether an investigation and/or prosecution is needed in the public interest (see section B.4 below). According to the UK authorities, prosecutors take such decisions in a fair and impartial way, acting at all times in accordance with the highest ethical standards and in the best interests of justice.

93. Superintendence – The Directors of the SFO and the CPS exercise their statutory functions subject to the superintendence of the AG. The AG is responsible for safeguarding the independence of prosecutors in taking prosecution decisions. The 2009 Protocol between the AG and the Prosecuting Departments (including the SFO) sets out the parameters of superintendence. According to the Protocol, the AG’s responsibilities for superintendence and accountability to Parliament mean that he or she, acting in the wider public interest, needs occasionally to engage with a Director about a case because it: (i) is particularly sensitive; and/or (ii) has implications for prosecution or criminal justice policy or practice; and/or (iii) reveals some systemic issues for the framework of the law, or the operation of the criminal justice system. In these circumstances the AG will be alerted to a case by the Director, or may call for information about a case, or will discuss the case with the Director. The Director will keep the AG informed as significant developments occur. The AG may express any concerns. The decision in these cases remains the Director's.

94. Consent for prosecution – The AG is not informed of, nor has any involvement in, the conduct of the vast majority of individual criminal cases in the UK. There are instances, however, where the AG’s consent is needed to bring a prosecution for: (i) certain offences defined by Parliament, including offences of conspiracy to commit offences outside England and Wales under section 1A of the Criminal Law Act 1977; (ii) any criminal case, including a foreign bribery case, where it is necessary to safeguard national security; and (iii) any bribery case that occurred before the adoption of the Bribery Act. At the time of drafting this report, the SFO had 6 ongoing investigations governed by pre-Bribery Act legislation. Therefore, the consent of the AG is still required to prosecute these cases since the Bribery Act is not retroactive.

95. Shawcross exercises – Under UK practice, the AG or the Directors of the SFO or CPS may conduct a Shawcross exercise (such as the one carried out at the time of the BAE-Al Yamamah investigation) “in a few very exceptional cases” to seek information from Ministers that is relevant to the decision of whether the public interest requires a prosecution. The responsibility for the eventual decision rests with the AG in any case which requires his consent to prosecute or with the relevant Director of prosecution. The same applies to the Lord Advocate in Scotland. The rationale for such a process is that other departments and ministerial colleagues may be privy to sensitive information which has a bearing on the decision to prosecute. This is an opportunity for them to make representations to the Law Officer (such as the AG) and bring sensitive material/considerations to the Law Officer’s attention. According to the Protocol, ministers are not able to dictate what the decision ought to be.<sup>66</sup> Although the Law Officer may consult with colleagues, the decision to consent is the Law Officer’s alone – in doing so the Law Officer acts independently of government and as guardian

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<sup>66</sup> Protocol, para. 4(e)3.

of the public interest.<sup>67</sup> Arguably a decision to consent could be influenced by considerations of national economic interest or the potential effect upon relations with another State if these were drawn to his attention by ministerial colleagues. This is a concern that was expressed at the time of Phase 2bis, which noted that Ministers who were consulted during the BAE Al Yamamah investigation made submissions based on factors prohibited under Article 5.<sup>68</sup> After Phase 2bis, the AG and the prosecuting departments signed the above-mentioned Protocol that organises the use of Shawcross Exercises. The Working Group clearly stated in the past that consultations of government ministers about individual criminal cases, as conducted in the Shawcross procedure, may generally not be appropriate in foreign bribery cases, in which the national economic interest and relations with other states will frequently be involved. The lack of information on the use made of this practice in foreign bribery cases undoubtedly contributes to challenge its appropriateness under the Convention. This was strongly echoed by civil society at the on-site visit, both orally and in writing.<sup>69</sup> According to the UK, there is no single process by which the use of Shawcross exercises is made public. Once an investigation or prosecution is concluded, consideration will be given whether the use of a Shawcross exercise can be made public on a case-by-case basis. The UK authorities believe that disclosing that a Shawcross exercise has taken place would enable the public to discover that the case was, in all likelihood, particularly sensitive and/or involved national security issues. In some cases, where these issues are not obvious, it may be damaging to make this disclosure.

96. More recently, in October 2014, some media and Transparency International UK expressed concerns over a risk of a re-run of the BAE/Al Yamamah scandal, in a case related to the investigation by the SFO of alleged corruption by GPT Special Project Management Ltd in the Saudi Arabia National Guard Communications (SANGCOM) project. This prompted concern from TI UK, which, jointly with other NGOs, sent a [letter](#) to the AG. According to the letter, this particular case had been discussed by the AG and the SFO Director as part of the AG's superintendence, but it was not clear whether the GPT case raised any national security issues which would require the AG's consent to prosecute. There does not appear to be any evidence that the AG has sought Ministerial representations in a public interest consultation exercise on the GPT case (as envisaged under a Shawcross exercise). The evaluation team heard from the SFO during the on-site visit and afterwards that this case was still under investigation.. The only tangible information on the GPT case and potential concerns in the context of Article 5 of the Convention relates to the fact that it was discussed by the AG and the SFO Director in accordance with the Protocol. The superintendence set out in the Protocol does not in substance undermine the independence of the SFO since the AG's superintendence role does not include the power to give directions to the Director in a given case. While the risk of undue influence in any high profile foreign bribery case cannot be completely ruled out (in the UK as elsewhere), there does not appear to be, in the GPT case, any evidence available at the time of drafting this report to conclude that there has been any undue influence in this particular case. More generally, no information was provided on whether a Shawcross exercise has been conducted in any other foreign bribery case since the Phase 3 evaluation.

*ii. Power of the Attorney General over the SFO Director*

97. Another concern raised by civil society during the on-site visit relates to the AG's right to appoint and terminate the Director of the SFO – a fact that, in its Phase 2bis review of the UK, the Working Group expressed concern about.<sup>70</sup> The Director's contract can be of any duration and can be

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<sup>67</sup> The Protocol states that the AG and Director of SFO would probe rigorously any Ministerial representations that are said to point away from prosecution (Protocol paras. 4(e)1-4(e)4).

<sup>68</sup> Phase 2bis report, para. 149.

<sup>69</sup> See Bond Anti-Corruption Group [Submission to the OECD Working Group on Bribery Review team](#).

<sup>70</sup> Phase 2bis report, paras 116-118.

terminated by the AG at any time. The appointment may also be renewed by the AG for any period.<sup>71</sup> For NGOs, the concern remains that, were a Director to refuse to end an investigation or prosecution on the instruction of the AG, his or her appointment could be terminated.<sup>72</sup>

98. At the time of the Phase 2bis evaluation in 2008, draft legislation was pending to amend the conditions under which the AG may appoint and remove the SFO director. The Bill submitted to Parliament ultimately did not contain the provision on the appointment and removal of the SFO Director, which remains unchanged and is still in force. This is concerning for the Working Group, which has followed up this issue for years, since the rules for the appointment and removal of the SFO Director should be designed to reinforce his/her independence. According to the UK, it is inconceivable in practice that an AG would dismiss the SFO Director because of a disagreement about an individual case as the roles and responsibilities of both are clearly defined in the 2009 Protocol and that none of the Directors of the SFO have ever been dismissed because of a disagreement about the investigation or prosecution of an allegation of bribery.

*iii. Adequate funding of the SFO*

99. The question of independence of law enforcement is also raised when resources are dependent on authorisation of the executive in specific cases. Blockbuster funding of the SFO (see section B.2 above) raises concerns since this extra funding is subject to HM's Treasury's approval. Several commentators, including members of Parliament<sup>73</sup> and civil society<sup>74</sup>, believe that the current financing of the SFO leaves the agency open to government interference in the cases it takes on. They are of the view that the SFO, to maintain its crucial role in investigating and prosecuting serious financial crimes, needs to be objective in its decision making without any form of government interference.

100. By contrast, inspectors, who saw "positive, tangible change" at the SFO since David Green took the helm in April 2012, said they found "no evidence whatsoever that funding would be withheld because of political interference."<sup>75</sup> At the on-site visit, prosecutors from the SFO denied that such funding could generate undue interference in actual cases, as demonstrated by the fact that ongoing SFO investigations that could impact national economic interest have received such funding. In its review of the SFO governance arrangements published in May 2016,<sup>76</sup> Her Majesty's Crown Prosecution Service Inspectorate stated that, whilst the blockbuster funding model draws criticism that there is a perceived lack of independence from Government, it found no evidence whatsoever that funding would be withheld because of political interference.

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<sup>71</sup> David Green was appointed Director in April 2012 for a fixed term due to end in April 2016. His contract was renewed in February 2016 and will end on 20 April 2018.

<sup>72</sup> See in particular Corruption Watch contribution [here](#).

<sup>73</sup> Catherine McKinnell, shadow attorney-general, said: "This is the third year running that the SFO has had to go cap in hand to the Treasury for contingency funding equivalent to over half its budget. This sticking-plaster approach is neither sustainable nor transparent and it simply cannot be right that George Osborne [the chancellor] gets to decide which major cases should be investigated". See [here](#).

<sup>74</sup> See Bond Anti-Corruption Group [Submission to the OECD Working Group on Bribery Review team](#).

<sup>75</sup> See [here: http://blogs.wsj.com/riskandcompliance/2016/05/26/the-morning-risk-report-sfo-funding-model-ripe-for-change/](http://blogs.wsj.com/riskandcompliance/2016/05/26/the-morning-risk-report-sfo-funding-model-ripe-for-change/).

<sup>76</sup> See the "Inspection of the Serious Fraud Office Governance Arrangements" review [here: https://www.justiceinspectors.gov.uk/hmcpsi/wp-content/uploads/sites/3/2016/05/SFO\\_May16\\_rpt.pdf](https://www.justiceinspectors.gov.uk/hmcpsi/wp-content/uploads/sites/3/2016/05/SFO_May16_rpt.pdf)



iv. *Investigations and prosecutions in the defence sector*

101. The MDP is able to investigate foreign bribery cases where the case “impacts significantly on the MOD”.<sup>77</sup> In Phase 3, the authorities added that occasionally the MOD Police Fraud Squad will also work with the SFO on cases of a politically sensitive nature because of its expertise in investigating corruption cases involving the MOD. At the time of the Phase 2 evaluation in 2005, concerns were raised with regard to the appropriateness of the MDP’s jurisdiction over bribery cases<sup>78</sup> as well as the MDP’s independence, particularly when MOD employees are being investigated. During this evaluation, the authorities clarified that the CPS also prosecutes MOD cases.

102. Representatives from the MOD and the MDP attended the Phase 4 on-site visit for the first time (they had declined to attend the Phase 2bis and Phase 3 visits), which is undoubtedly a positive development. The MDP confirmed its role in investigations related to defence and defence capability and the practice to have MDP personnel seconded to the SFO when such cases occur. The representative from the MDP also confirmed that the MDP has jurisdiction on MOD employees suspected of wrongdoings and when the MOD is a victim. The risk of undue influence and interference in foreign bribery cases was also discussed. Although it was acknowledged that such a risk exists in defence sector-related investigations and prosecutions, the evaluation team was told at the on-site visit that the only instance the MDP heard about such interference was in the BAE-Al Yamamah case.

v. *Situation in Scotland*

103. In Scotland, when deciding to prosecute foreign bribery cases, prosecutors are bound by the Lord Advocate’s instructions. As specified in responses to the Phase 4 Questionnaire, such instructions make it explicit that a prosecution decision must take no account of: (i) considerations of national economic interest; (ii) the potential effect upon relations with another State or; (iii) the identity of the natural or legal persons involved. Specific reference is made to Article 5 of the Convention in the Lord Advocate’s instructions.

104. Scotland has a high concentration of companies operating in corruption-sensitive sectors (essentially oil and gas) which are also a major component of the Scottish economy. The devolution process has changed the institutional and political landscape in Scotland, and it has been suggested that this could create risks of political interference in sensitive cases.<sup>79</sup> This issue was discussed at the on-site visit with a representative from the COPFS, who was not aware of any situation of interference in foreign bribery cases, stating that decisions to prosecute are solely taken on legislative grounds (referring in particular to the public interest test).

vi. *Other issues surrounding the implementation of Article 5 of the Convention*

105. As part of discussions within the UK on the SFO’s future as an institution in charge of foreign bribery investigations and prosecutions (see section 2(a) above), consideration has been given to allocating foreign bribery investigations to the NCA. Several press articles<sup>80</sup> have highlighted the

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<sup>77</sup> Phase 3 Report, paras 86-88.

<sup>78</sup> Phase 2 Report, paras. 109-114 and follow-up issue 8(b).

<sup>79</sup> See “Politics and the police in Scotland: The impact of devolution” here: <http://link.springer.com/article/10.1007/s10611-011-9274-9>

<sup>80</sup> See for instance “[The future of the SFO: An exercise in crystal ball gazing?](http://www.aoinvestigationsinsight.com/future-sfo-exercise-crystal-ball-gazing/)” here: <http://www.aoinvestigationsinsight.com/future-sfo-exercise-crystal-ball-gazing/>.

risks of political interferences if this were the case.<sup>81</sup> Private sector lawyers have voiced similar concerns, stating “at the moment the SFO is operationally independent from all ministers, including the attorney-general. This move would involve some transfer of power to the Home Office, and the power to indirectly influence the SFO’s operations through the NCA.”<sup>82</sup>

106. During the on-site visit, civil society pointed out that Brexit could heighten risks that Article 5 considerations be taken into account by government ministers in assessing whether a particular investigation or prosecution might undermine the UK’s national economic interests at a time when protecting the economy is the absolute priority for ministers. In addition, NGOs believe that Brexit could increase the risk of UK companies threatening to relocate and potential loss of UK jobs as a bargaining chip in negotiations with prosecutors over charges. Given that the SFO has on its books some very large UK companies that are significant partners in the government’s industrial strategy, this is a real concern for several NGOs in the UK.<sup>83</sup> This concern was echoed by the business community which highlighted the risk of losing impetus in the fight against foreign bribery. During on-site visit discussion, the UK authorities stressed that their commitment to implement the Convention, unrelated to EU legal instruments, remains a priority. They acknowledged a possible impact on capacities to deliver and respond to mutual legal assistance requests, and stated that this is an area under close scrutiny in the Brexit discussions (see further discussion on international cooperation under Section B.7).

### *Commentary*

*The lead examiners consider that Phase 3 recommendation 8(a) and (b) continue to be unimplemented. They therefore recommend that the UK take any appropriate action to ensure that Article 5 is clearly binding on investigators, prosecutors (including Scotland), the Attorney General and the Lord Advocate at all stages of a foreign bribery investigation or prosecution. The UK should also ensure that all relevant parts of the government are fully aware of their duty to respect the principles in Article 5, so that they can assist investigators and prosecutors to act in accordance with that Article.*

*The lead examiners recognise that the SFO’s record testifies to its current independence and capacity to seriously investigate and prosecute foreign bribery allegations. Nevertheless, the lead examiners consider that the rules that govern the financing of the SFO cause concerns in the context of Article 5 of the Convention. They note that for many commentators, including in the judiciary sphere, the reliance of the SFO on blockbuster funding represents a risk of political interference, and could, at the very least, result in an unfortunate perception of influence of the executive over law enforcement. The lead examiners believe that this risk exists and should be addressed.*

*The possibility given to Government Ministers to be consulted about individual criminal cases (Shawcross exercise), continues to raise concern. The lead examiners reiterate the view expressed*

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<sup>81</sup> See “TI-UK concerned by news of SFO losing its independence” here <http://www.transparency.org.uk/press-releases/tiuk-concerned-by-news-of-sfo-losing-its-independence/> and the [anti-corruption group submission to the evaluation team referred to above](#)

<sup>82</sup> See “Crime agency to be given powers over SFO in shake-up” here <https://www.google.fr/amp/s/amp.ft.com/content/daa673be-d0da-11e5-831d-09f7778e7377>

<sup>83</sup> See, *inter alia*:

- <http://www.transparency.org.uk/what-does-brexit-mean-for-the-uks-fight-against-corruption/>
- <http://www.cw-uk.org/2016/07/05/brexit-what-next-for-the-anti-corruption-movement-in-the-uk/>
- <http://www.lexology.com/library/detail.aspx?g=1416d3a5-bb9d-4824-8d00-fa33ada34362>
- <http://blogs.lse.ac.uk/europpblog/2016/07/25/anti-corruption-after-brexit/>
- Bond Anti-Corruption Group [Submission to the OECD Working Group on Bribery Review team.](#)

*in the past by the Working Group that such a procedure may generally not be appropriate in foreign bribery cases, in which the national economic interest and relations with other states will frequently be involved. They recommend that the UK take measures to ensure that the use of this practice in foreign bribery cases is publicised and transparent, as the circumstances permit.*

*Finally, the lead examiners consider that the rules for the appointment and removal of the SFO Director should be designed to reinforce his/her independence, and that the SFO's independence could be further improved by ensuring appropriate safeguards are in place regarding appointment and dismissal of its Director. The lead examiners believe that this is an issue that the Working Group should continue to follow up on.*

#### **B.4. Conducting a foreign bribery investigation and prosecution**

107. This section of the report explores the rules that govern the conduct of a foreign bribery investigation and prosecution by the SFO as the agency which handles most of foreign bribery cases.

##### *a. Case acceptance and management of cases at the investigative stage*

108. In 2012, the SFO replaced the old case acceptance criteria with a [Statement of Principle](#).<sup>84</sup> According to this Principle, the SFO investigates and, where appropriate, prosecutes cases of serious or complex fraud (including cases of domestic or overseas bribery and corruption) which, in the opinion of the Director of the SFO, call for the multi-disciplinary approach and legislative powers available to the SFO. In deciding which cases to adopt, the Director takes into account all the circumstances of the case and considers: (i) whether the apparent criminality undermines UK PLC commercial or financial interests in general and in the City of London in particular, (ii) whether the actual or potential financial loss involved is high, (iii) whether actual or potential economic harm is significant, (iv) whether there is a significant public interest element, and (v) whether there is new species of fraud.

109. The SFO has upgraded substantially the processes used to decide which cases are accepted for investigation, in answer to concerns expressed. More robust structures, including the Case Evaluation Board, now exist to consider reports prepared by the Intelligence Unit, which acts as a single point of entry for all referrals into the SFO. The CEB advises the Director on the suitability of any given case by application of the Statement of Principle.<sup>85</sup> The decision to accept or decline an investigation lies solely with the Director. If the Director agrees with the CEB's recommendation to investigate a case, he/she endorses the file supporting the investigation. Where the Director declines to accept a case for investigation, a full narrative is made setting out the rationale for his decision. Depending on the reasons for the decision, consideration is given to whether the case should be referred to another agency for investigation, regulatory action or other disposal. The SFO indicates that the Director has never rejected a bribery case that has been recommended for acceptance by the CEB.

110. This process is properly set out in the operational handbook available to all staff. The Statement of Principle is perceived within the SFO as being sufficiently broad to encompass the top level of complex or serious cases without committing the SFO to cases which can be handled by other law enforcement bodies.<sup>86</sup> It also allows the SFO to develop its strategy effectively, as times change.

<sup>84</sup> See [www.sfo.gov.uk/publications/guidance-policy-and-protocols/](http://www.sfo.gov.uk/publications/guidance-policy-and-protocols/)

<sup>85</sup> For more details, see a review of this process in the "[Inspection of the Serious Fraud Office governance arrangements](#)" (published by Her Majesty's Crown Prosecution Service Inspectorate's (HMCPSP) in May 2016).

<sup>86</sup> See the conclusions of the HMCPSP review mentioned above.

SFO managers expressed their support for this approach at the on-site visit, as did most external stakeholders. Some criticism however remains, the Statement of Principle being perceived by some as hampering clear strategic and operational co-operation<sup>87</sup>, something that the SFO strongly denies. SFO's case acceptance policy also generated comments in the press after a jury acquitted six defendants in January 2016 in the LIBOR rate fixing scandal. Private sector lawyers suggested that some decisions to accept cases for investigation could be driven by other factors than those set out in the Statement of Principle, including to secure the limelight and publicity for the SFO.<sup>88</sup> These views relate to one particularly visible case, and no general conclusion can be drawn on this basis, although this shows the level of external scrutiny to which the SFO's case acceptance policy is subject, and the importance of transparency in this respect.

111. Once cases are accepted for investigation they are subject to various levels of control and quality assurance until the end of the case. Cases are managed by a case controller who holds team meetings to progress and plan the investigative strategy. An independent counsel is also usually assigned to the case and provides an essential element of external review and oversight, independent of the investigative team. Since 2013, a General Counsel further ensures that all new cases pass the Statement of Principle test and are fit for investigation, in conformity with the SFO's strategic aims. Although good levels of assurance have been embedded into the case acceptance and case review processes, some commentators believe that such processes could still be improved to ensure that only those cases for which there is a realistic prospect of conviction are brought before the courts.<sup>89</sup>

### *Commentary*

*The lead examiners are of the view that the Statement of Principle is fit for purpose. They also believe that the case acceptance and case management policies should be subject to regular review to ensure that it remains fully relevant and that its implementation achieves the expected results. This would be a way for the SFO to demonstrate that it is a 'learning' organisation, by learning from its own successes but also from the challenges it may encounter.*

#### *b. Investigative powers and tools*

112. As a general remark, it should be noted that there is no time limit for completing an investigation in the UK. Furthermore, the prosecution of offences is not subject to any limitation periods per se, although a defendant has a right to a fair and public hearing within a reasonable time.<sup>90</sup>

113. With respect to investigative tools available to the SFO, there are no changes since Phase 3. SFO representatives explain that some police powers are not available to them, such as arresting suspects or securing locations before entering to carry out search and seizures. The SFO explains this allows it to save money on these aspects of investigations by delegating to other police authorities, and to focus training of SFO investigators on broader financial crime techniques. The SFO further reports it had no trouble having access to NCA or other police resources to carry out arrests or secure premises to allow the SFO to enter and carry out search and seizure.

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<sup>87</sup> Idem.

<sup>88</sup> See [Martin Kenney on the LIBOR scandal: Working for the SFO can't be easy](#).

<sup>89</sup> See the conclusions of the HMCPSI review mentioned above.

<sup>90</sup> Human Rights Act 1998 and the European Convention on Human Rights, Article 6(1).

*i. Section 2 powers of the SFO*

114. The Criminal Justice Act 1987 (CJA) created the SFO and its primary investigative tools, often referred to as “Section 2 powers”. These include the powers to search property and require persons to answer questions and produce documents. Written notice is always given when exercising these powers. Notices are typically issued to individuals, banks, financial institutions, accountants and other professionals, most of whom will have a duty of confidentiality to their clients. Issuing them with section 2 notices obliges them lawfully to give the information the SFO requires. On 6 June 2016 the SFO published new [guidance](#) on the process for inviting and handling requests for individuals interviewed under Section 2 to be accompanied by a lawyer. Following a number of adverse outcomes for the SFO in recent years (most notably the acquittals of all five defendants in the Wickes case), it is now broadly understood that the SFO will usually compel individuals under section 2 only if it is satisfied that they are not suspects in the case. Section 2A enables the Director of the SFO to use section 2 powers before a formal investigation has begun in relation to overseas bribery and corruption cases.

115. Under section 2A(1) of the Criminal Justice Act 1987 the Director has the power to use section 2(2) [person to answer questions] and (3) [produce specified documents] powers for the purpose of deciding whether to start an investigation in relation to alleged overseas bribery and corruption. Although the remit of SFO is to investigate and prosecute within England, Wales and Northern Ireland, under section 17(2) of the Criminal Justice Act, the powers of the Director to issue section 2A notices extends to Scotland. However, this excludes interviewing persons or obtaining documents located outside of the SFO’s jurisdiction or cases of pure domestic bribery. However, the Intelligence Unit of the SFO has issued section 2A notices to ‘co-operating’ corporates that has resulted in the voluntary repatriation of documents to the SFO’s jurisdiction. The SFO reports that in 2015 and 2016, section 2A was used at the pre- investigations stage for 4 cases accepted for full investigation.

*ii. The UK’s PSC Register and its potential benefits in foreign bribery investigations*

116. The May 2016 UK Anti-Corruption Summit produced a number of commitments and agreements that are intended to have a positive impact on the investigation and prosecution of foreign bribery.<sup>91</sup> Amongst these are beneficial ownership initiatives that should make it easier to investigate the complex web of financial structures commonly associated with foreign bribery cases. UK law enforcement agencies acknowledge that the opacity of current beneficial ownership arrangements is a significant barrier to tackling money laundering, bribery and corruption, and to successfully recovering stolen assets.<sup>92</sup> The UK’s public central register of company beneficial ownership information for all companies incorporated in the UK was launched in October 2016. This register – the “PSC” or “persons with significant control” register – is a new statutory register which most UK companies and Limited Liability Partnerships are required to keep in order to ensure that the individuals who are its ultimate beneficial owners and controllers are identified, and details of their holdings made public.<sup>93</sup> The authorities note that information of the legal ownership of a company was

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<sup>91</sup> See in particular the [U.K. country statement](#).

<sup>92</sup> As a way of illustration, the Metropolitan Police Service estimate that in cases where hidden beneficial ownership is an issue, 30-50% of an investigation can be spent in identifying the beneficial owners through a chain of ownership “layers” ([here](#)).

<sup>93</sup> Companies are required to have a register of PSCs from 6 April 2016. That information must be declared to Companies House from 30 June 2016, with the company’s annual statement, and Companies House’s register should therefore be complete by 29 June 2017. Companies House published several guidance documents for various types of company and partnership.

already available before the PSC register was created but they hope that the PSC Register will help combat financial crimes by allowing a full picture of both the legal and beneficial ownership of businesses to be created.

117. In April 2016, the UK OTs and CDs committed to storing information about beneficial ownership of companies in a central location, accessible by UK law enforcement. Standards of disclosure of the ultimate beneficiary of companies in the CDs and OTs will however not be brought in line with those in the UK. In particular, they will not be public registers. Some of them will only be automatically open to law enforcement agencies, primarily the NCA and the SFO.

118. Opinions on the PSC expressed during the on-site visit were nuanced. There was a general recognition that this is a step in the right direction (as acknowledged by one panellist, “it removes a place from which people can hide”) and that this new requirement on companies sends the right political message. Some participants were of the view that the register will benefit white collar crime investigations. Others, however, highlighted its weaknesses, notably the fact that such an obligation of transparency does not apply to legal arrangements such as trusts, and the absence of mechanisms to ensure that the information provided by the company is accurate. Civil society also commented that the models of registries to be developed in the CDs and OTs will not meet the PSC standards, including regarding their accessibility to the public. Several participants also highlighted the need to further regulate beneficial ownership of land and real estate to address the problem of offshore companies investing the proceeds of corruption in UK property.

*iii. Envisaged enlargements of SFO powers*

119. Regarding the SFO corporate internal investigation process, discussions within the SFO<sup>94</sup> were taking place at the time of drafting this report on the possibility to further formalise it, using a model similar to the one developed by the FCA. Section 166 of the Financial Services and Markets Act allows the FCA to commission a skilled persons’ review,<sup>95</sup> normally by an independent law or accountancy firm, which will carry out an examination of a business’ activities if they are a cause of concern. While the review is paid for by the company under scrutiny, the FCA must approve which law or accountancy firm conducts the examination. Either the company under review puts forward its choice of firm for FCA approval, or the regulator chooses a firm from its pre-selected panel.<sup>96</sup> This could represent an interesting development for the SFO, should this change be pursued.

120. Finally, the Criminal Finances Bill, introduced before Parliament in October 2016, grants the SFO a direct access to the investigative powers under POCA, like officers of all other national law enforcement agencies. The Bill proposes to grant them use of those powers<sup>97</sup> In addition, plans to extend the scope of the corporate criminal offence of ‘failure to prevent’ beyond bribery to other economic crimes, such as money laundering, false accounting and fraud, would contribute to strengthening the powers of the SFO, according to some commentators<sup>98</sup> as well as representatives of the SFO interviewed during the on-site visit. In the view of the latter, this could, for instance, allow corporates to be prosecuted for foreign bribery under different offences, as is sometimes done in other jurisdictions when, for instance, certain elements of the foreign bribery offence are difficult to establish (see also section C.1 on corporate liability).

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<sup>94</sup> See for instance the discussion [here](#).

<sup>95</sup> See [www.the-fca.org.uk/about/supervision/skilled-persons-reviews](http://www.the-fca.org.uk/about/supervision/skilled-persons-reviews).

<sup>96</sup> See [www.fca.org.uk/your-fca/documents/skilled-person-panel--1-april-2013](http://www.fca.org.uk/your-fca/documents/skilled-person-panel--1-april-2013).

<sup>97</sup> See “[Criminal finances Bill – Explanatory Notes](#)”.

<sup>98</sup> See [here](#).

## Commentary

*The lead examiners note that the SFO employs a variety of investigative tools to expose illegal activities and subject them to the force of the law. They welcome the “Persons with Significant Control” or PSC register which has emerged from the UK commitment at the 2013 G8 Lough Erne Summit and the May 2016 Anti-Corruption Summit, and which may further facilitate investigations and prosecutions. The lead examiners also welcome the expressed intention by the UK Overseas Territories and Crown Dependencies to establish some form of beneficial ownership registries accessible to UK law enforcers. As this is work in progress, the lead examiners encourage the UK to continue working on these issues with a view to achieving concrete results in the near future. They recommend that the Working Group follow up on these developments and their implementation in practice in cases of foreign bribery and related offences.*

### *c. The most appropriate jurisdiction for prosecution and double jeopardy*

121. Foreign bribery cases often involve multiple jurisdictions. Under the Convention, the Parties involved shall, at the request of one of them, consult with a view to determining the most appropriate jurisdiction for prosecution (Article 4.3). In dealing with cases where multiple countries have jurisdiction, the SFO’s approach is to have a frank and open discussion with the overseas agency/ies regarding the ambit of the respective investigations and seek to agree to co-operate. This includes updating on progress of the respective investigations, and discussing lines of enquiry and intelligence sharing. The SFO explains that it places great importance in understanding and managing any conflicts of interest between the investigating agencies as well as seeking mutual benefit. The SFO also stated that there should be a preliminary presumption that a prosecution should take place in the jurisdiction where the majority of the criminality occurred or where the majority of the loss was sustained. When reaching a decision, prosecutors should balance carefully and fairly all the factors both for and against commencing a prosecution in each jurisdiction where it is possible to do so. The SFO would consider a number of factors (e.g. the location of the accused, potential for delay, evidential problems, resources and costs of prosecuting, etc.) and criteria, set out in particular in Eurojust guidelines.<sup>99</sup> In addition, the SFO and the NCA/ICU investigators routinely assess the potential for joint investigations, including in the framework of a Joint Investigation Team (JIT)<sup>100</sup>.

122. Whilst there is guidance, the ability to apply the guidance faithfully depends on good relationships between the potential prosecutors. Problems can range between one jurisdiction wanting to lead every aspect of the case where the case might properly involve another jurisdiction, or cases where the other jurisdiction does not want to act when it properly should. The SFO is of the view that organisations such as the OECD WGB and Eurojust/Europol offer the opportunity to ensure co-operation occurs. In the *Standard Bank* case, the UK had concurrent jurisdiction with the USA and Tanzania. In this case, agreement was reached with the US DOJ that the conduct was mostly UK based so that the SFO should lead but the DOJ would retain an active interest. To the extent that the conduct could all be captured in the UK and appropriate sanctions imposed, the DOJ agreed it would take no action. As the corporate benefit was shared between a UK and Tanzanian company, the Tanzanian Prevention and Combatting of Corruption Bureau had potential jurisdiction. It was agreed

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<sup>99</sup> The SFO refers in particular to the Eurojust guidelines that were first published as an annex to the Eurojust Annual Report 2003 and was included again as an annex to the [Annual Report 2004](#).

<sup>100</sup> A JIT is an investigative team that is set up for a fixed period and for a specific purpose, based on an agreement between or among two or more law enforcement authorities in EU Member States. Competent authorities from countries outside the EU may participate in a JIT with the agreement of all other participating parties. JITs are used by the SFO especially where it is not possible to commence a domestic investigation.

with them that the SFO take the lead on the basis that the SFO could sanction the conduct and obtain compensation.

123. The doctrine of double jeopardy in the UK remains unchanged since Phase 3. It prevents a criminal prosecution in at least two situations. First, a person may not be convicted twice of the same offence based on substantially the same facts. Second, barring special circumstances, a person should not be tried for an offence based on facts that are the same, or substantially the same, as those in a previous trial where that person was acquitted. These principles apply equally if the earlier conviction or trial occurred in a foreign jurisdiction. However, a prior criminal conviction or trial would not bar subsequently civil proceedings. In some jurisdictions, a defendant may enter into a deferred prosecution or non-prosecution agreement (DPA or NPA) which results in sanctions without a formal conviction. According to the SFO, such agreements are tantamount to convictions for the purpose of double jeopardy.

124. Double jeopardy is an important principle of law framed to protect the rights of defendants, but it is also an area of law that has been cited by the SFO as a reason for failing to launch certain foreign bribery prosecutions.<sup>101</sup> Since Phase 3, the UK cites double jeopardy as the reason for not opening an investigation in the *Finmeccanica* case. As mentioned above, primacy over a case is a matter for negotiation between the countries involved. The outcome can depend on the circumstances of the misconduct and investigations, as well as the likelihood of successful prosecution. Where misconduct is first reported, however, will often play some part.

125. For some anti-bribery campaigners in the UK, the concept of double jeopardy should not be used to frustrate criminal proceedings in the UK in those cases where there is a strong public interest to argue for primacy of the UK courts. Transparency International UK and private sector lawyers have expressed concern over how certain anti-bribery multi-jurisdiction cases are dealt with in the UK, highlighting that this might encourage defendants to ‘forum shop in the expectation that they can play jurisdictions against each other’.<sup>102</sup> TI has therefore called for greater transparency in the process of determining primacy. According to the NGO, in those cases where double jeopardy is pleaded as a reason for not proceeding with criminal charges, it should be fully reasoned and publicly justified.

126. One concern for a company considering entering into a DPA expressed at the on-site visit is the prospect of agreeing to stringent compensation payments and financial penalties in the UK but remaining open to other proceedings in other jurisdictions. In the *Standard Bank* case it seems that significant steps were taken to try to remove this uncertainty. The U.S. DOJ was consulted both on the size of the fine being imposed under the DPA and to obtain an indication that it would drop its own investigation should the matter be dealt with by a concluded DPA in the UK. The U.S. Securities and Exchange Commission (SEC) was also informed of the proposed DPA, in particular the disgorgement of profit, and announced its agreed civil penalty effectively simultaneously. Further, the appropriate Tanzanian anti-corruption authority was consulted and confirmed that it did not object to the DPA. Similarly, the Rolls-Royce DPA was part of a global settlement involving a separate DPA with the US Department of Justice and a Leniency Agreement with the Brazilian Ministério Público Federal. These proactive approaches show the importance and the need for active collaboration between jurisdictions.

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<sup>101</sup> At the time of Phase 3, the SFO took the view that the principal objection to obtaining a criminal conviction for foreign bribery in two cases was the doctrine of double jeopardy (*DePuy* and *BAE-Al Yamamah*).

<sup>102</sup> See <http://www.transparency.org.uk/publications/policy-paper-series-1-deterring-punishing-corporate-bribery-2/> and <http://www.theinhouselawyer.co.uk/index.php/fraud-and-corporate-crime/10687-corporate-crime-multiple-enforcement-actions-and-the-rule-of-international-double-jeopardy>.



## Commentary

*The lead examiners welcome the pragmatic approach promoted and implemented by the SFO in regard of foreign bribery cases involving multiple jurisdictions, including close coordination and interaction with counterparts as well as the use of networks such as the WGB Law Enforcement Officials meetings or available arrangements within Eurojust and Europol.*

*The lead examiners note that double jeopardy is an area of law that has been cited by the SFO as a reason for not launching certain foreign bribery prosecutions. They also heard that the risk of multiple proceedings may create a disincentive for self-reporting to UK enforcement authorities, for fear of facing multiple prosecutions in various countries. The lead examiners consider that these issues and challenges go beyond the scope of this evaluation and that this is a horizontal issue among Parties to the Convention.*

### d. Other relevant issues relating to prosecution

127. All decisions to prosecute unlawful activity are governed by the Full Code Test in the Code for Crown Prosecutors and the applicable joint SFO/CPS prosecution guidance. A new edition of the [Code for Crown Prosecutors](#) was published in January 2013 and sets out the general principles Crown Prosecutors should follow when making decisions on cases. While the two-stage test for deciding whether to prosecute a case has remained unchanged since Phase 3, the public interest factors have however been amended.<sup>103</sup> However, one public interest factor that tends against prosecution where “a prosecution may require details to be made public that could harm [...] international relations or national security [...]” is still in force (see comments above in Section B.3).

128. The Code also sets out rules that govern out-of-court disposals. An out-of-court disposal may take the place of a prosecution in court if it is an appropriate response to the offender and/or the seriousness and consequences of the offending. Prosecutors must follow any relevant guidance when asked to advise on or authorise a simple caution, a conditional caution, any appropriate regulatory proceedings, a punitive or civil penalty, or other disposal. They should ensure that the appropriate evidential standard for the specific out-of-court disposal is met, including, where required, a clear admission of guilt, and that the public interest would be properly served by such a disposal. The public interest factor in the Rolls Royce DPA was very much commented in the press and among the anti-corruption community in the UK, notably thanks to the detailed judgment published by the Court laying out the reasons for accepting the DPA and for calculating the sanctions imposed. The Court stated why the acceptance of the DPA in this case was in the public interest, considering especially the impact of a prosecution. The first argument was that the basis underlying the DPA had received a “robust challenge to the approach following a detailed analysis of the circumstances of the investigated offences, and an assessment of the financial penalties” so that the Court believed it was fair. Second was that Rolls-Royce is an “industry of central importance” to the UK and as such a settlement was more in the interests of the country, the company’s shareholders, its employees, customers and “those with whom it deals.” The judge did however note the “national economic interest is irrelevant” when making the decision to approve this DPA. Some commentators challenged the argument that prosecution would be against the interests of justice and questioned whether this implies that big government contractors of Rolls-Royce’s significance are likely to escape trial and consequently avoid being debarred from public contracts.<sup>104</sup>

129. The [Joint prosecution guidance on corporate prosecutions](#) and the Joint guidance for prosecutors issued by the Director of Public Prosecutions and the Director of the SFO are also

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<sup>103</sup> Phase 3 Report, paras 93-95.

<sup>104</sup> See in particular [www.cw-uk.org/2017/01/19/a-failure-of-nerve-the-sfos-settlement-with-rolls-royce/](http://www.cw-uk.org/2017/01/19/a-failure-of-nerve-the-sfos-settlement-with-rolls-royce/)

applicable. This sets out the Directors' approach to deciding whether to bring a prosecution under the Bribery Act. This Guidance was reissued in October 2012, following the appointment of the then new Director of the SFO, Mr. David Green CB QC.

130. The general rules under the Code for Crown Prosecutors are unchanged since Phase 3. Prosecutors should select charges which (a) reflect the seriousness and extent of the offending supported by the evidence; (b) give the court adequate powers to sentence and impose appropriate post-conviction orders; and (c) enable the case to be presented in a clear and simple way.<sup>105</sup>

131. Additional guidance from the AG concerns the commencement of civil asset recovery proceedings.<sup>106</sup> The Guidance states that “[t]he reduction of crime is in general best secured by means of criminal investigations and criminal proceedings”, since “criminal disposal will generally make the best contribution to the reduction of crime.” Proceedings for non-conviction based recovery (*e.g.* civil recovery orders) may also be taken where (a) it is not feasible to secure a conviction, (b) a conviction is obtained but a confiscation order is not made, or (c) a relevant authority is of the view that the public interest will be better served by using those powers rather than by seeking a criminal disposal.

132. Previous WGB evaluations noted<sup>107</sup> that disclosure of evidence by the prosecution to the defence in complex economic crime cases was very labour-intensive and time-consuming. Reviews concluded that the disclosure regime was not suited for these cases. In Phase 3, the UK cited management of vast quantities of digital material and the laborious disclosure process as continuing challenges in foreign bribery cases. The authorities state that, since Phase 3, they have invested significantly in technology to assist them in managing the disclosure burden. Advanced software allows them to create detailed audit trails in relation to every document reviewed. Resolving a case by way of a DPA also avoids a trial and with it the attending disclosure obligations.

*e. The SFO's performance in investigating and prosecuting foreign bribery*

133. The SFO's stated purpose since its creation in 1988 has been to investigate and prosecute serious or complex fraud and corruption, and to help maintain confidence in the UK's business and financial institutions. Despite some early successes, the SFO has regularly become mired in controversy and incidents<sup>108</sup> that led many to question whether the organisation had a viable future. The SFO now benefits from a significantly enhanced enforcement arsenal: the 2010 Bribery Act and the introduction of DPAs in 2014, in particular, have given the SFO greater legal powers than ever before to deal with corporate offending. Cases are handled by a workforce which has grown by over 100 people under the current director's tenure. The Roskill Model also looks to be a real strength. Looking forward, the SFO may benefit from the proposed new corporate offence of failing to prevent tax evasion, if it comes to light. With the recalibration of the role of the SFO in the past years, the SFO has returned to its primary role as an investigator and prosecutor of “top tier” economic crime. Several of the SFO's current investigations are high profile, multijurisdictional, high value and complex, across a range of industries including manufacturing, food, pharmaceutical and security; precisely the types of top tier cases for which the SFO was designed. The challenge for the SFO will be converting

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<sup>105</sup> Section 6.1 of the Code.

<sup>106</sup> “Asset recovery powers for prosecutors: guidance and background note 2009”, published on 29 November 2012.

<sup>107</sup> Phase 2bis Report, paras. 243-5 and Phase 3 Report, para. 142.

<sup>108</sup> The investigation into the Tchenguiz brothers, which resulted in a civil claim against and apologies from the SFO, was a new low. There have also been a number of well publicised out of court incidents, including the loss by the SFO of highly sensitive data relating to its controversial investigation into BAE Systems.

these high profile investigations into successful prosecutions, many of which are expected to come through over the next couple of years. The SFO's strategy in the recent years has been to concentrate on prosecutions rather than seeking civil settlements, with mixed fortunes.<sup>109</sup> This switch has also been slow to produce results.

134. Representatives from civil society met during the on-site visit unambiguously highlighted the importance of the role and achievements of the SFO in enforcing the foreign bribery offence, including in terms of prosecutions. They emphasised the improvement of the quality of the SFO's investigations and the prospects of prosecutions of these investigations in the next two years. As noted above, they also expressed concerns over some challenges faced by the SFO, including in terms of funding.

135. The SFO's performance continues to be closely scrutinised by the UK administration<sup>110</sup> as well as the media and the legal and business communities. Recent assessments highlight some potential issues regarding the SFO's performance, pointing for instance at expanding functioning costs and diminishing conviction rates. While the conviction rate by defendant for 2013-14 was 85%, which slipped to 78% in 2014-15, the most recent figures are notably worse: in 2015-16, only 6 defendants in 4 cases were convicted, giving a dramatically low conviction rate of 32%. At the same time, the SFO's expenditure has been rising inexorably: from GBP 40.9 million in 2012-13, the total spent reached GBP 61.2 million in 2015-16. The SFO argues that the complex nature of the cases it prosecutes means they are dealing with long-running trials that last up to 3 to 4 months and that, consequently, conviction rates can vary significantly year on year. They suggest that looking at the figures over a longer period provides a more "representative perspective" and, to illustrate this, provide data for the period 2012 to 2016 with a conviction rate of 65% by defendant and 81% by case, with 75 defendants convicted in 25 cases.<sup>111</sup> It is also worth mentioning that, whilst the conviction rate is a key indicator of success, DPAs are not yet calculated within the conviction rate.

136. Another issue was raised by some commentators when considering the SFO's overall performance: the SFO's capacity to follow up on allegations it receives. Whistleblower reports are an important source of information for the SFO and it is essential to preserve it and make the best use of it. However, information published in the press<sup>112</sup> suggests that the SFO might not make the best use of bona fide whistleblower reports. This criticism is however challenged by the SFO (see also section A.2. on whistleblower reports to the SFO). Allegations in the WGB foreign bribery matrix are also not sufficiently used as a source of detection (see section A.4.(iv)). Where the SFO decides not to follow up on potential sources, these could be picked up by other competent agencies. This could be the case in practice but would need to be more evidenced. While it cannot be expected that the SFO investigates everything, since its remit is to look into only the most serious and complex cases of fraud and corruption, the SFO should have the capacity, resources and sufficient reactivity to assess all relevant allegations. The SFO expresses the view that it will never refuse to take on an investigation on grounds of cost, as demonstrated by its current caseload.

137. Some observers have also questioned whether UK authorities systematically conduct sufficiently thorough investigations in foreign bribery cases. In particular, in the *Standard Bank case*

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<sup>109</sup> Some commentators believe that technicalities in the current legislation mean that the SFO is left with prosecuting more junior or peripheral individuals with the result, as in the Libor case, that most have been acquitted fairly quickly by a jury.

<sup>110</sup> In particular, see above reference to the reviews conducted by HMCPSI.

<sup>111</sup><sub>2</sub> See the [SFO Annual Report 2015-2016](#) and [here](#).

<sup>112</sup> See [www.solicitorsjournal.com/news/crime/general-principles/25431/pinsent-masons-accused-%e2%80%98deliberately-misinterpreting-%e2%80%99-sfo-data](http://www.solicitorsjournal.com/news/crime/general-principles/25431/pinsent-masons-accused-%e2%80%98deliberately-misinterpreting-%e2%80%99-sfo-data).

the SFO interviewed Standard Bank staff and found none of its employees had committed an offence, but some commentators have questioned whether the SFO relied too heavily on the company's self-investigation and suggested that the SFO could have interviewed staff of Standard Bank's overseas subsidiary and other culpable individuals<sup>113</sup> However, the SFO strongly rejects any such criticism and insists that in this case—as in all others—it carried out a comprehensive and independent investigation before determining the appropriate outcome. The SFO rejects any notion that a company's self-report would be accepted at face value. Specifically in relation to the *Standard Bank* case, the SFO explains that: it obtained valuable information through the company's own investigation that would have been difficult or impossible to obtain from the overseas country; it cannot treat as suspects persons over whom it has no jurisdiction; it could not interview individuals in the other country without MLA which in this case may not have been provided, and that no other culpable individuals were identified. On the issue of thorough foreign bribery investigations, it is noted that the Court in approving the Rolls Royce DPA summarised the SFO's investigative steps and described them as an "extensive investigation".<sup>114</sup> Another issue concerns the *Dahdaleh* case in which the court reportedly criticised the SFO for effectively delegating an aspect of the investigation to an overseas law firm. The SFO strongly rejects this criticism. It considers that a thorough investigation was conducted and, in any event, the foreign lawyers were not relied on to provide substantive evidence but instead to demonstrate the chain of custody of evidence to secure its admissibility (discussed in Section 4 below).<sup>115</sup>

138. Finally, an issue has been raised by civil society that natural persons have been charged in only one of the SFO's cases involving corporate failure to prevent bribery.<sup>116</sup> In relation to this issue, the SFO explained on-site that all reasonable lines of inquiry against natural persons were pursued in each of these cases, but that sufficient evidence was not found against UK natural persons in all cases (the Rolls-Royce case was resolved against the company after the on-site visit). Understandably, law enforcement authorities can only proceed on the basis of available evidence, and it is comforting that several natural persons have been charged and prosecuted in other cases since Phase 3. The investigation of natural persons involved in the *Rolls-Royce* case is reportedly ongoing, and the observation of civil society that "Individual prosecutions against the executives involved will be a key test of the SFO's commitment to dealing with the alleged corruption effectively" is well made.<sup>117</sup>

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<sup>113</sup> See Rahul Rose, 26 April 2016, "Standard Bank DPA: interview transcripts not required", Global Investigations Review, available at <http://globalinvestigationsreview.com/article/1035486/standard-bank-dpa-interview-transcripts-not-required>; and Michael Bowes and Judy Krief, June 2016, "DPAs: ensuring public confidence and third-party fairness", International Bar Association Anti—Corruption Committee Newsletter, Vol. 8, No. 1, pp.35-39, available at [http://2ml09g1c47ej1qqg1m3mp53u.wpengine.netdna-cdn.com/wp-content/uploads/2016/06/AntiCorruption\\_June\\_2016.pdf](http://2ml09g1c47ej1qqg1m3mp53u.wpengine.netdna-cdn.com/wp-content/uploads/2016/06/AntiCorruption_June_2016.pdf)

<sup>114</sup> Judgment of Sir Brian Leveson, 17 January 2017, Serious Fraud Office and Rolls-Royce Plc & Anor, para. 19, available at <<https://www.sfo.gov.uk/cases/rolls-royce-plc/>>.

<sup>115</sup> Financial Times, 21 March 2014, "Serious Fraud Office blamed for collapse of Victor Dahdaleh trial", available at [www.ft.com/content/2d482512-b0ef-11e3-9f6f-00144feab7de](http://www.ft.com/content/2d482512-b0ef-11e3-9f6f-00144feab7de).

<sup>116</sup> See Bond Anti-Corruption Group [Submission to the OECD Working Group on Bribery Review team](#).

<sup>117</sup> Corruption Watch, undated, "A failure of nerve: SFO's settlement with Rolls-Royce", available at <http://www.cw-uk.org/2017/01/19/a-failure-of-nerve-the-sfos-settlement-with-rolls-royce/>.

## Commentary

The lead examiners note, in spite of the broad unanimity on the SFO's good performance, there is still an expectation that it could achieve more in terms of foreign bribery investigations and prosecutions. In this context, the lead examiners recommend the UK address the following important issues:

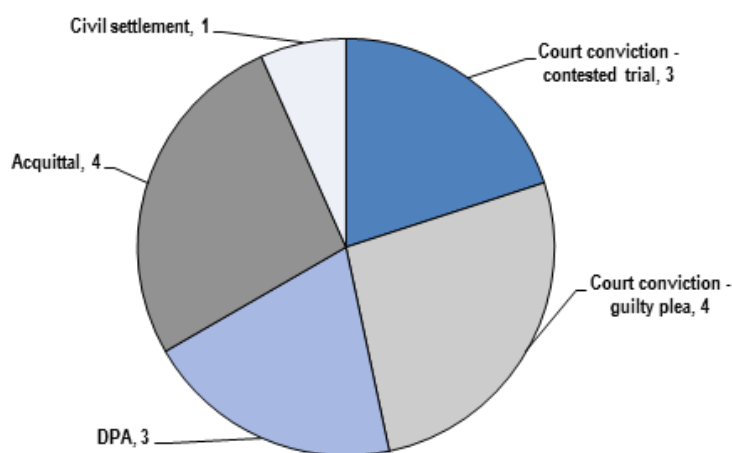
There should be a mechanism by which the SFO reviews on a regular basis its case acceptance policy to ensure that such policy achieves the expected results, i.e. the SFO follows up all the allegations that fall under its remit and in accordance with its capacities and resources.

The UK should take any measures to ensure that all credible factual allegations of bribery of foreign public officials are seriously assessed and investigated by the competent authorities.

Finally, in light of questions about the effective prosecution of natural persons for foreign bribery by the SFO, the lead examiners recommend that the Working Group follow up on this issue to determine whether there is a problematic trend in this regard. They also recommend that the Working Group follow up on the application of the public interest factor in future DPAs.

### B.5. Concluding and sanctioning foreign bribery

Figure 7. Methods used to conclude foreign bribery cases



Note a single case may involve multiple methods.

#### a. Cases concluded by court conviction, jury acquittal or prosecution discontinuance

##### i. Legal persons

139. Concluded foreign bribery cases since Phase 3 that involve legal persons include:

- the UK's first DPAs (Rolls-Royce, Standard Bank and XYZ Ltd);
- first conviction of a corporate for foreign bribery after a contested trial (Smith & Ouzman);
- first conviction under section 7 of the Bribery Act 2010 for a corporate failure to prevent bribery (Sweett Group); and
- one additional company has been subject to civil enforcement action for foreign bribery (Oxford Publishing Limited).

140. Further, two insurance brokerage firms have been fined by the FCA for failure to adopt adequate corporate compliance measures to prevent foreign bribery (*Besso* and *JLT*) under section 206

of the *FSMA*. Sanctions for foreign bribery-related accounting misconduct were applied in the *Rolls-Royce* case. There have been no corporate convictions for money laundering where the predicate offence is foreign bribery.<sup>118</sup>

## Decisions to not prosecute the legal person

141. In at least two concluded cases, it appears that law enforcement agencies have decided not to pursue legal persons despite an apparent basis for doing so. In *Mondial Defence Systems*, an investigation conducted by the COLP, only natural persons have been prosecuted despite the fact the company itself was awarded lucrative defence contracts as a result of the corruption and the natural persons who committed the offence were company directors. Further, the SFO decided not to charge or pursue confiscation against Swift Technical Solutions. While four natural persons were prosecuted for foreign bribery in that case (but ultimately acquitted, as explained below), no charges against the company were sought on public interest grounds due to the company's cooperation with the investigation, although it was the company that stood to profit from the corruption. The SFO further explained after the on-site visit that other significant factors included change in leadership of the company, new anti-corruption policies in place at the company, that the company had ceased trading in the country concerned and the prosecution of natural persons was not compromised by the absence of the company. Similarly, no confiscation or civil forfeiture measures were taken to confiscate the proceeds because the benefit to the company could not be reliably quantified. The alleged bribes resulted in lower tax assessments, but it proved impossible to quantify what would have been the correct level of taxes in Nigeria. The UK authorities noted that this was a finely balanced decision and that had section 7 of the Bribery Act been applicable to this case, the case may have been resolved differently, as liability for failure to prevent bribery may have been more readily established. However, the same argument could not be made for *Mondial Defence Systems* given that the natural persons convicted, as company directors, were clearly part of the guiding mind and will of the company.

### ii. Natural persons

142. The 10 natural persons convicted of foreign bribery since Phase 3 relate to 5 separate cases:

- 4 natural persons in Innospec (2 pleaded guilty, and 2 pleaded not guilty and were convicted after contested trials)
- 2 in *Smith & Ouzman* (both pleaded not guilty and were convicted after contested trials)
- 2 in *Mondial Defence Systems* (both pleaded guilty)
- 1 in *Securrency* (pleaded not guilty and was convicted after contested trial), and
- 1 in *Capelson* (pleaded guilty).

## Acquittals

143. Since Phase 3, 3 natural persons charged with foreign bribery have been acquitted or had the proceedings against them discontinued. The UK prosecuted two natural persons in the *Dahdaleh* case. One was a bribe recipient who was convicted and sentenced. The other was charged with bribery of a foreign public official as an alleged intermediary between a US aluminium producing company (Alcoa) and officials in Bahrain. The prosecution of Mr Dahdaleh was discontinued in 2013 when the

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<sup>118</sup> The UK can only provide aggregated figures on money laundering enforcement, but no figures are available on money laundering convictions and prosecutions where foreign bribery is the predicate offence.

SFO offered no evidence on the basis that there was no longer a realistic prospect of conviction. The SFO explained that a key witness (Mr Hall) did not come up to proof, and two other witnesses who were lawyers in the US refused to attend the trial without certain guarantees with regard to cross examination that could not be provided. In relation to the witnesses who refused to attend the trial, and according to media reports, the SFO was criticised by the judge in this case for effectively delegating that aspect of the investigation to the American law firm.<sup>119</sup> The SFO provided reasonable explanations for this and assured the evaluation team that no aspect of the investigation was delegated, and that it had conducted its own, independent investigation. Furthermore, it is noted that the court's decision in this case has not been made public and is not available to the evaluation team, who could only rely on media reports of the case.

144. The UK prosecuted four natural persons in the *Swift Technical Solutions* case. A prosecution was brought following an investigation by the SFO in conjunction with the COLP into allegations that employees or agents of a Swift Group subsidiary had paid bribes to tax officials in Nigeria to avoid, reduce or delay paying tax on behalf of Swift Group workers. The SFO investigation suggested that value of the bribes alleged to have been paid was approximately GBP 180 000. The prosecution against the most senior employee was discontinued on the basis of a serious illness which made him unfit for trial. The trial proceeded against the three other defendants, all lower-level employees of the company. These defendants were found not guilty by the jury, and the jury was unable to reach a verdict on one count against the third defendant, for reasons known only to the jury members. The SFO has ventured that perhaps the acquittal was because of a perception of unfairness, given the most culpable defendant was not on trial.

145. In the *Smith & Ouzman* case, although the company and two of its directors were convicted, two additional natural persons, who were lower-level agents of the company, were also charged in the case but were ultimately acquitted by the jury.

### *Commentary*

*The lead examiners commend UK law enforcement authorities for successfully resolving cases of foreign bribery involving legal and natural persons since Phase 3. They recognise the significance of the UK's first DPAs, the resolution of allegations against Rolls-Royce, the first conviction of a legal person after a contested trial and the first conviction under section 7 of the Bribery Act for failure to prevent bribery. They are encouraged by the SFO's willingness to try foreign bribery cases in difficult circumstances as demonstrated by the decision to continue prosecutions against natural persons in the Swift Technical Solutions case despite the most culpable accused being unavailable for trial. Nevertheless, they are concerned that enforcement action has not systematically been taken against legal persons involved despite the fact they may have benefited from the bribery. Therefore, they recommend that UK law enforcement agencies ensure that legal persons are subject to confiscation, civil forfeiture or other financial sanctions, as appropriate, in foreign bribery cases.*

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<sup>119</sup> E.g. Financial Times, 21 March 2014, "Serious Fraud Office blamed for collapse of Victor Dahdaleh trial", available at <https://www.ft.com/content/2d482512-b0ef-11e3-9f6f-00144feab7de>.

*b. Deferred prosecution agreements and settlements (including corporate monitors)*<sup>120</sup>

*i. Deferred prosecution agreements*

146. The UK made deferred prosecution agreements (DPAs) available in England and Wales in February 2014<sup>121</sup> and has used DPAs to resolve three foreign bribery cases since (*Rolls-Royce*, *Standard Bank* and *XYZ Ltd*). Power to negotiate DPAs is available only to approved prosecutors of the SFO and CPS. In setting DPAs, prosecutors are required to follow the DPA Code of Practice which was published by the SFO and CPS in 2014.<sup>122</sup> New sentencing guidelines (discussed below) create a requirement that any financial penalty in a DPA “must be broadly comparable to the fine that a court would have imposed on [the defendant] on conviction for the alleged offence following a guilty plea.”<sup>123</sup>

147. A DPA is a court-approved agreement between a prosecutor and a legal person<sup>124</sup> that allows a prosecution to be suspended for a defined period provided the legal person meets certain specified conditions. Conditions attached to a DPA may include: disgorgement of profits; payment of a fine, compensation and costs; cooperation in any prosecution of individuals; and implementation of a compliance programme, if necessary with a monitor appointed. DPAs can be used for fraud, bribery and other specified economic crime. At the on-site visit, judges of the Southwark Crown Court considered that the construction of DPAs in the UK has been quite robust and proportionate. They commented that the system gives the courts power to apply appropriate checks and balances at the preliminary and final stages of the DPA approval process, including assessing the public interest of a proposed DPA, and that the outcome is proportionate. They did, however, point out that the DPA has no focus on the responsibility of individuals, which justices would normally focus on.

148. As noted above, the SFO has used DPAs in three foreign bribery cases (*Rolls-Royce*, *Standard Bank* and *XYZ Ltd*). The *Rolls-Royce* DPA is perhaps the most noteworthy in terms of the significance of the company sanctioned, and the substantial financial penalties imposed. Nevertheless, some specific features of this DPA have raised questions or indicate potential concerns, as raised by civil society.<sup>125</sup> One concern relates to the 50 per cent reduction in the fine approved by the judge – even though the company had not self-reported (see discussion above on self-reporting under section A.1). Another major concern relates to the assurance provided by the SFO to *Rolls-Royce* that the SFO “would not consider it to be in the interests of justice to investigate or prosecute it for additional conduct pre-dating the DPA and arising from the currently opened investigations into *Airbus* and *Unaoil* (which, in any event, is covered by the DPA reached by *RR* in the US)”.<sup>126</sup> The

<sup>120</sup> Phase 3 follow up issue 14(b) is to follow up on legislative and other efforts concerning plea negotiations, civil settlements, deferred prosecution agreements and plea agreements.

<sup>121</sup> *Crimes & Courts Act 2013*, see [www.legislation.gov.uk/ukpga/2013/22/contents/enacted](http://www.legislation.gov.uk/ukpga/2013/22/contents/enacted)

<sup>122</sup> DPA Code of Practice available at <https://www.sfo.gov.uk/publications/guidance-policy-and-protocols/deferred-prosecution-agreements/>.

<sup>123</sup> Sentencing Guidelines for Fraud, Bribery and Money Laundering, available at [www.sentencingcouncil.org.uk/publications/item/fraud-bribery-and-money-laundering-offences-definitive-guideline/](http://www.sentencingcouncil.org.uk/publications/item/fraud-bribery-and-money-laundering-offences-definitive-guideline/).

<sup>124</sup> DPAs are not available to natural persons.

<sup>125</sup> See for instance Corruption Watch: [www.cw-uk.org/2017/01/19/a-failure-of-nerve-the-sfos-settlement-with-rolls-royce/](http://www.cw-uk.org/2017/01/19/a-failure-of-nerve-the-sfos-settlement-with-rolls-royce/); and Transparency International: <http://www.transparency.org.uk/what-can-we-learn-about-the-future-of-dpas-from-the-rolls-royce-case/>.

<sup>126</sup> Judgment of Sir Brian Leveson, 17 January 2017, Serious Fraud Office and *Rolls-Royce Plc & Anor*, para. 134, available at <https://www.sfo.gov.uk/cases/rolls-royce-plc/>.



Court noted that the reason for the assurance is that the DPA spans a very broad scope of conduct.<sup>127</sup> However, the Court also recognised that the investigations into Unaoil and Airbus are “insufficiently advanced” requiring “substantial further investigation”.<sup>128</sup> It is unclear how this should be interpreted in light of the terms of the DPA which “do not provide any protection against prosecution for conduct not disclosed by Rolls-Royce prior to the date on which the Agreement comes into force”.<sup>129</sup> Any commitment to not pursue any further investigation or prosecution of Rolls-Royce in the context of the Airbus and Unaoil investigations would be problematic if the company escaped liability for additional foreign bribery as a result. The SFO acknowledges but does not accept the criticism voiced by the NGOs in this regard.

ii. *Other settlements*

149. The Working Group has previously raised concerns about the use of civil settlements in foreign bribery cases.<sup>130</sup> The seriousness of foreign bribery offending usually warrants a punitive fine against the legal person involved, which the mere disgorgement of profit through a civil settlement does not achieve. Furthermore, civil settlements tend to lack transparency. These concerns have been echoed by civil society,<sup>131</sup> a member of the UK judiciary,<sup>132</sup> and by the SFO itself.<sup>133</sup>

150. The introduction of the DPA scheme for England and Wales has not removed or otherwise changed pre-existing arrangements regarding other forms of settlements or plea bargains in the UK. For example, the plea negotiations process<sup>134</sup> remains in place, and has been used to resolve one foreign bribery case since Phase 3 (for which reporting restrictions apply). Settlements through civil recovery orders, available under POCA, have been used by the SFO in foreign bribery cases since Phase 3 in *Oxford Publishing Limited* (OPL) and *Griffiths Energy International*. The use of civil settlements in these two cases appears to be justified. In the former case, civil enforcement action was pursued because, although OPL had received income generated through unlawful conduct, the conduct had been committed only by its subsidiaries incorporated abroad. There was no evidence that OPL itself was involved in the bribery, and when OPL became aware of it, it investigated immediately and made a voluntary report. The SFO considered that civil enforcement action was sufficient to disgorge all gross profit from the tainted contracts, which seems like a reasonable enforcement outcome in these circumstances. In the latter case, *Griffiths Energy International*, the company has been separately prosecuted and fined in Canada; with the SFO taking steps for civil recovery of related proceeds of crime located in the UK.

151. Scotland has no DPA scheme, but has indicated it is open to the introduction of DPAs, although no concrete plans to introduce these appear to be on the way. As in Phase 3, Scotland has a

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<sup>127</sup> Ibid., para 135.

<sup>128</sup> Ibid.

<sup>129</sup> Rolls-Royce DPA, para. 5. See also Judgment of Sir Brian Leveson, 17 January 2017, Serious Fraud Office and Rolls-Royce Plc & Anor, para. 66, both available at <<https://www.sfo.gov.uk/cases/rolls-royce-plc/>>.

<sup>130</sup> Phase Report, paras. 62-73.

<sup>131</sup> See Bond Anti-Corruption Group [Submission to the OECD Working Group on Bribery Review team](#)

<sup>132</sup> E.g., the *Innospec* case.

<sup>133</sup> E.g., speech by Alun Milford, SFO General Counsel, 26 March 2014, “Corporate criminal liability and deferred prosecution agreements” available at <https://www.sfo.gov.uk/2014/03/26/corporate-criminal-liability-deferred-prosecution-agreements/>.

<sup>134</sup> Phase 3 evaluation, paras.53-57.

self-report scheme that allows for civil settlement of bribery cases. A settlement in this context is a contractual agreement between the Scottish Ministers and the company, with no role for the courts at all. The scheme was renewed in 2016 and is currently in place until 30 June 2017. Scotland has published guidance for this scheme<sup>135</sup> similar to what was in place for England and Wales prior to the introduction of DPAs. Accordingly, the concerns noted above with regard to the adequacy and transparency of civil settlement regimes applies to Scotland.

152. While Scotland has not resolved any cases involving bribery of a foreign public official, it presented for the examination team's consideration two cases involving private-sector bribery by Scottish companies in international business: *Abbot Group* and *International Tubular Services*.<sup>136</sup> In both cases, the companies self-reported to the Scottish authorities. The authorities reached a civil settlement directly with the companies under the *Proceeds of Crime Act 2002* to recover the benefits obtained from the bribery. Based on these cases, and noting Scotland has never in practice applied criminal liability to a legal person for foreign bribery or similar misconduct, it appears that Scottish authorities may rely heavily on civil settlements rather than criminal proceedings. This approach could prove problematic if applied to foreign bribery cases in future.

### iii. Corporate monitors

153. In Phase 3, the WGB decided to follow up on the use of corporate monitors in practice.<sup>137</sup> Measures to improve a company's corporate compliance programme, such as through the appointment of a corporate monitor, may be included in the conditions of a DPA. Such measures featured in the DPAs with Rolls-Royce and Standard Bank and in the civil enforcement action taken against Oxford Publishing Limited. The Rolls-Royce DPA requires the company to continue to engage Lord Gold to conduct an anti-bribery and corruption compliance review, devise an implementation plan, complete the plan and report to the SFO in respect of its implementation. Similarly, the Standard Bank DPA subjects Standard Bank to an independent review of its anti-corruption compliance measures by Pricewaterhouse Coopers (PwC) and requires the Bank to implement PwC's recommendations.

154. Civil society has called for the courts to be given greater tools to require companies to take remedial corporate compliance measures,<sup>138</sup> but judges suggested at the on-site visit that their powers were adequate, and that it would be difficult for courts to oversee corporate monitors. Questions also arise with respect to the independence of corporate monitors: the choice of monitor is not made by the prosecuting authorities, nor is there any external party to control compliance with the recommendations made by the monitor. This has in particular been pointed out by civil society in

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<sup>135</sup> OPFS, Scotland's Prosecution Service, Guidance on the Approach of the Crown Office and Procurator Fiscal Service to Reporting by Businesses of Bribery Offences available at [http://www.copfs.gov.uk/images/Documents/Prosecution\\_Policy\\_Guidance/Guidelines\\_and\\_Policy/Guidance%20on%20the%20approach%20of%20COPFS%20to%20reporting%20by%20businesses%20of%20bribery%20offences%20JUNE2016.pdf](http://www.copfs.gov.uk/images/Documents/Prosecution_Policy_Guidance/Guidelines_and_Policy/Guidance%20on%20the%20approach%20of%20COPFS%20to%20reporting%20by%20businesses%20of%20bribery%20offences%20JUNE2016.pdf).

<sup>136</sup> *Abbot Group*: In 2007 an overseas subsidiary of oil and gas drilling company Abbot Group paid bribes of unspecified value to unspecified recipients overseas (who were not public officials). The benefit to the company was GBP 5 600 000 which was recovered through civil enforcement action.

*International Tubular Services*: An employee of oil and gas extraction company International Tubular Services (ITS) paid bribes of unspecified value in Kazakhstan. The benefit to the company was GBP 172 700 which was recovered through civil action.

<sup>137</sup> Phase 3 Recommendation 6(a), which the WGB found fully implemented but decided to follow up on its application in practice.

<sup>138</sup> See Bond Anti-Corruption Group [Submission to the OECD Working Group on Bribery Review team](#).

relation to the Rolls-Royce DPA.<sup>139</sup> However, it appears on the face of the DPA that the SFO was comfortable with the appointment of the monitor in the Rolls Royce case.<sup>140</sup> The DPA also states that if the current monitor is replaced, the replacement selected by Rolls-Royce must be approved by the SFO.

### *Commentary*

*The lead examiners consider that the use of DPAs in foreign bribery cases is an interesting and effective feature for sanctioning legal persons in foreign bribery cases. Nevertheless, in light of certain questions raised by recent DPAs, the lead examiners recommend that the Working Group follow up on their use in foreign bribery cases to evaluate in particular the effective, proportionate and dissuasive character of sanctions imposed in that context, notably the reductions granted in the absence of self-reporting. The Working Group should also follow up on the assurance provided by the SFO to Rolls-Royce in its February 2017 DPA, to ensure that the company does not escape liability for any additional foreign bribery not covered by the DPA, and on whether similar assurances are given in the context of future settlements.*

*The lead examiners further echo the concerns raised by the WGB in previous evaluations regarding the use of civil settlements in foreign bribery cases. Accordingly, they recommend that law enforcement authorities, particularly in Scotland, exercise considerable caution in deciding whether to resolve foreign bribery cases through civil settlements. They encourage Scotland to adopt a scheme comparable to the DPA scheme in the UK to overcome the weaknesses apparent in civil settlements, and to achieve consistency across the UK with regard to the tools available to law enforcement authorities for the resolution of foreign bribery cases.*

#### *c. Is information published on concluded cases sufficiently transparent?*

155. In Phase 3, the WGB raised concerns about the lack of transparency in concluded cases, including with respect to the availability of the courts' sentencing remarks, plea agreements, and SFO civil settlements. At the time of the Phase 3 follow up, the UK had only partially implemented the WGB's recommendations 5(c) and (d), which called for the UK to make public as much information as possible about settlement agreements, and to avoid entering into confidentiality agreements that prevent disclosures of information.

156. The level of information made public about concluded foreign bribery cases since Phase 3 differs from case to case and may depend on which agency is leading the case. The SFO upholds an exemplary practice of publishing information about concluded foreign bribery cases on its website, which includes the date and location of offending, value of the bribe and the advantage received in return, and an explanation of how the penalties imposed were calculated.<sup>141</sup> Regarding the two foreign bribery cases investigated by the COLP and prosecuted by the CPS, information has understandably not been made available about the *Capelson* case due to an ongoing prosecution scheduled for April 2017. In *Mondial*, a press release was published on the date of sentence that provides complete information. For the foreign bribery cases concluded since Phase 3, the UK has not entered into confidentiality agreements with defendants that prevent the disclosure of information to the public about case resolutions.

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<sup>139</sup> Transparency International, available at < <http://www.transparency.org.uk/our-work/business-integrity/rolls-royce-case-dpas/>>.

<sup>140</sup> Judgment of Sir Brian Leveson, 17 January 2017, Serious Fraud Office and Rolls-Royce Plc & Anor, para 43, available at <<https://www.sfo.gov.uk/cases/rolls-royce-plc/>>.

<sup>141</sup> See SFO-published information on Innospec at ; Smith & Ouzman at ; Standard Bank ; XYZ Limited ; Oxford Publishing Limited; Sweett Group ; Chapman (Securrency) ;

157. For Scotland, while there are no concluded foreign bribery cases, the press releases issued at the conclusion of the *Abbot Group* and *International Tubular Services* cases, which involve bribery of private sector actors in international business, are instructive. Those press releases provide limited information. The press release for *Abbot Group* identifies the date of the offending and name of the company, and asserts that the amount recovered (GBP 5.6m) represents the advantage received by the company. However, missing are details about the location of the offending, the bribe recipient and the subsidiary involved, the value of the bribe, and how the advantage was calculated. The *International Tubular Services* press release lacks similar information. Both press releases state that “In view of any criminal investigation of others that may follow, it is not possible to provide any further details of the corrupt payments”, but there does not appear to have been any other enforcement activity taken in connection with these cases. The Working Group would expect Scotland to provide more comprehensive information about any foreign bribery cases concluded in future.

158. For cases involving administrative liability, the FCA published final notices and issued public statements about both of the foreign bribery-related cases it concluded since Phase 3 (*Besso* and *JLT Speciality*), which provides all relevant information.

159. Practice with regard to the publication of court decisions is mixed. On the one hand, the preliminary and final judgments of the Southwark Crown Court in relation to the three DPAs (*Rolls-Royce*, *Standard Bank* and *XYZ Ltd*) are publicly available on the Court and SFO websites. The Consent Order made in *Oxford Publishing Limited* is available on UK archives.<sup>142</sup> On the other hand, court sentencing remarks in *Smith & Ouzman* and *Sweett Group*, and judgments in the *Chapman* case, are not on the websites of the SFO or the relevant courts. Accordingly, information about the advantages received and how the sentences were calculated in these cases is not readily available. The sentencing remarks in *Smith & Ouzman* are available on an NGO website and in *Sweett Group* were provided to the evaluators by the Court after the on-site visit. Civil society representatives and some public officials noted with concern that court sentencing remarks and judgments are not routinely published and would generally only be available for a significant transcription fee.

160. An interesting feature of the UK sanctioning system, including DPAs, is that the sanctions imposed on natural and legal persons in foreign bribery cases may include the repayment of the costs incurred by the investigating and prosecuting authorities. Such costs in foreign bribery cases are often high, due notably to their duration and the resources required to investigate complex corporate structures and intricate criminal activities. Recuperating these costs from guilty parties who have the means to pay is beneficial from a public policy perspective.

### *Commentary*

***The lead examiners are encouraged by the SFO’s practice of publishing clear and comprehensive information about ongoing and concluded foreign bribery cases. However, they are concerned that court sentencing remarks and judgments in all foreign bribery cases are not routinely made available. The lead examiners therefore consider that recommendation 5(c) is only partially implemented, and recommend that the UK take steps to remedy these issues. The lead examiners also recommend that the Working Group follow up to ensure that Scotland makes public all relevant details about any finalised foreign bribery cases. They emphasise that transparency with respect to concluded cases is critical for deterrence and awareness, and to enable the Working Group to conduct a proper assessment of whether sanctions are effective, proportionate and dissuasive in practice. Given that the UK has not entered into confidentiality agreements with defendants since Phase 3, recommendation 5(d) is fully implemented.***

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<sup>142</sup> The Consent Order in the *Oxford Publishing Limited* case is available at [http://webarchive.nationalarchives.gov.uk/20121021111424/http://www.sfo.gov.uk/media/215466/sealed\\_consent\\_order.pdf](http://webarchive.nationalarchives.gov.uk/20121021111424/http://www.sfo.gov.uk/media/215466/sealed_consent_order.pdf).

*d. Are sanctions in practice effective, proportionate and dissuasive?*

161. The UK published new sentencing guidelines for fraud, bribery and money laundering in May 2014 and updated in May 2016.<sup>143</sup> As noted above, under these guidelines there is a requirement that any financial penalty in a DPA “must be broadly comparable to the fine that a court would have imposed on [the defendant] on conviction for the alleged offence following a guilty plea.”<sup>144</sup> The SFO also undertakes to apply the DPA Code of Practice to cases settled through civil recovery orders. The sentencing guidelines set the following process for sanctioning a corporate defendant:

- Determine whether compensation should be ordered (it should be ordered ahead of any fine).
- Determine whether confiscation should be ordered to take away any financial benefit.
- Determine the offence category (high, medium or lesser culpability). Among other factors, corrupting a government official is a factor that tends towards high culpability, whereas efforts to prevent bribery would tend towards lesser culpability.
- Determine the harm factor based on the financial gain, which would usually be the gross profit from the tainted contract in a bribery case, or the cost avoided by failing to put in place measures to prevent bribery in a Section 7 case.
- Use the offence category and harm factor to identify the penalty starting point and category range. Then apply other aggravating factors, which would include an offence committed across borders, and mitigating factors, such as early cooperation, to determine the fine level.
- Consideration of a final adjustment to ensure the penalty is proportionate, having regard to the size and financial position of the defendant and the seriousness of the offence. The Court should consider whether the combination of sanctions (e.g. confiscation and fine) achieves the removal of all gain, appropriate additional punishment and deterrence. The fine “must be substantial enough to have a real economic impact which will bring home to both management and shareholders the need to operate within the law”. Whether the fine would have the effect of putting the offender out of business will be relevant; “in some bad cases this may be an acceptable consequence.”
- The fine may be reduced in recognition of assistance provided or for a guilty plea.

*i. Legal persons*

162. The sanctions imposed on legal persons in foreign bribery cases since Phase 3 demonstrate how the new sentencing guidelines operate in practice, and suggest that, based on the limited sample available, the sanctions do not raise concerns of effectiveness, proportionality and dissuasiveness, particularly with respect to criminal cases. The courts have confirmed that foreign bribery is a serious offence, for example, the offending was assessed within the high culpability range in *Rolls-Royce (for almost all counts)*, *Smith & Ouzman*, *Standard Bank* and *Sweett Group*. The sanction ultimately imposed in the XYZ case was significantly less than what the courts would have otherwise imposed, because the company was a modestly-resourced SME for which a higher fine, although warranted, would have forced insolvency, contrary to the public interest. The company’s voluntary self-report was taken into consideration in assessing the public interest. Overall, the SFO assesses that the new sentencing guidelines have created a clearer sentencing process. A judge at the on-site visit expressed

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<sup>143</sup> Sentencing Guidelines for Fraud, Bribery and Money Laundering,, available at <https://www.sentencingcouncil.org.uk/publications/item/fraud-bribery-and-money-laundering-offences-definitive-guideline/>.

<sup>144</sup> Ibid.

similar sentiment that the overall result in applying the guidelines was fair and proportionate in one particular foreign bribery case. Please see Table 4 below for details of legal person sanctions.

**Table 4. Sanctions for legal persons since Phase 3**

	Legal person	Approx. value of advantage in GBP unless otherwise stated (bribe value)	Sanctions in GBP unless otherwise indicated
Criminal cases	Rolls-Royce (DPA)	258m gross profit (over USD 50m)	<b>Total 510m</b> Confiscation 258m, fine 239m, SFO costs 13m, corporate compliance obligations
	Smith & Ouzman	440 000 gross profit (395 074)	<b>Total 2.2m</b> Confiscation 880 000; fine 1.3m
	Standard Bank (DPA)	USD 8.4m profit from transaction fees (USD 6m)	<b>Total USD 33m</b> Confiscation 8.4m; compensation 7m; fine; 16.8m; SFO costs 330 000; corporate compliance obligations
	Sweett Group	850 000 gross profit (500 000)	<b>Total 2.25m</b> Confiscation 851 000; fine 1.4m
	XYZ Ltd (DPA)	6.5m gross profit across 28 contracts (500 000)	<b>Total 6.5m</b> Confiscation 6.2m; fine 352 000
Civil	OPL	1.9m	<b>Settlement 1.9m</b> Corporate compliance obligations
Administrative	Besso	Not applicable	<b>Fine 315 000</b>
	JLT Speciality	Not applicable	<b>Fine 1.8 m</b>

163. Based on the limited sample of concluded cases, it appears that the calculation of the sanctions imposed by the courts when sentencing a convicted legal person and those imposed through DPAs are comparable, although higher discounts have been applied under DPAs. This situation is to be expected given the sentencing guidelines require that the DPA sanction be broadly comparable to the fine a court would have imposed. Indeed, one commentator at the on-site visit opined that it can be difficult to convince a corporate entity to make a self-report, given the ultimate sanction would be roughly equivalent to what a court would impose on the basis of an early guilty plea anyway. However, it is interesting to note that in approving the DPAs of the Rolls-Royce and XYZ Ltd cases, the court applied a reduction of 50 per cent in recognition of Rolls-Royce's substantial cooperation and XYZ's self-report. These reductions are more generous than what could have been applied had the defendant not entered into a DPA, but pleaded guilty at an early stage of a prosecution. In the XYZ case, the court departed from the one third discount contemplated in the sentencing guidelines on the basis that the company's admissions were far in advance of the company being charged and brought to court.<sup>145</sup> These reductions are also discussed under section A.1. on self-reporting and B.5.c. on DPAs.

ii. *Natural persons*

164. With respect to natural persons, sentences range from suspended terms of imprisonment to three years of imprisonment, and appear to generally meet the criteria of effective, proportionate and dissuasive.

<sup>145</sup> Judgment of Sir Brian Leveson, 8 July 2016, *Serious Fraud Office and XYZ Limited*, para. 57, available at < <https://www.sfo.gov.uk/2016/07/08/sfo-secures-second-dpa/>>.

**Table 5. Sanctions for natural persons since Phase 3**

	Natural person (case)	Approx. value of advantage in GBP	Sanctions
<b>Criminal cases</b>	Kerrison (Innospec)		3 years imprisonment <sup>146</sup>
	Jennings (Innospec)		2 years imprisonment
	Papachristos (Innospec)		18 months imprisonment
	Turner (Innospec)		16 months suspended sentence
	N Smith (Smith & Ouzman)	18 693	3 years imprisonment, disqualified from acting as a company director for 6 years, confiscation 18 693, costs 75 000
	C Smith (Smith & Ouzman)	4 500	18 months suspended sentence, 250 hours unpaid work, 3 month curfew, disqualified from acting as a company director for 6 years, confiscation 4 500, costs 75 000
	Chapman (Innovia/Securrency)		30 months imprisonment
	Capelson (Capelson)		1 year imprisonment
	Gillam (Mondial)		2 years imprisonment
	Davies (Mondial)		11 months imprisonment

### *Commentary*

*The lead examiners welcome the clarity introduced by the new sentencing guidelines for fraud, bribery and money laundering. They consider that, based on the limited sample of sanctions imposed on legal and natural persons in foreign bribery cases since Phase 3, UK sanctions do not raise concerns of effectiveness, proportionality and dissuasiveness, particularly with respect to criminal cases.*

#### *e. Confiscation*

165. Confiscation is an essential component of an adequate sanctions regime, and the UK has demonstrated good practice in this regard in foreign bribery cases since Phase 3. In all five criminal cases against legal persons since Phase 3, the gross profit from the misconduct has been assessed and confiscated in addition to punitive or remedial sanctions. Interestingly, in making its confiscation order in *Smith & Ouzman*, the court assessed the gross profit to the company as GBP 440 000 then added the value of the bribe of approximately 400 000 to reach a total confiscation of 840 000 which became a confiscation order of GBP 880 000 when indexed to the change in the value of the money – so the confiscation order was double the actual gross profit to the company. In the civil cases concluded since Phase 3, the proceeds of foreign bribery have also been assessed and confiscated. Further, two natural persons have had the proceeds of foreign bribery confiscated in addition to being sentenced to terms of imprisonment (*Smith & Ouzman*).

<sup>146</sup> Innospec itself was sanctioned in 2010 by a fine of USD 12.7m comprising USD 6.7m confiscation and USD 6m civil recovery.

166. However, in July 2016 the Home Affairs Select Committee of the UK Parliament found significant problems in the UK's capacity to freeze and confiscate the proceeds of crime more generally.<sup>147</sup> It considers that the overall low level of asset recovery by the UK is a consequence of insufficient capacity and resources for law enforcement, and poor use of existing tools. Among other things, the Committee calls for assets to be frozen simultaneously with the accused becoming aware of the investigation for the first time, and not at the point of conviction, for all police officers to receive financial investigative training to secure recovery, and for the creation of a specialist 'confiscation court' to combat what it found was a lack of interest and expertise in confiscation orders among prosecutors and judges. The Committee also calls for the NCA to be made the lead agency for the recovery of criminal assets with the necessary resources and tools to be effective. These issues do not appear to have affected foreign bribery cases in the UK to date.

### *Commentary*

*The lead examiners commend UK law enforcement for its regular confiscation of the proceeds of corruption in all foreign bribery cases since Phase 3. Nevertheless, they note the concerns raised by the Home Affairs Select Committee of the UK Parliament regarding the UK's capacity to freeze and confiscate the proceeds of crime more generally, and recommend that the WGB follow up to test that confiscation continues to be effective in foreign bribery cases.*

#### *f. International asset recovery*

167. Although the topic of international asset recovery will not be systematically reviewed in all Phase 4 country evaluations, following the resolution of the *Standard Bank* case by DPA in November 2015, the SFO, CPS and NCA adopted general principles with respect to providing compensation to victim governments or countries as part of the resolution of foreign bribery cases. Pursuant to these principles the agencies work collaboratively with DFID, the Foreign and Commonwealth Office (FCO), Home Office and Her Majesty's Treasury to identify potential victims overseas, assess the case for compensation, obtain evidence in support of compensation claims, ensure the process for the payment is "transparent, accountable and fair", and identify means by which compensation can be paid to avoid the risk of further corruption. Building on this initiative, the May 2016 UK Anti-Corruption Summit included commitments from nine countries to develop common principles governing the payment of compensation to countries affected by foreign bribery.<sup>148</sup> The UK's policy rationale for pursuing compensation payments is summarised in the summit's communique as "an important method to support those who have suffered from corruption."<sup>149</sup>

168. In practice, compensation has been provided to foreign countries or governments in the following foreign bribery cases since Phase 3:

- *Smith & Ouzman* – Compensation was not ordered by the court, but the SFO worked with DFID and FCO to organise GBP 395 000 compensation to Mauritania and Kenya through the exercise of executive power. For Mauritania, where the public official in question had remained in post since the corruption was discovered, the UK made a payment to the World

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<sup>147</sup> See [www.publications.parliament.uk/pa/cm201617/cmselect/cmhaff/25/2505.htm#\\_idTextAnchor009](http://www.publications.parliament.uk/pa/cm201617/cmselect/cmhaff/25/2505.htm#_idTextAnchor009)

<sup>148</sup> UK, Afghanistan, Mexico, Nigeria, Australia, Switzerland, Italy, Indonesia and Jordan. See Anti-Corruption Summit Country Statements at [www.gov.uk/government/publications/anti-corruption-summit-country-statements](http://www.gov.uk/government/publications/anti-corruption-summit-country-statements).

<sup>149</sup> Anti-Corruption Summit London, 12 May 2016, Communique, para. 21., available at [www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/522791/FINAL\\_-\\_AC\\_Summit\\_Communique\\_-\\_May\\_2016.pdf](http://www.gov.uk/government/uploads/system/uploads/attachment_data/file/522791/FINAL_-_AC_Summit_Communique_-_May_2016.pdf).



Bank to fund infrastructure projects in the country. For Kenya, the UK agreed the funds would be spent on purchasing ambulances for the country.

- *Standard Bank* – As part of the court-approved DPA, USD 7 million compensation was ordered to be paid directly to the Government of Tanzania. The UK explains that as the corporate benefit was shared between a UK and Tanzanian company, Tanzania had potential jurisdiction. The UK agreed with Tanzania that the SFO would take the lead on the basis that the SFO could sanction the conduct and obtain compensation. In providing the payment to Tanzania, the SFO was assisted by the FCO and DFID working in collaboration with the Ministry of Finance of the Government of Tanzania.
- *Oxford Publishing Limited* – In addition to the GBP 1.9m civil recovery order, OPL unilaterally offered to contribute GBP 2m to not-for-profit organisations for teacher training and other educational purposes in sub-Saharan Africa. This benefit to the people of the affected region has been acknowledged and welcomed by the SFO, but the SFO decided that the offer should not be included in the terms of the court order, as the SFO considers it is not its function to become involved in voluntary payments such as this.
- A fourth case for which reporting restrictions apply.

**g. Public procurement aspects**

169. In Phase 3, the WGB expressed concern about the public procurement exclusion system in the UK, and recommended that the UK take steps in this regard. Phase 3 recommendation 6(c) was considered not implemented at the time of the Written Follow-Up.

170. The UK's system of mandatory and discretionary exclusion of a bidder from the procurement process is the same as in Phase 3,<sup>150</sup> although the legislative basis has changed to regulation 57 of the *Public Contracts Regulations 2015* (PCRs), implementing EU Directive 2014/14/EU.<sup>151</sup> UK procurement authorities explained on-site that as the directive has been transposed into UK law, thus leaving the EU would not automatically effect regulation 57. The regulation 57 grounds are however the only permissible grounds for exclusion and cannot be added to by the UK while it remains part of the EU.

171. A conviction under section 7 of the Bribery Act is a discretionary ground for exclusion assuming the conviction demonstrates grave professional misconduct which renders the bidder's integrity questionable. DPAs and civil settlements fall outside the mandatory exclusion scheme because they do not result in a conviction for the corporate defendant. For these matters, the contracting authority should look at a DPA or settlement to assess whether the circumstances are appropriate for the contracting authority to exercise its right to discretionary exclusion for grave professional misconduct. In approving the Rolls-Royce DPA, the Court took this issue into account: "Debarment and exclusion would clearly have significant impact, and potentially business critical, effects on the financial position of Rolls-Royce. This could lead to the worst case scenario of a very negative share price impact, and, potentially, more serious impacts on shareholder confidence, future strategy, and therefore viability."<sup>152</sup> Some civil society representatives have been critical of this

<sup>150</sup> Phase 3 Report, paras. 207-210.

<sup>151</sup> Public Contracts Regulations available at <http://www.legislation.gov.uk/uk/si/2015/102/contents/made>; Guidance available at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/402221/PPN\\_02-15\\_-\\_PCR\\_2015.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/402221/PPN_02-15_-_PCR_2015.pdf).

<sup>152</sup> Judgment of Sir Brian Leveson, 17 January 2017, Serious Fraud Office and Rolls-Royce Plc & Anor, paras. 52-57, available at <https://www.sfo.gov.uk/cases/rolls-royce-plc/>.

approach, believing the decision to grant a DPA to Rolls-Royce put too much weight on the risk of non-discretionary exclusion that would have followed a criminal conviction,<sup>153</sup> and that sanctions imposed, without the element of debarment, may be insufficient to act as a punishment and deterrent.<sup>154</sup>

172. The UK has not taken steps since Phase 3 to address recommendation 6(c). As a result, there is no systematic approach to allow contracting authorities to easily access information on companies sanctioned for corruption (whether through conviction, DPA, or another settlement). In accordance with regulation 59 of the PCRs, which implement EU provisions relating to use of the European Single Procurement Document, the UK relies only on self-disclosure by bidders, until the point of identifying a preferred bidder, at which point supporting documents may be required. There is no specific guidance on exercising discretion with regard to excluding a company convicted under Section 7 of the Bribery Act. The UK has provided training to contracting authorities on the new Regulations and issued guidance on excluding bidders for poor past performance, but these do not appear to cover the specific matters addressed in the outstanding Phase 3 recommendation. In its recent paper, the All-Party Parliamentary Group (APPG) on Anti-Corruption has supported measures to more easily identify companies subject to exclusion.<sup>155</sup> Further, during the on-site visit, law enforcement officials observed that exclusion could be enforced more rigorously.

173. However, the UK has made some important commitments in this regard, including during the London Anti-Corruption Summit. The UK has committed to putting in place a procedure for criminal records checks to ensure that corrupt bidders are not awarded government contracts. Under the proposed new system, a contracting authority would have access, through conviction data held on the Police National Computer, to details of any relevant convictions. The UK is currently preparing a pilot programme to implement this commitment, for which bidders will be made aware in the bidding documentation that the successful bidder will be subject to a proactive criminal record check by the contracting authority. This would apply where the bidder or a member of the administrative, management or supervisory board of the bidder, or a person with powers of representation, decision or control in it, or a person of significant control in the company has a relevant conviction. Bidders are required, within the Standard Selection Questionnaire (the UK's version of the European Single Procurement Document), to declare any grounds that may lead to exclusion from the procurement process under regulation 57 of the PCRs. At this stage, however, the contracting authorities may only become aware of allegations of bribery resolved through a settlement or DPA by consulting the SFO website or if declared by the bidder.

### *Commentary*

***The lead examiners consider that Phase 3 recommendation 6(c) continues to be not implemented, and recommend the UK consider adopting a systematic approach to allow relevant agencies to easily access information on companies sanctioned for foreign bribery, including companies sanctioned through court orders, DPAs and other settlements. They are encouraged by the UK's expressed intention made at the London Anti-Corruption Summit to put in place a procedure for criminal records checks and encourage expedient progress in this respect. Such a system would need to be supported by suitable training and guidance on excluding economic operators including with regard to companies convicted under Section 7 of the Bribery Act.***

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<sup>153</sup> Corruption Watch, undated, "A failure of nerve: SFO's settlement with Rolls-Royce", available at <http://www.cw-uk.org/2017/01/19/a-failure-of-nerve-the-sfos-settlement-with-rolls-royce/>.

<sup>154</sup> <http://www.transparency.org.uk/our-work/business-integrity/rolls-royce-case-dpas/>

<sup>155</sup> APPG on Anti-Corruption, 9 December 2016, "Reaching export 2020 with integrity", pp. 1 & 9-10, available at <http://www.anticorruptionappg.org/reaching-export-2020-with-integrity-all-party-parliamentary-group-on-anti-corruption-report-on-anti-corruption-guidance-for-uk-exporters/>.

## B.6. International cooperation

174. According to the UK, obtaining evidence from multiple jurisdictions is one of the principal challenges encountered in investigating and prosecuting foreign bribery. The authorities acknowledge that it can be extremely difficult to get MLA, or even intelligence sharing, from some jurisdictions. Extradition issues can also be complex, in particular where there may be double jeopardy. International liaison magistrates and international liaison officers are deployed internationally by the UK to facilitate MLA.<sup>156</sup>

### a. Mutual Legal Assistance (MLA)

175. The legal MLA framework has not changed since Phase 3.<sup>157</sup> The 12<sup>th</sup> edition of the [UKCA guidelines](#) was published in March 2015 to ensure that requests for MLA received by the UK can be executed promptly and efficiently. These guidelines contain advice on how to make an MLA request, service of process, transfer of proceedings and restraint and confiscation of property, and include (i) guidance to authorities who wish to make a formal request for MLA to the UK; and (ii) guidance to authorities on what can be requested without making a formal request for MLA to the UK. These Guidelines, which are publicly available and updated on a regular basis, are a useful tool for foreign authorities when requesting international assistance from the UK.

#### i. Management of MLA requests

176. Phase 3 recommendation 10(a) recommended the UK produce more detailed statistics on formal MLA requests received, sent and rejected, and was considered partially implemented at the time of the Phase 3 Written Follow-Up Report.

177. Situation at the UKCA – At the time of the Written Follow-up, the UK Central Authority (UKCA)<sup>158</sup> was developing a new database which would provide more detailed statistics. UKCA’s case management system was introduced in October 2014, to enhance casework delivery and provide management and performance information. This case management system enables UKCA to monitor and record the progress of each MLA case from receipt to execution. Each incoming and outgoing request<sup>159</sup> is assigned to a caseworker, responsible for the efficient progress of their cases. UKCA ensures cases are progressed expediently by setting and monitoring key performance indicators. All cases are assessed and prioritised to ensure the most sensitive and urgent cases are processed within appropriate timeframes. According to UKCA, the nature of bribery cases is such that these are dealt with as urgent cases. To improve efficiency, UKCA also operates a fully digitalised casework system since April 2016.

178. Situation at the SFO and NCA – The SFO has established an International Assistance Unit within its Strategy and Policy Division, which deals with all incoming and outgoing letters of request. Mapping processes track the execution of incoming and outgoing MLA requests, with a view to

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<sup>156</sup> According the authorities, 32 officers were posted overseas in January 2017.

<sup>157</sup> Phase 3 report paras 171-173.

<sup>158</sup> The U.K. has three central authorities: (i) Home Office UK Central Authority (“UKCA”) for MLA requests in England, Wales and Northern Ireland; (ii) Her Majesty’s Revenue and Customs (‘HMRC’) for MLA requests in England, Wales and Northern Ireland relating to tax and fiscal customs matters only; and (iii) Crown Office for MLA requests in Scotland (including devolved Scottish tax matters).

<sup>159</sup> Outgoing requests to EU States (as well as for Switzerland, Monaco, Liechtenstein, Norway and Iceland) can be directly exchanged by prosecuting authorities.

monitoring performance and providing statistics. For incoming requests, each new referral from UKCA is input onto an SFO-shared database. In addition to recording and tracking information, the database assists in identifying links between international and domestic investigations. All official documents are digitalised, facilitating the move away from the transmission of hard copy evidence to the provision of evidence in a secure electronic format. For outgoing requests, since 1 April 2014, the SFO operates a centralised system for the monitoring of all outgoing MLA requests. The NCA ICU has also established databases to record, manage and track MLA requests.

179. Important efforts have been deployed by the UK since the Phase 3 evaluation to streamline and improve the management of MLA requests, especially within UKCA and SFO. Both institutions are able to provide detailed and comprehensive statistics (see below), including in relation to bribery cases. Such tracking systems are key tools to improve the management of requests. According to UKCA, however, the existing performance indicators do not allow for the automatic calculation of the length of time taken to respond to foreign bribery-related MLA requests received by UKCA. UKCA explains that although such data is not routinely recorded by the type of offence it can be extracted through a manual examination of files and manual extraction of data, on a case-by-case basis. This is regrettable, since such information would be highly valuable, if systematically available.

ii. *Outgoing requests*

**UKCA data related to MLA in bribery cases (no separate data for foreign bribery cases)**

180. Between 2013 and 2015, 20 outgoing requests concerning bribery offences were processed by the UKCA (in addition to requests made directly to CDs, EU member states, Monaco, Switzerland, Liechtenstein, Norway and Iceland).<sup>160</sup> If no response is received to an outgoing request, the UKCA will request an update directly from the receiving competent authority and may involve the use of diplomatic and law enforcement liaison officer channels. The UKCA case management system includes setting reminders and tasks to monitor and progress the execution of an outstanding request. No data is available on whether the absence of a response resulted in the termination of proceedings.

**Table 6. SFO data related to MLA in foreign bribery cases**

		FY 2014-15	FY 2015-16
Parties to the OECD Convention	Requests made	26	17
	Granted	24	17
	Rejected	2	0
	Requests where evidence received	22	13
	Average time for response	205 days	131 days
Non-parties to the OECD Convention	Requests made	7	20
	Granted	6	19
	Rejected	1	1
	Requests made	26	17
	Granted	24	17

181. The SFO reports that the assistance it receives most commonly covers banking evidence. The SFO monitors requests, and contacts the requested state if, after a reasonable time, a response has not been received. Since Phase 3, the SFO reports it has not had to drop any case specifically because of non-assistance, although a failure to obtain assistance always causes significant operational challenges. According to figures provided by the SFO, delays to obtain assistance from Parties to the Convention decreased in 2015/2016. Among other things, the SFO is capitalising on direct contacts

<sup>160</sup> At the time of drafting this report, the UKCA had 7396 open MLA cases.

made with counterparts in informal settings, such as the OECD meetings of Law Enforcement Officials. Such contacts generally contribute to ease and expedite MLA processes.

### **CPS data related to MLA in foreign bribery cases**

182. Since Phase 3, the Crown Prosecution Service has made one MLA request related to a foreign bribery case.

#### *iii. Incoming requests*

### **UKCA data related to MLA in bribery cases (with no separate data for foreign bribery cases)**

183. Between 2013 and 2015 the UKCA received 105 requests concerning bribery: 30 in 2013, 34 in 2014 and 41 in 2015. The UKCA has accepted 92 requests for bribery; 69 of these requests were from Parties and 23 from non-Parties. The UKCA refused 13 requests; 8 of these requests were from Parties and 5 were from non-Parties. The reasons for refusal generally lie in an absence of jurisdiction or established link to the UK, or the requests do not fall under the scope of the UKCA. The types of measures requested most commonly cover banking evidence. 16 of these requests were asset freezing or confiscation related requests.<sup>161</sup> By way of comparison, in 2015, the UKCA received 7342 requests, comprising 5725 requests to obtain evidence and 1616 requests for service of process. On average the UKCA deal with 545 requests a month (477 in 2015).

184. According to the UKCA, in 2014 and 2015, 38 MLA incoming requests (related to bribery) required coercive measures (house searches, arrests, freezing orders and other compulsory measures). The CPS and the SFO are authorised to execute incoming requests to freeze and confiscate assets in England and Wales so that they may be used to pay for overseas confiscation and forfeiture orders. These requests are executed under the Proceeds of Crime Act 2002 (External Requests and Orders) Order 2005 and the Criminal Justice (International Co-operation) Act 1990 (Enforcement of Overseas Forfeiture Orders) Order 2005.

185. Given its situation as one of the largest financial centres worldwide, the UK receives a high volume of requests to obtain banking evidence (not limited to bribery cases). According to the UKCA, this volume of requests may reduce the speed at which a request is executed. Information from a financial institution, known in the UK as “special procedure material” (such as a customer’s name or details about a customer’s transaction) is obtained promptly. According to the authorities, the UKCA will consider an MLA request within 12 days of receipt on average, and the Crown Office within three working days. However, depending on the nature of the request, this may not always be possible. All central authorities will take into account any reasons for urgency which are clearly stated in the request. If a request is urgent, the UKCA indicates it will try to deal with the request as quickly as possible. According to the authorities, requests related to certain offences, such as foreign bribery, are treated as urgent and processed in priority.

186. In the first stages of this evaluation, and in accordance with the Phase 4 monitoring procedures, member countries of the WGB were consulted on their experience with the UK concerning international cooperation in relation to foreign bribery cases. According to the information provided, overall the UK appears to be performing well in facilitating MLA to WGB-member countries. Two issues of concern were raised by two delegations. One delegation indicated

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<sup>161</sup> Please note that all UKCA statistics in this report have been provided from local management information and have not been quality assured to the level of published National Statistics. As such they should be treated as provisional and therefore subject to change.

experiencing lengthy delays in getting assistance from the UK. Another highlighted the problem for the UK to deliver assistance in relation to coercive measures (house searches, arrests, freezing orders and other compulsory measures), the level of proof required being too high and the time for processing too long. However, no definitive conclusion can be drawn on how effectively the UK performs in delivering MLA, considering the limited number of responses and incomplete range of information received.<sup>162</sup>

187. Both in the Phase 4 Responses and during the on-site visit, the UK provided successful examples of international cooperation, including in cases related to the identification, freezing, seizure and confiscation. In the *Griffiths Energy International Inc.* case, following an MLA request from the US Department of Justice, the SFO took steps in July 2014 to freeze GBP 17.6 million contained in a UK account. In the *Eni and Shell* case in September 2014, the CPS applied for a restraint order against ENI S.p.A (an Italian oil and gas company) and others in order to freeze approximately USD 83 million held in a UK bank account. The application arose out of an MLA request from the Public Prosecutor of Milan leading a criminal investigation in Italy into the circumstances of an alleged corrupt sale, in 2011, of a licence to exploit an oil field.

### *Commentary*

*The lead examiners welcome the UK's efforts since Phase 3 to streamline and improve the management of MLA requests, and to maintain more detailed and comprehensive statistics, both within UKCA and the SFO. Despite these efforts, as in Phase 3, it remains very difficult to assess whether and to what extent the UK is able to provide prompt and effective mutual legal assistance in foreign bribery cases. This difficulty essentially lies with a lack of information available, both from countries on their international cooperation experience with the UK, as well as from the UKCA and SFO tracking systems which do not currently automatically generate information on certain data.*

*The lead examiners consider Phase 3 recommendation 10(a) to be fully implemented. Nevertheless, they recommend that the UK continue improving the tools available to measure performance when providing MLA in foreign bribery cases, to systematically gather information on the timelines for executing incoming MLA requests in relation to specific offences.*

#### *b. Extradition*

188. The framework for extradition in foreign bribery cases under the Extradition Act 2003 has not substantially changed since previous evaluations.<sup>163</sup> The Phase 2bis Report expressed concerns over a proposed “forum” bar to extradition that would allow courts to refuse extradition if (1) a significant part of the conduct in respect of which extradition is sought occurred in the UK, and (2) it would not be in the interests of justice for the offence in question to be tried in the state requesting extradition.<sup>164</sup> The amendment has been enacted, but had not yet entered into force at the time of Phase 3. In Phase 3, the WGB agreed to follow up the implementation of the “forum” bar to extradition.

189. The forum bar, as it was introduced originally in the Police and Justice Act 2006, was never brought into force, and a new forum bar was introduced in the “2013 Act” and commenced in October 2013. The forum bar is not currently in force in Scotland.

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<sup>162</sup> Only 10 of the 40 Working Group countries (not counting the UK) responded to the questionnaire.

<sup>163</sup> Phase 3 report paras 169-170.

<sup>164</sup> Phase 2bis report, paras 206-208.

190. Under the 2013 Act, extradition may now be barred by British courts for all EU countries, and countries with which the UK has bilateral extradition treaties, including the U.S., “if the extradition would not be in the interests of justice.” Judges are required to take a number of reasonable criteria into account when deciding to block extradition. If a “substantial measure” of the alleged criminal conduct took place in Britain, these considerations must include: where most of the harm or loss caused by the crime occurred; the interests of victims; the prosecutor’s view on the appropriateness of UK jurisdiction; the availability of evidence; any concerns about delays that would be caused by blocking extradition; the jurisdiction in which it is desirable and practical to try offences given the location of witnesses, co-defendants, and other suspects – and where it is best for such persons to give their evidence; and whether the individual in question has connections with Britain. However, judges do not have unlimited power to bar extradition. A prosecutor has the power to issue a certificate that prevents a judge from barring extradition on the basis of the forum bar, if the offences occurred in the UK, and there has been a formal consideration for undertaking a UK prosecution for the alleged conduct.

191. By requiring a judge to have regard to a range of specified criteria, and by creating the prosecutor’s veto, the 2013 Act ensures that extradition proceedings will take into account all the circumstances of a case. This makes it easier, *inter alia*, for the interests of victims – individuals, institutions or governments – to be taken into account, a consideration too often ignored in debates about extradition. For some commentators, however, one disadvantage of the forum bar is that it provides yet another ground for appeals against extradition.<sup>165</sup> According to the authorities interviewed during the on-site visit, this new framework works well in practice although it has not been tested in foreign bribery cases yet. They highlighted one positive impact of this new regime on awareness raising (i.e. prosecutors going to the CPS to seek information and advice).

### *Commentary*

***The new features and arrangements of the “forum” bar to extradition introduced in 2013 have not been tested yet in foreign bribery cases. The lead examiners therefore recommend that the Working Group continue to follow up its implementation.***

#### ***c. Seeking MLA from Crown Dependencies and Overseas Territories***

192. The CDs and OTs are not part of the UK and are wholly responsible for executing MLA and extradition requests within their own jurisdictions. In previous evaluations, the OECD had asked the UK to improve the ability of the CDs and OTs to provide MLA. In Phase 2bis, the SFO reported difficulties in obtaining MLA from the CDs and OTs. Sources of delay included the requirement of formal mechanisms for making requests and the lack of resources in the CDs and OTs. In Phase 3, formal letters rogatory continued to be required for MLA requests to the CDs and OTs. The Phase 2bis Report also pointed out that dual criminality may be an obstacle. At that time, at least some OTs and CDs required dual criminality before they could provide co-operation, and many still had not adopted foreign bribery legislation.<sup>166</sup> During the Phase 3 evaluation, the UK reported no problems with seeking MLA from the CDs and OTs.

193. In the process of this evaluation, figures were provided by the SFO on its cooperation with the OTs and CDs. Upon SFO's request, such figures are not published in this report. In any case, the limited number of MLA requests sent by the SFO to the OTs does not allow drawing any definitive conclusion on their ability to provide MLA. The CPS has sent 5 letters of request for the period 2013-2015 to UKCA for onward transmission to the OTs and CDs. All were responded. No more

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<sup>165</sup> See “Assessing the new legislation on extradition” [here](#).

<sup>166</sup> Phase 2bis Report, para. 269.

information was provided regarding the territories concerned, whether the requests were accepted or not, and the timelines for responding.

194. The CDs and OTs also provided information on the number of MLA requests (from 2013 to 2015) as follows:

CD or OT	Total number of incoming MLA requests	MLA requests received that related to corruption, including foreign bribery offences	MLA requests received that related to money laundering offences	MLA requests received to freeze or confiscate assets related to bribery offences	Timelines to respond to the incoming MLA requests
British Virgin Islands (BVI)	NA	35 <sup>167</sup>	NA	NA	NA
Cayman Islands	32	6	25	NA	NA
Guernsey <sup>168</sup>	142	31	58	2	70 days <sup>169</sup>
Isle of Man	196	12	18	NA	NA
Jersey	171	19	30	3	3 months
Gibraltar	249	5	54	NA	NA

195. In previous evaluations, sources of delay for CDs and OTs to respond to MLA included the requirement of formal mechanisms for making requests and the lack of resources in the CDs and OTs. Dual criminality is only required for the exercise of coercive powers in the CDs and some OTs (Gibraltar),<sup>170</sup> which have now all adopted foreign bribery legislation. The situation in the other OTs is unclear and there is no evidence that the requirement of dual criminality would not constitute an obstacle in providing MLA in foreign bribery cases, especially in the territories that have not yet ratified the Convention. Regarding available resources, the situation available concerning some CDs and OTs is as follows:

- *Cayman Islands*: there are six Counsels who make up the International Team and who may be allocated International Requests to respond to. The team leader is Senior Crown Counsel (International Cooperation) who is the central point of contact and has oversight of all matters;
- *Guernsey*: there is a dedicated mutual legal assistance lawyer who has day-to-day responsibility for most incoming MLA requests. Some requests are also dealt with by a second MLA lawyer who works partly in this area and partly on the policy and legislative aspects of financial crime. In the absence of either of the MLA lawyers, incoming requests are referred to the Attorney General or the Solicitor General.

<sup>167</sup> Since 2012.

<sup>168</sup> The figures should be viewed as approximate because they include requests where there were several possible predicate offences, requests involving corruption where it was not clear whether or not bribery was involved, multiple requests made by a jurisdiction in relation to the same case, and requests by different jurisdictions in relation to the same case.

<sup>169</sup> Average execution time for standard requests, i.e. those that did not require additional information from the requesting state before they could be executed.

<sup>170</sup> In these territories, it does not matter if foreign offences are named, categorised or worded in a different way from domestic offences, as the only question is whether the underlying conduct that is alleged would come within an indictable domestic offence.



- *Isle of Man*: The Attorney General’s Chambers is the central authority responsible for making and receiving MLA requests. The Attorney General is assisted in dealing with incoming Letters of Request by a full time qualified lawyer.
- *Jersey*: a core “MLA team” of four legal advisers which is supported by the Director of the Criminal Division, the Attorney General and the Solicitor General as necessary. Outside counsel are retained where specialised expert advice is required.
- *Gibraltar*: a lawyer within the Office of Advisory Counsel specifically deals with incoming and outgoing MLA requests, supported by the Attorney General and lawyers from the Office of Criminal Prosecution and Litigation, where necessary.
- *BVI*: The Attorney General’s Chambers is responsible for responding to MLA requests. Two counsels within the Chambers are directly assigned to handle requests in support of the Attorney General.

196. Consultation of the WGB has taken place on international cooperation with the UK (see above), but only one WGB Member Country reported on its experience in requesting international cooperation from one OT. The request (related to a foreign bribery case) was sent to the judicial authorities of Turks and Caicos, which provided all the requested documents in due time. This limited feedback contributes to the difficulty in assessing whether the capacity of the CDs and OTs to provide prompt and effective MLA has improved since Phase 3. The active participation of all CDs and quite a few OTs in the discussion on international cooperation, both on-site and through written exchanges with the evaluation team, is worth mentioning. Their involvement and efforts to provide information and data related to MLA is a positive development, regardless of the persistent difficulty to assess their capacity to provide international cooperation to the UK and other Parties to the Convention in foreign bribery cases.

### *Commentary*

*The lead examiners consider that assessing the ability of the CDs and OTs to provide foreign bribery-related MLA to the UK remains a challenge, essentially due to the lack of comprehensive and appropriate data from certain OTs. Considering the role of some of these territories as major offshore financial centres which could be used to facilitate foreign bribery, the lead examiners recommend that the Working Group should continue monitoring this issue.*

*Given the problem areas identified in previous evaluations and the absence of data on the subject, the lead examiners recommend that the UK, in collaboration with all Territories, conduct a review of the institutional framework and arrangements in place in each CD and OT to respond to international cooperation requests, and compile relevant statistics, with a view to identifying any obstacle or difficulty in delivering assistance in foreign bribery cases and to possibly providing support for any necessary corrective measure.*

#### *d. Cooperation in criminal and policing matters between the UK and the EU*

197. Although the UK has never agreed to be fully associated to EU policies in the ‘Area of Freedom, Security and Justice’, it is an important player in criminal and policing matters within the EU. The UK has engaged in mutual recognition in criminal matters, in particular the law on the European Arrest Warrant, which is a fast-track extradition system. The UK has also signed up to EU laws, in particular on mutual recognition of investigation orders and confiscation of assets and freezing orders. The UK has been particularly keen to participate in the exchange of police information (and in networks such as Europol and Eurojust. JITs are being used in two foreign bribery investigations, one by the SFO and one by the COLP.

198. Overall, commentators agree that Brexit is likely to lead to a reduction in cooperation in criminal and policing matters between the UK and the EU, although the significance of the change is

obviously still difficult to measure at the time of this report. It is certain that the UK's participation in EU criminal and policing arrangements and networks has contributed to boost enforcement in the UK in the foreign bribery arena (and beyond). It is also true that the UK will continue to rely on international instruments to fight foreign bribery, including in the context of the OECD Convention. A challenge will be to come up with new arrangements with the EU that maintain some capacity for the UK to fully cooperate with EU countries in criminal investigations, including in foreign bribery cases.

### *Commentary*

*Although the Brexit vote and its consequences are difficult to predict, leaving the EU is likely to impact the ways in which the UK cooperates with EU countries in foreign bribery cases. On this basis, the lead examiners recommend that the Working Group follow up on the developments in this area to review their possible impact on the UK's foreign bribery enforcement, and recommend that the UK report on developments in this respect.*

## C. RESPONSIBILITY OF LEGAL PERSONS

### C.1. Corporate liability

#### a. Introduction

199. The UK's regulatory and institutional framework for legal person liability for foreign bribery has not changed since Phase 3. For foreign bribery offences that occurred prior to the entry into force of the Bribery Act on 1 July 2011, legal persons may be held criminally liable on the basis of the identification theory. For foreign bribery offences committed after the Bribery Act, corporate criminal liability may be imposed on the basis of the identification theory (sections 1-6 of the Bribery Act) or corporate failure to prevent bribery under section 7 of the Bribery Act.<sup>171</sup> Private sector representatives at the on-site visit generally agreed that section 7 provides a very effective incentive for legal persons to adopt adequate corporate compliance measures and internal controls. Civil enforcement action for foreign bribery related conduct may also take place under POCA, or administrative enforcement action for failure to maintain effective controls to guard against foreign bribery risks under section 206 of FSMA. Furthermore, legal persons may also be held responsible for false accounting under the *Companies Act 1985*, *Companies Act 2006*, or the *Theft Act 1968*, and for money laundering offences predicated on foreign bribery under POCA.

200. Since Phase 3, while criminal liability for foreign bribery has been imposed on six companies (see Table 4 and section B.5 above), the various concepts of corporate liability for foreign bribery have not been interpreted by the courts. Section 7 of the Bribery Act was the basis for criminal liability in four cases – *Rolls Royce*, *Sweett Group*, *Standard Bank and XYZ Limited*. Sweett Group pleaded guilty. Rolls Royce, Standard Bank and XYZ entered into DPAs. Accordingly, the defence of adequate procedures has not been tested in the courts. The identification theory was the basis for criminal liability in *Rolls Royce* (some of the offending occurred prior to the Bribery Act) and in *XYZ Limited* (the offending in that case occurred from 2004-2012, spanning both the old and the new UK foreign bribery regimes) and *Smith & Ouzman*. These cases were resolved through DPAs and, for *Smith & Ouzman*, by a finding of guilt by the court. Although the *Smith & Ouzman* case involved a contested trial in which the legal person and natural persons accused pleaded not guilty, the case does not advance the identification theory of corporate liability because the company directors themselves committed the bribery. Consequently, there have been no relevant developments with regard to the identification theory in foreign bribery. Similarly, there have been no developments concerning interpretation of the written law exception in section 6 of the Bribery Act, which puts the onus on the prosecution to show that no written law permits the foreign public official to be influenced by an advantage offered or given, and which was identified for follow-up by the WGB in Phase 3.<sup>172</sup>

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<sup>171</sup> Phase 3, paras. 30-34.

<sup>172</sup> Phase 3 evaluation, follow up issue 14(a).

**b. *Guidance to commercial organisations – hospitality and promotional expenditure***

201. The Guidance to Commercial Organisations (GCO) was published by the Ministry of Justice in March 2011.<sup>173</sup> It provides guidance to commercial organisations on how to prevent bribery. It does not have the force of law and is not binding on prosecutors or courts, but, importantly, it is a factor prosecutors would consider in making charging decisions in accordance with the Code for Crown Prosecutors, which may have bearing on the exercise of prosecutorial discretion.<sup>174</sup> In Phase 3, the WGB raised concerns about the treatment of hospitality and promotional expenditures in the Guidance, and issued recommendation 2(a) asking the UK to clarify problematic hypothetical examples in the Guidance that (i) seek to illustrate reasonable and proportionate hospitality expenditure, and (ii) fail to properly identify the risk of bribery in certain transactions.<sup>175</sup> This recommendation was considered not implemented at the time of the Written Follow-Up.

202. The GCO has not been amended since it was published in March 2011, thus the Phase 3 recommendation remains outstanding. Further, there has been no case law that addresses hospitality payments. However, the UK disagrees that the GCO requires clarification and reemphasises that the Guidance is not law and is merely intended to guide. As in Phase 3, the UK explains that the relevant section of the GCO deals with factors that would relate to the evidential nexus between hospitality and promotional expenditure and the intention to influence a foreign official so as to obtain business or an advantage by reference to borderline scenarios. The UK notes that the guidance makes it clear that “the more lavish the hospitality or the higher the expenditure in relation to travel, accommodation or other similar business expenditure provided to a foreign public official, then, generally, the greater the inference that it is intended to influence the official to grant business or a business advantage in return.” However, the Working Group’s concerns relate to examples in the GCO such as “[f]lights and accommodation to allow foreign public officials to meet with senior executives of a UK commercial organisation in New York as a matter of genuine mutual convenience, and some reasonable hospitality for the individuals and his or her partner, such as fine dining and attendance at a baseball match are facts that are, in themselves unlikely to raise the necessary inferences.” As noted in Phase 3, this is a high-risk activity under almost all circumstances. This and other concerns regarding the GCO’s treatment of hospitality and promotional expenditure are detailed in the Phase 3 report.<sup>176</sup> The GCO is further discussed in section C.2 on engagement with the private sector.

**c. *Approach to small facilitation payments***

203. In October 2012, the SFO issued new guidance regarding facilitation payment cases in response to Phase 3 recommendation 1(a). The new policy stated that, in deciding whether to prosecute such cases, the SFO would apply the Full Code Test in the Code for Crown Prosecutors and the Bribery Act Joint Prosecution Guidance. This brought the SFO’s approach in line with other UK prosecuting agencies, thus implementing the first part of Phase 3 recommendation 1(a). However, the

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<sup>173</sup> Ministry of Justice, Guidance to Commercial Organisations, available at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/181762/bribery-act-2010-guidance.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/181762/bribery-act-2010-guidance.pdf).

<sup>174</sup> As noted in Phase 3 para. 14, the Joint Prosecution Guidance (pp. 11-12) provides that “[p]rosecutors must take [the GCO] into account when considering whether the procedures put in place by commercial organisations are adequate to prevent persons performing services for or on their behalf from bribing”. It also notes that the GCO may be “helpful” in determining the policy rationale behind the offences in the Bribery Act.

<sup>175</sup> Phase 3 evaluation paras. 20-25.

<sup>176</sup> Ibid.

UK did not amend the different definitions of facilitation payments in various guidance documents (Joint Prosecution Guidance, the GCO and the Quick Start Guide) to make them consistent.<sup>177</sup>

204. In Phase 4, the UK continues to provide no exception for facilitation payments. The definitions of facilitation payments in the various guidance documents have not been changed, but this did not appear to raise concerns for the public, private or NGO representatives at the on-site visit. In the UK's Phase 4 response and at the on-site visit, the Ministry of Justice explained that while the GCO and the Joint Prosecution Guidance use different definitions of facilitation payment, they are not inconsistent with each other and the texts are merely descriptive and indicative, holding no legal meaning as such payments amount to low value bribes. During the on-site visit, the SFO agreed that a prosecutor would take the Guidance into consideration in making charging decisions, but indicated no concerns in this regard.

*d. Offence of failure to prevent bribery*

205. The UK explains that there has been no case law or amendment to the GCO to address Phase 3 recommendation 2b to “clarify the significance of indirect benefits in determining whether persons may be an ‘associated person’ under section 7 of the Bribery Act”.<sup>178</sup> Liability under section 7 arises only if a person “associated” with a commercial organisation commits bribery for the organisation. The problem identified in Phase 3 was that the Guidance, when explaining that an offence will be committed only if the agent intended to obtain an advantage for the organisation, states that “[t]he fact that an organisation benefits indirectly from a bribe is very unlikely, in itself, to amount to proof of the specific intention required by the offence”. However, section 7 of the Bribery Act does not give greater weight to direct benefits over indirect ones. Thus, the Working Group found that the Guidance and Bribery Act are inconsistent.<sup>179</sup> Recommendation 2(d) was considered not implemented at the time of the Written Follow-Up, but the UK stated that it would consider the WGB's recommendation if it revises the GCO in future. During the Phase 4 on-site visit, the UK indicated the Guidance could be updated if such case law were to be developed in future.

206. The UK is considering expanding the concept of corporate liability for failure to prevent bribery to failure to prevent other economic offences. During the on-site visit, the Ministry of Justice agreed that such an expansion could potentially provide assistance in foreign bribery-related cases where all elements of the foreign bribery offence are not apparent but the elements of another offence are. Civil society expressed that such an extension would assist prosecutors in combating broader financial crime including that linked to corruption such as money laundering, false accounting and fraud.<sup>180</sup> The UK Ministry of Justice has the policy lead on this issue. The Ministry has explained that this proposal will be considered as part of a wider consideration of possible options for a revision of the law governing corporate criminal liability. On 13 January 2017, the Ministry published a Call for Evidence on corporate criminal liability. The UK indicates that it will consider the responses received following closure of the Call for Evidence in March 2017 in determining the case for reform and any resulting proposals.

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<sup>177</sup> Phase 3 para. 19.

<sup>178</sup> Phase 3, recommendation 2(b).

<sup>179</sup> Ibid., paras. 42-45.

<sup>180</sup> See Bond Anti-Corruption Group [Submission to the OECD Working Group on Bribery Review team](#).

e. *Successor liability*

207. Regarding successor liability for corrupt conduct committed prior to the acquisition, merger or other succession of a target company, there is no such liability under the Bribery Act or the pre-Bribery Act legislative or common law regimes. However, civil recovery may be taken to recover the proceeds of historical bribery, as occurred in *International Tubular Services*. Further, a company may also be liable for a bribery scheme that continues past the point of succession. The Rolls-Royce DPA states that Rolls-Royce agrees to include in any contract for sale, merger or transfer a provision binding the purchaser or successor to the obligations described in the DPA.

*Commentary*

*The lead examiners are encouraged to see the application in practice of criminal liability on corporates for foreign bribery. However, they are concerned that the GCO has not been amended in line with Phase 3 recommendation 2(a) regarding guidance on hospitality and promotional expenditures, nor recommendation 2(b) to clarify the significance of indirect benefits for the purpose of determining liability under section 7 of the Bribery Act. These two recommendations are still not implemented. They note that Phase 3 recommendation 1(a) regarding consistent definitions of facilitation payments in guidance documents remains partially implemented. They also recommend that the WGB continue to follow up as case law and practice develops on the written law exception in Section 6 of the Bribery Act.*

**C.2. Engagement with the private sector: the crucial need to support SMEs**

208. Various UK authorities play a role in engaging with the private sector with respect to preventing, detecting and reporting foreign bribery. As noted above, the Ministry for Justice is responsible for the Guidance to Commercial Organisations to prevent bribery, which is also promoted by other agencies, such as DFID, the NCA and SFO. For its part, the FCO has run several events in recent years to raise awareness of the Bribery Act in foreign capitals via UK embassies. The COLP has developed films which they provide to commercial organisations and law enforcement around the world to raise awareness. In early 2016, the NCA ICU appointed a full time staff member to conduct private sector outreach, with a major focus on corruption prevention for SMEs. SFO engagement with the private sector continues to be underpinned by its role as an enforcement agency, and not an advisory service, but the SFO makes efforts to build trust and relationships with corporates and lawyers in the private sector to, among other things, foster self-reports and cooperation.<sup>181</sup> The FCA has provided advice and guidance in the form of its 2015 Financial Crime Guide<sup>182</sup> and by publishing the results of thematic reviews that it has undertaken. The UK also reported that the Government is developing sector-specific guidance on resisting bribes with UK's Professional and Business Services Council Tax and Regulatory sub-group.

209. Overall, discussions with private sector representatives during the on-site visit demonstrated that the adoption of anti-corruption corporate compliance measures by companies in the UK is well advanced. The introduction of section 7 of the Bribery Act appears to have prompted substantial progress in this regard. Companies and business organisations spoke about highly developed, sector-specific compliance tools and programmes and a strong level of awareness generally. Other commentators described a growing market for compliance services.

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<sup>181</sup> E.g. Speech by Ben Morgan, SFO Joint Head of Bribery and Corruption, 15 September 2016, available at <https://www.sfo.gov.uk/2016/09/15/ben-morgan-global-investigations-review-live/>.

<sup>182</sup> Financial Conduct Authority, April 2015, Financial crime: a guide for firms, available at [https://www.handbook.fca.gov.uk/handbook/document/FC1\\_FCA\\_20150427.pdf](https://www.handbook.fca.gov.uk/handbook/document/FC1_FCA_20150427.pdf).

210. However, several representatives on-site called for clearer guidance, particularly with regard to determining adequate procedures for the purposes of section 7 of the Bribery Act. For example, one private sector participant suggested ISO37001 could be adopted by law enforcement as a benchmark, and another suggested the SFO publicise instances where it finds that adequate procedures are in place. In 2016, the All-Party Parliamentary Group (APPG) on Anti-Corruption found that “All UK businesses looking to export to markets where there is a high risk of bribery and corruption would benefit from the improved coordination and publication of existing government guidance. The current guidance could also be better framed specifically to match exporters’ needs.”<sup>183</sup> The SFO acknowledged calls for more guidance, but cautioned against moving towards a check-box approach, as it may risk undermining the quality of compliance measures or may create a false impression with regard to reliance on the defence of adequate procedures. While the business sector’s desire for greater certainty is understandable, there is indeed an inherent risk in promoting a check-box approach to compliance, and it is often difficult in practice for governments and law enforcement authorities to produce comprehensive guidance that can be widely relied on. The broad indicators in the existing guidance are a useful starting point on which greater understanding and clearer principles are likely to be built as case practice develops. As case law develops, publication by the SFO of instances where it finds that adequate procedures are in place should also be helpful in this regard.

211. The major gap in the UK's engagement with the private sector concerns its support of SMEs. In 2015 the Ministry for Justice and the Department for Business, Innovation and Skills published the findings of its consultation and survey on the impact of the Bribery Act on SMEs.<sup>184</sup> The survey involved 500 SMEs, 95% of which were exporting goods. It found that approximately two-thirds were aware of the Bribery Act, just over half did not have bribery prevention procedures in place, and only one quarter was aware of the Guidance to Commercial Organisations to Prevent Bribery.<sup>185</sup> Civil society has called on the Government to devote more time, energy and resources on awareness-raising for SMEs, particularly given that SMEs have fewer resources than larger companies to set up compliance procedures.<sup>186</sup> Similarly, the APPG found that support for SMEs is lacking and called for more tailored, accessible, strategically coherent and better integrated guidance for SMEs.<sup>187</sup> These calls echo the findings of the WGB in Phase 3, which issued recommendation 11 for the UK to continue its efforts to encourage companies, in particular SMEs, to develop internal control and compliance mechanisms.<sup>188</sup>

212. As discussed with several participants at the on-site visit, SMEs may face other challenges that are not as apparent for large multinational corporations. While these challenges are a horizontal issue across many WGB members, they are perhaps particularly acute in the UK context because of the specificities of the systems of corporate liability. These challenges include limited ability to find resources to defend foreign bribery charges. Furthermore, SMEs are arguably exposed to greater risk of law enforcement, since it is easier to establish the corporate liability of an SME under the

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<sup>183</sup> APPG on Anti-Corruption, 9 December 2016, “Reaching export 2020 with integrity”, p.1, available at <http://www.anticorruptionappg.org/reaching-export-2020-with-integrity-all-party-parliamentary-group-on-anti-corruption-report-on-anti-corruption-guidance-for-uk-exporters/>.

<sup>184</sup> Ministry of Justice, Insight into awareness and impact of the Bribery Act 2010, available at <https://www.gov.uk/government/publications/impact-of-the-bribery-act-2010-on-smes>.

<sup>185</sup> Ibid., p.39.

<sup>186</sup> See Bond Anti-Corruption Group [Submission to the OECD Working Group on Bribery Review team](#).

<sup>187</sup> APPG on Anti-Corruption, 9 December 2016, “Reaching export 2020 with integrity”, pp. 1 & 4-6, available at <http://www.anticorruptionappg.org/reaching-export-2020-with-integrity-all-party-parliamentary-group-on-anti-corruption-report-on-anti-corruption-guidance-for-uk-exporters/>.

<sup>188</sup> Phase 3, recommendation 11.

identification doctrine because the “directing mind of the entity” would usually be much easier to establish than in a vast, complex corporate structure. Similarly, SMEs could be more likely to “fail to prevent” bribery contrary to section 7 of the Bribery Act; indeed many SMEs still perceive the setting up of adequate procedures to prevent bribery as too burdensome. Civil society and lawyers at the on-site visit suggested this may unfairly disadvantage SMEs, notably because it exposes them to greater probability of mandatory or discretionary debarment for a criminal conviction under the Bribery Act. The UK considers that SMEs are no more likely than larger companies to fail to prevent bribery because the offence applies in accordance with the principle of proportionality – meaning an SME is not expected to have the same kind of sophisticated bribery prevention procedures as a larger company – but acknowledges that SMEs may perceive setting up adequate procedures as too burdensome. Civil society and lawyers at the on-site visit also urged law enforcement to resist any temptation to only pursue these easier targets and to be careful to also pursue major corporates and their senior officials. The sanctions imposed on Rolls-Royce since the on-site visit and the fact that the SFO is looking into allegations of foreign bribery involving other major household brand companies, including Airbus and GlaxoSmithKline, suggest the SFO is serious about pursuing major corporates and is not targeting only SMEs. Nevertheless, support from the UK Government to SMEs to better understand and develop adequate anti-corruption compliance is crucial.

### *Commentary*

*The lead examiners are encouraged by the efforts of various UK authorities to engage the private sector. They recognise that the adoption by UK companies of sophisticated corporate compliance measures to prevent bribery is advanced in the UK, and that section 7 of the Bribery Act appears to have had a significant positive influence in this regard. However, they are concerned that SMEs are being left behind, and recommend that the UK undertake further awareness-raising and produce more targeted guidance for SMEs on setting up compliance procedures. They consider that Phase 3 recommendation 11 concerning awareness-raising among SMEs remains partially implemented. To further assist the private sector, they recommend that the UK facilitate the publishing and dissemination of more targeted information for SMEs on setting up anti-bribery compliance measures to effectively prevent and detect foreign bribery.*

*The lead examiners further recommend that the WGB follow up to check what types of companies UK law enforcement authorities pursue in foreign bribery cases, to test whether there is sufficient focus on major corporates as well as SMEs.*



## D. OTHER ISSUES AFFECTING IMPLEMENTATION OF THE CONVENTION

### D.1. Tax-related measures

#### a. *Tax deductibility of bribes and enforcement*

213. In Phase 3, the WGB made one recommendation to Her Majesty's Revenues and Customs (HMRC) in relation to the non-deductibility of bribes.<sup>189</sup> Under recommendation 12(a), HMRC was recommended to proactively enforce the non-tax deductibility of bribe payments against defendants in past and future foreign bribery-related enforcement actions, including by systematically re-examining defendants' tax returns for the relevant years to verify whether bribes had been deducted. The recommendation was considered partially implemented at the time of the Phase 3 Written Follow-Up. At that time, HMRC stated that its policy was to review the tax returns of defendants in foreign bribery cases. However, there was no information that this was done in practice.

214. According to the UK, there has been no change in this area since the Phase 3 evaluation. When enforcement actions are concluded in the UK<sup>190</sup> or abroad, HMRC would re-examine the tax returns that have been filed by the defendant for the relevant period. If it is revealed that bribes had been deducted from income or corporation tax, HMRC would commence proceedings to recover the unpaid tax, interest, and any applicable penalty for submitting an incorrect or inaccurate return. During the on-site visit, representatives from HMRC were unable to provide specific details or numbers of cases but confirmed that when HMRC receives information that enforcement action has been taken in respect of a foreign bribery related offence, HMRC compliance staff responsible for the business will review their tax position for current and previous years and will take intervention action if appropriate. However, there is no evidence that this has ever occurred in practice. Despite repeated requests during this evaluation process, HMRC has been unable to provide information in this area. After the visit, HMRC stated that, due to the sensitive nature of the cases involved, it would be inappropriate to reveal examples of cases where HMRC has carried out enquiries into returns where bribery payments are suspected, even in an anonymised state. No aggregate figures on the number of such reopening were provided either. In addition, HMRC offered no examples of cases where it re-examined the tax returns of the individuals and corporations sanctioned for foreign bribery.

215. In light of information available, there is no evidence that HMRC proactively enforces the non-tax deductibility of bribe payments, and the reasons for such a situation are unclear. As the Working Group noted in the past, tax authorities should be informed of foreign bribery convictions so that tax audits can be systematically performed. HMRC confirmed that it is informed when the SFO initiates or concludes a foreign bribery enforcement action,<sup>191</sup> and it also indicated during the on-site visit that it can rely on a variety of information sources to guide its operations. HMRC representatives clearly stated that they rely on the law enforcement community to share any relevant information with

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<sup>189</sup> See Phase 3 report para. 160-163.

<sup>190</sup> Including on the context of DPAs.

<sup>191</sup> Phase 3 Report, para. 162.

them. After the visit, HMRC described the process in place for responding to information received about individuals and corporations sanctioned for foreign bribery cases.<sup>192</sup> HMRC also stated that it has an MOU in place with the SFO and others for sharing of information. However, no information is available on the use made of such a mechanism in foreign bribery cases, if any. Based on information available, it appears that HMRC continues to lack proactivity when it comes to re-assessing the tax returns of taxpayers convicted of foreign bribery.

216. One related question regarding tax deductibility concerns the possible deduction of financial sanctions and disgorgements. According to case law from 1999 provided by the UK authorities, fines and disgorgements which are punitive in nature are not deductible, as “*legislative policy would be diluted if the taxpayer were allowed to share the burden with the rest of the community by a deduction for the purposes of tax.*”<sup>193</sup> Furthermore, according to all DPAs approved to date, no tax reduction can be sought in relation to any payment by way of compensation, disgorgement or fine. The Rolls Royce DPA clarifies that this is the case, in the UK or elsewhere.

### *Commentary*

*The lead examiners remain concerned as to the effective enforcement of the non-deductibility of bribes in the UK, especially when bribery has been proven. There is no evidence that HMRC has yet entered into re-assessment of the tax returns of taxpayers convicted of foreign bribery. Phase 3 recommendation 12(a) therefore remains only partially implemented. HMRC should therefore engage, as a matter of priority, in a more proactive approach in enforcing the non-tax deductibility of bribe payments against the defendants in past and future foreign bribery enforcement actions, including by systematically re-examining defendants’ tax returns for the relevant years to verify whether bribes have been deducted. HMRC should also systematically collect information on the implementation in practice of its policy of re-examination of tax returns of individuals and corporations sanctioned for foreign bribery. Finally, the UK should ensure that the mechanisms in place for HMRC to be routinely informed of foreign bribery convictions are efficient and used in practice.*

#### *b. Detection and information sharing*

##### *i. Detection*

217. Phase 3 recommendation 12(a) also asked HMRC to examine why it had failed to detect proven cases of bribery. At the time of the Written Follow-Up, HMRC had not examined why it had failed to detect proven cases of bribery.

218. At the Phase 4 on-site visit, representatives from HMRC stated that tax inspectors have uncovered bribe payments during tax examinations but could not provide more information, including on what happened in these instances. According to HMRC, such information is not retained routinely or systematically. In practice, HMRC has not detected any foreign bribery cases yet. As indicated in

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<sup>192</sup> Where SFO (or any other law enforcement or government agency) has taken action and believes information is of worth to HMRC, they would provide an Intelligence Report to HMRC via the Risk and Intelligence Service, Intelligence Bureau. The RIS Intelligence Bureau reviews the Intelligence report and will disseminate the report to the relevant HMRC office e.g. Fraud Investigation Service, Large Business, Corporation Tax. At this stage, that particular directorate will review the intelligence received and decide whether they wish to pursue. If an enquiry is taken up, HMRC will check whether the company has claimed the bribe as an expense against tax, and may examine business records to see if other bribes have been paid. When the enquiry is concluded, HMRC will issue an amended tax assessment and will consider charging penalties.

<sup>193</sup> McKnight v Sheppard [1999] 71TC419.

the Phase 3 report, a useful method to improve detection, if it is confirmed that bribes have been deducted in the past, would be for HMRC to examine why it had failed to detect the bribes when the tax returns were initially filed. Such a review has not been conducted despite the explicit recommendation made to the UK in Phase 3.

219. The absence of detection by the tax authorities is concerning considering the functions of HMRC, which imply exposure to foreign bribery allegations and therefore a potential to regularly detect and report. This suggests a need for strengthened foreign bribery detection and reporting mechanisms within HMRC, along with greater cross-agency cooperation. As noted above, HMRC is not part of the 2014 MOU (and *de facto* of the Clearing House). The participation of HMRC in the Joint Financial Analytical Centre (JFAC) together with the SFO, the NCA and FCA is not only an opportunity to strengthen cross-agency intelligence gathering and exchange, but also to give HMRC a more integrated and active role in identifying and developing bribery and corruption cases.

220. As a way forward, HMRC should conduct a review of its methods and capacity to detect and report foreign bribery with the objective to identify areas for improvement.<sup>194</sup> The review to be conducted should assess in particular whether adequate guidance is provided to tax authorities as to the types of expenses that are deemed to constitute bribes to foreign public officials, and whether such bribes are effectively detected and reported by tax authorities. The review should be seen as a means of fostering HMRC's engagement in the fight against foreign bribery in the UK. In addition, training of tax inspectors targeting foreign bribery's detection should be conducted on a regular basis.

ii. *Sharing of tax information*

221. One recommendation also remains unimplemented since Phase 3 (and pending from Phase 2bis) concerning the sharing of information by HMRC. Recommendation 12(c) recommended that the UK impose an obligation on HMRC to provide information for use in foreign bribery-related investigations upon request, and to report suspicions of foreign bribery to the SFO.

222. HMRC's regime for sharing tax information has not changed since Phase 2bis<sup>195</sup>. HMRC may, but is not obliged to, disclose information for the purposes of assisting criminal investigations or proceedings whether in the UK or abroad. Secrecy laws do not bar disclosure.<sup>196</sup> HMRC may also make "public interest disclosures", *e.g.* disclosures "to a person exercising public functions, whether in the UK or abroad, for the purpose of preventing or detecting a crime".<sup>197</sup> At the on-site visit, HMRC representatives stated that the statutory "gateway" to enable information exchange between HMRC

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<sup>194</sup> This would fall in part under the requirement made to countries under the 2009 Recommendation (I. (ii)), to review on an ongoing basis, the effectiveness of their [...] practices for disallowing tax deductibility of bribes to foreign public officials.

<sup>195</sup> In Phase 2bis, the SFO stated that it could not use its powers under Section 2 of the CJA 1987 to demand information from other government agencies, including HMRC. Section 3(3) of the CJA 1987 only permits (but does not require) disclosure of information subject to statutory secrecy obligations (other than those in an enactment contained in the Taxes Management Act 1970). Phase 2bis Recommendation 5(b) thus asked the U.K. to take steps to ensure that the SFO can obtain information that may be relevant to a foreign bribery investigation and which is held by other U.K. government agencies.

<sup>196</sup> Anti-Terrorism, Crime, and Security Act 2001, Sections 19 and 20. See also "Anti-Terrorism, Crime and Security Act 2001: Code of Practice on the Disclosure of Information".

<sup>197</sup> HMRC Internal Disclosure Guide 46050 and 46250; Commissioners for Revenue and Customs Act 2005, Section 20; see also HMRC Internal Disclosure Guide 46300, Annex 2.

and the SFO (in the form of secondary legislation) is in place, and that appropriate information is being passed to the SFO.<sup>198</sup>

223. According to HMRC, intelligence and other information has been passed to law enforcement agencies (NCA and COLP) in respect of suspected bribery of foreign officials. These instances related to arms dealing in the Middle East and supply of naval vessels to a West African country. The COLP also stated that it has agreed gateways with agencies such as HMRC and has received and passed information and intelligence via those gateways. After the on-site visit, HMRC provided information on the number and type of information forwarded, upon request, to the SFO. According to HMRC, from April to October 2016, HMRC has received a total of 99 requests from the SFO, with some relating to ongoing foreign bribery investigations. It is unclear whether the HMRC responded to all of these requests. In addition, no information was made available on the number of suspicions of foreign bribery spontaneously sent by HMRC to the SFO.

### *Commentary*

*The lead examiners are concerned that HMRC, given its particular role and responsibilities, has been unsuccessful in detecting foreign bribery cases since the entry into force of the OECD Convention in the UK. The lead examiners therefore consider that Phase 3 recommendation 12(a) remains only partially implemented, and recommend that HMRC conduct as a matter of priority a comprehensive review of its methods and capacity to detect and report foreign bribery, including to examine why HMRC has failed to detect proven cases of foreign bribery. This process should be accompanied with regular training of tax inspectors on the detection of bribe payments disguised as legitimate allowable expenses.*

*The lead examiners further note that no measures have been taken to implement Phase 3 recommendation 12(c). They therefore recommend that the UK take immediate action to ensure that HMRC is able to provide information for use in foreign bribery investigations upon request and report suspicions of foreign bribery to the SFO.*

## **D.2. Export credits**

224. The UK's export credit agency (ECA), known at the time of Phase 3 as the Export Credits Guarantee Department, is now called UKEF (UK Export Finance). The evaluation team considered UKEF's policies to implement the 2006 Recommendation on Bribery and Officially Supported Export Credits (the 2006 Recommendation), some of which are very far-reaching. Pending Phase 3 recommendations were also discussed with UKEF during and following the Phase 4 on-site visit, and UKEF was very forthcoming in providing responses.

### ***a. UKEF's high standards to implement the 2006 Recommendation***

225. UKEF's policies go beyond several of the requirements of the 2006 Export Credit Recommendation, and showcase higher standards than many members of the OECD Export Credit Group. In particular, UKEF may be considered as following good-practice in the following key areas:

- **Broad definition of corrupt activities:** UKEF goes beyond "bribery of foreign public officials" to include commercial bribery and money laundering.

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<sup>198</sup> After the on-site visit, HMRC stated that the lawful basis for the exchange of information between HMRC and the SFO is section 19 Anti-Terrorism Crime and Security Act 2001. Under the MOU signed between the two authorities, HMRC's Intelligence Witness Statement Unit and the National Coordination Unit are able to exchange information with the SFO, as set out in section 19.

- UKEF requires applicants to provide a copy of their code of conduct and written procedures to discourage and prevent corrupt activities. This is in line with the 2009 Anti-Bribery Recommendation X.C.(vi) which recommends government agencies consider the existence of ethics and compliance measures in their decisions to provide support to companies.
- UKEF has the right to audit the records of the exporters that relate to obtaining the supply contract, including with regard to the agent’s details and adherence to the supplier’s code of conduct.
- Scope of due diligence: UKEF considers not only the applicant/exporter, but also joint venture/consortium partners, brokers, agents, buyers, borrowers, guarantors, beneficial owners, major shareholders and directors. It runs these parties through risk-management databases such as Thomson Reuters World-Check and the FCA’s FIN-NET.
- Details on the use of agents for all transactions are required, and any cases where the amount exceeds GBP 1 million or 10% of the contract value are referred to top management. This and the point above are indeed very relevant to the fight against foreign bribery since 70% of corrupt transactions are reported to occur through intermediaries – yet, many ECAs do not systematically consider these aspects.

226. UKEF also indicates that it attempts to ascertain whether local public procurement legislation has been observed, and whether the employment and payment of agents is legal in the buyer country. In this and other respects, UKEF makes use of UK overseas diplomatic missions.

227. The advanced policies developed by UKEF and their impact on exporters may be the reason behind the recent self-disclosure made by one of its clients to UKEF. In April 2016, Airbus reported to UKEF that it had discovered inaccuracies in applications for export support concerning the use of overseas agents. Under UKEF’s agent-related policies, Airbus had an obligation to report to UKEF if it became aware of any inaccuracies. Following this self-disclosure, UKEF referred this information to the SFO. As a result, the recent Airbus investigation by the SFO (see Annex 3) is one of the rare foreign bribery investigations across the 41 Convention countries to have been supported by reporting by an ECA to law enforcement. UKEF also reports it has “paused its support while the nature and extent of the issue is investigated and understood”, and liaised with the French and German ECAs, which have similarly paused export credit support for the company.<sup>199</sup>

***b. Reviewing conditions for providing support where foreign bribery is alleged – Implementation of Phase 3 recommendations and latest developments***

228. Although UKEF policies are quite far-reaching in some respect and go beyond the requirements of the 2006 Export Credit Recommendation, their application in practice raises some concern, not only in light of past foreign bribery cases considered in earlier Working Group evaluations, but also given more recent examples.

229. In Phase 3, the WGB made two recommendations relating to prevention of bribery through export credits, both of which were outstanding recommendations from Phase 2bis, and both of which were considered still not implemented at the time of the Phase 3 Written Follow-Up.<sup>200</sup> They related to the much-debated BAE Al Yamamah case.<sup>201</sup> During Phase 4, UKEF underlined that the facts of the situation that arose in relation to the Al Yamamah case have not been repeated since. Furthermore, the

<sup>199</sup> See <https://www.theguardian.com/business/2016/aug/07/uk-office-launches-inquiry-into-airbus-deals>

<sup>200</sup> Phase 3 recommendations 13(a) and (b).

<sup>201</sup> Phase 3, paras 214-216 and Phase 3 Written Follow-Up Report, para. 15.

support to BAE in relation to the Al Yamamah contract had been discontinued. This was not as a result of the evidence transmitted by the SFO, nor of the Working Group's Phase 2bis and Phase 3 recommendations, but simply due to the supply contract being completed. No changes to the internal rules or policies have been brought about to address similar situations.

230. More recently, questions have been raised by civil society as to how active UKEF has been in investigating contracts or denying support in respect of suspect transactions.<sup>202</sup> One such question relates to the *Smith and Ouzman* case, in relation to a contract to export ballot papers to Kenya. At the time that the UKEF support was given in January 2013, Smith and Ouzman were under investigation by the SFO for corruption, and had been since October 2010. Furthermore, in January 2013, the same month UKEF gave support, a court case was launched in Kenya by competitors alleging that procurement rules had been breached, as reported in media articles at the time.<sup>203</sup> UKEF indicates that the specific contract supported by UKEF was not amongst those that were found to have been corruptly won, that it had no knowledge of ongoing investigations in the UK or Kenya, that media reports only appeared after UKEF had issued an offer to Smith and Ouzman and that the UKEF risks on the transaction in question expired before the final conviction in December 2014. Nevertheless, suspicions about the company's conduct over the same period could have alerted the export credit agency to undertake enhanced due diligence even after the contract was granted. UKEF is also providing export credit support to several companies under ongoing investigations in the UK and abroad, in connection with contracts involved in a major bribery and corruption scandal in another country Party to the Convention.<sup>204</sup> In most of these cases, there has been an admission that bribes were paid, although not all cases are finalised. In spite of this, UKEF did not refuse, suspend or withdraw support.<sup>205</sup> UKEF indicates that, in one case, it did not have information about the agent who admitted to paying bribes for the UK company – a statement which, again, raises questions on the application in practice of its anti-bribery measures, since UKEF reports that it requires the details on the use of agents for all transactions. UKEF also explains that its due diligence in respect of one of the companies indicates that the company in question has been transparent in its efforts to reform and implement greater financial transparency. In the other two related instances, UKEF reports having discussed with the companies and that it “continues to monitor the position.” With respect to Airbus, although the coordination between UKEF and the SFO has been exemplary, the fact that it was Airbus that self-reported initially again raises the question as to why the due diligence measures on agents, which appear very advanced on their face, did not pick up the anomaly. Media reports published after the on-site visit show greater activity on UKEF's part following the conclusion of the Rolls Royce DPA. In February 2017, UKEF reportedly opened an internal inquiry to establish whether the Rolls-Royce fraudulently obtained financial support.<sup>206</sup> For certain civil society commentators this may be “a key test of how robust UKEF's anti-corruption procedures are and how willing UKEF is to enforce them”.<sup>207</sup>

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<sup>202</sup> See Bond Anti-Corruption Group [Submission to the OECD Working Group on Bribery Review team](#)

<sup>203</sup> <http://www.standardmedia.co.ke/article/2000074590/iebc-grapples-with-court-case-over-tender-to-supply-ballot-papers>

<sup>204</sup> This has been picked up by civil society and the media. See in particular Bond Anti-Corruption Group [Submission to the OECD Working Group on Bribery Review team](#).

<sup>205</sup> In responses to the [2015 Survey on Measures Taken to Combat Bribery in Officially Supported Export Credits](#), UKEF does not report any instance where it has decided not to provide or to suspend or withdraw support.

<sup>206</sup> See <https://www.theguardian.com/business/rollsroycegroup>

<sup>207</sup> See <https://www.theguardian.com/business/2017/feb/05/rolls-royce-faces-civil-service-inquiry-over-uk-state-funding>

## Commentary

*The lead examiners welcome the advanced policies developed by UKEF that, in some instances, go beyond the requirements of the 2006 Recommendation on Bribery and Officially Supported Export Credits. They consider the recent self-reporting by a company to UKEF, and the subsequent report by UKEF to the SFO, to be a positive consequence of such policies and their impact on UKEF-supported exporters.*

*However, the lead examiners question how effective UKEF policies are in practice. They note that, in spite of its advanced disclosure requirements, UKEF has never itself detected foreign bribery committed by exporters – even though some of the companies receiving support have subsequently admitted that bribery had occurred in relation to UKEF-supported contracts, nor has UKEF turned down an application from an exporter following due diligence on its agents. They recommend that UKEF undertake a comprehensive review of its policies to identify how they could better be applied in practice to enable detection of foreign bribery. Where appropriate, UKEF should make vigorous use of all its powers, including its audit powers, to carry out due diligence with a view to refusing, suspending or withdrawing support, if applicable.*

*Finally, with respect to pending Phase 3 recommendations 13(a) and (b), the lead examiners consider that, in the absence of similar instances such as the one under consideration in Phase 3, these recommendations no longer merit follow up.*

### D.3. Promoting foreign bribery enforcement abroad

#### a. Initiatives to prevent and enforce foreign bribery globally

228. In its Phase 4 responses, the UK highlights a number of initiatives to improve foreign bribery enforcement globally. These include:

- *Country-specific initiatives in:*
  - Sri-Lanka – the SFO seconded two officials to Sri Lanka to build capacity in the Sri Lankan Bribery Commission and other police institutions. Key Sri Lankan law enforcement officials also attended training seminars in London. To further this initiative, the FCO and SFO developed a two-year anti-corruption programme, in coordination with Australia, Canada, the EU and the US.
  - Singapore – the SFO reports a strong bilateral relationship with Singapore, in particular with the Corrupt Practices Investigations Bureau, Attorney General’s Chambers and Commercial Affairs Department, and has seconded an SFO official to spend time with each of these agencies, notably with a view to facilitating engagement between the SFO and these agencies. Likewise, Singapore law enforcement officials have been seconded to the SFO.
  - Scotland reports exchanges with law enforcement officials from many countries, including, most recently, Japan and Pakistan.

- Participation in *networks*:
  - International Foreign Bribery Taskforce – the UK participates actively in this transborder agreement to combat foreign bribery, made up of specialised investigators from Australia, Canada, the UK and the US. The taskforce provides a platform for police experts to share knowledge, skills, methodologies and case studies. Its last meeting was held in May 2016 in Ottawa.
  - Global Law Enforcement Network – The inaugural meeting in December 2015 was funded by the FCO and chaired by the SFO Director, David Green. This was the first and only forum that brought together over 100 law enforcement practitioners from all regions of the world (50 countries) to share best practices and learning on modern and effective enforcement methods and practices with a specific focus on investigating and prosecuting complex corruption crimes.
  - Working Group on Bribery – In addition to participation of the UK – alongside the 41 other countries – in the quarterly meetings of the Working Group, the SFO Director, David Green, made a presentation at the [March 2016 Ministerial Meeting of the WGB](#). The SFO also regularly attends the bi-yearly meetings of the WGB Law Enforcement Network, and David Green was appointed as its Chair in June 2016.
  - Economic Crime Agencies Network (ECAN) is a high-level global network of law enforcement organisations, primarily involved in the investigation and prosecution of complex, cross-border economic crimes, including bribery and corruption. In addition to the SFO and the City of London Police, members include law enforcement authorities from Australia, Hong Kong China, Indonesia, Malaysia, New-Zealand, Nigeria, Singapore and the USA, as well as the European Anti-Fraud Office (OLAF), the European Commission.

**b. *How UK ODA contributes to foreign bribery enforcement***

229. There are no pending recommendations from earlier WGB reviews concerning the provision of official development assistance (ODA). However, as the UK has developed specific ODA policies which contribute directly to tackling foreign bribery and corruption, both from within the UK and in foreign countries, these deserve to be highlighted in the context of the tailored-approach envisaged under Phase 4.

230. The UK is a significant contributor of ODA, 86% of which is administered by the Department for International Development (DFID).<sup>208</sup> The UK is one of only six Development Assistance Committee (DAC) members to have met the UN target of committing 0.7% of its Gross National Income (GNI) to ODA. In 2015, the UK provided USD 18.7 billion in net ODA, which represented 0.71% of GNI and a 3.2% increase in real terms from 2014. It is the sixth largest DAC provider in terms of ODA as a percentage of GNI, and the second largest by volume. All of the UK's ODA (excluding administrative costs and in-donor refugee costs) was untied in 2014 (as well as in 2012 and 2013), compared to a DAC average of 80.6%.<sup>209</sup>

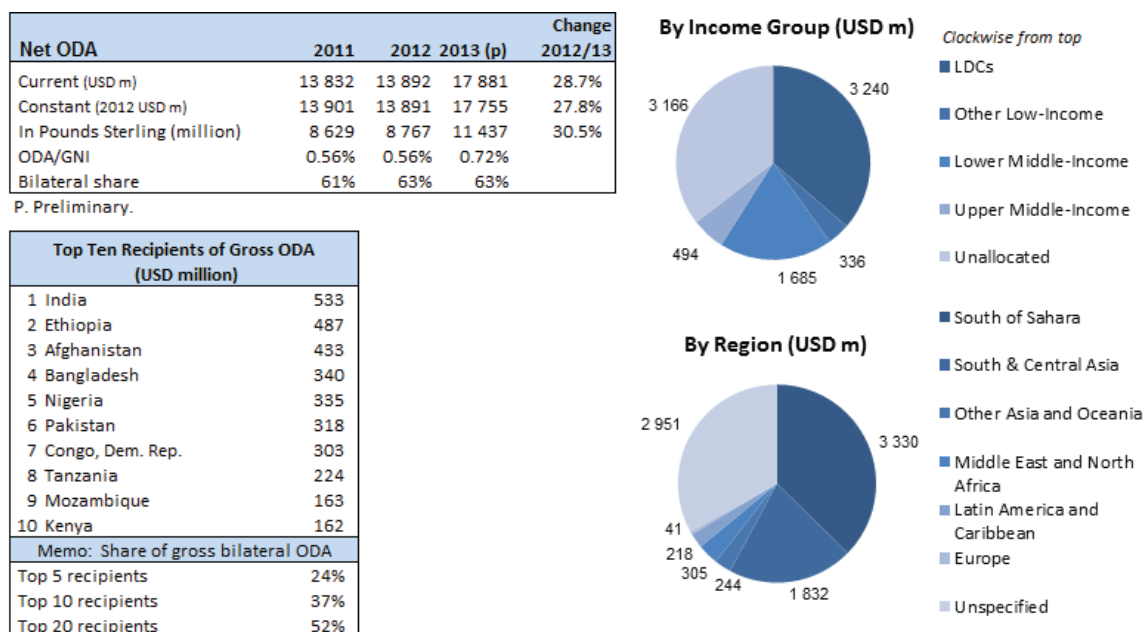
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<sup>208</sup> See UK Department for International Development, Statistics on International Development 2015: [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/482322/SID2015c.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/482322/SID2015c.pdf)

<sup>209</sup> See OECD (2014), [OECD Development Co-operation Peer Reviews: United Kingdom 2014](#), OECD Development Co-operation Peer Reviews, OECD Publishing.



Figure 8. UK ODA at a glance



Source: OECD – DAC; [www.oecd.org/dac/stats](http://www.oecd.org/dac/stats)

231. In response to the recommendation of the 2010 DAC peer review, the UK stepped up its cross-government approach to tackling both the supply and demand sides of corruption, both at home and abroad.

*i. Tackling corruption, including foreign bribery, from the UK*

231. In its Development Cooperation Review of the UK, the DAC (and other observers) welcomed the UK’s case-by-case approach to policy coherence for development. This is particularly true in the area of anti-corruption, where the Cabinet has engaged strategically and where DFID has successfully promoted deeper joint efforts with other government departments to prevent bribery and help partner countries recover stolen assets (see above section B.5.f on international asset recovery).

232. ODA funding for UK law enforcement – Most notably, and rather uniquely, DFID started engaging with UK law enforcement authorities in 2006 to strengthen their capacity to work more systematically on corruption occurring outside of the UK. To this end, DFID began providing funding to the Proceeds of Corruption Unit within the Metropolitan Police Service to investigate cases of money laundering by foreign politically exposed persons in the UK, and to the Overseas Anti-Corruption Unit (OACU) within the City of London Police to investigate cases of foreign bribery by UK companies.<sup>210</sup> The creation of the OACU in particular was very helpful to the SFO at its inception, as it worked exclusively on foreign bribery cases. However, after a change in its funding structure, the OACU could only be relied on in foreign bribery cases when the bribed official was from a developing country. Cases involving developed countries’ officials had therefore to be drawn from the COLP Economic Crime Department, and compete for resources with investigations of other types of economic crime.<sup>211</sup> Responsibility for investigating foreign bribery offences was transferred

<sup>210</sup> For a more detailed description, see “[Making development assistance work at home: DfID's approach to clamping down on international bribery and money laundering in the UK.](#)”

<sup>211</sup> See Phase 3 Report, para. 137.

from the OACU into the newly established NCA ICU, whose primary focus will continue to be foreign bribery taking place in developing countries. This naturally has an impact on the extent to which the NCA may be involved in foreign bribery cases (see section B.2 above).

ii. *Helping address corruption in recipient countries*

233. The DAC notes: “It is positive that the UK focuses not only on protecting its own investments, but also on supporting partner countries in protecting their national resources, strengthening their financial management systems and recovering stolen assets.”<sup>212</sup> In recipient countries, the DAC review expresses appreciation for the UK for its systematic and robust analyses of the different types of corruption risks, which has helped strengthen its approach to corruption.

234. Positive achievements to be noted include:

- Guidance produced for DFID staff on fighting corruption and fraud;
- A proactive approach by the Internal Audit Department, and efforts to ensure UK aid is not lost to corruption managed by a Counter Fraud Unit within DFID. Through this mechanism, five reports have been forwarded from DFID’S Counter Fraud Unit to the NCA in the past year, although it is unclear whether any of these reports relate to foreign bribery and/or have led to investigations and prosecutions;
- Anti-corruption strategies have been developed in each priority country, following recommendations from an Independent Commission for Aid Impact. In particular, an external firm conducts pre-grant due diligence which includes reviewing the anti-bribery policies and procedures of organisations selected for DFID grants, and a review of business practices has helped strengthen anti-fraud measures across DFID programmes;
- DFID and the World Bank have signed an MoU to undertake joint investigations and develop new ways to prevent fraud and corruption in their projects and support anti-corruption efforts of recipient governments;
- DFID country offices have the latitude to select the channel that will be the most efficient for delivering a specific programme. For instance, in Nigeria, a resource-rich, middle income country with endemic corruption, DFID does not provide funds to government; 75% of the programme is delivered through private sector companies, 20% by multilateral organisations and 5% by civil society organisations. In Nepal, one-third of the programme is delivered through the government, one-third through private contractors, and one-third through multilateral organisations and CSOs. At the same time, DFID tries to transfer knowledge and build national institutions.

235. Furthermore, the UK has developed general principles with respect to providing compensation to victim governments or countries as part of the resolution of foreign bribery cases in the UK. This is carried out in coordination between the law enforcement agencies as well as DFID, FCO and HM’s Treasury. In practice, compensation has been provided as a result of the conclusion of four foreign bribery cases (see section B.5.f above).

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<sup>212</sup> See OECD (2014), [OECD Development Co-operation Peer Reviews: United Kingdom 2014](#) at p. 19.

## CONCLUSION: POSITIVE ACHIEVEMENTS, RECOMMENDATIONS AND ISSUES FOR FOLLOW-UP

236. The Working Group welcomes the important steps taken by the UK in recent years to become a major enforcer of the foreign bribery offence among the Working Group countries. The UK has demonstrated a strong anti-corruption drive, especially in 2016 with the organisation of the Anti-Corruption Summit and announcement of several major legislative reforms. The Working Group looks forward to seeing these efforts brought to fruition, and hopes they can further enhance enforcement of foreign bribery and related offences. Nevertheless, the Group is concerned that enforcement could be weakened through the continuing questions that remain over the SFO's existence and role in foreign bribery cases, and that some of the elements that put the UK most at risk of foreign bribery are not being sufficiently addressed in the current framework, including with respect to detection through anti-money laundering measures, and the role played by the Crown Dependencies and Overseas Territories.

237. Regarding outstanding Phase 3 recommendations, the Working Group regrets that very limited progress has been accomplished to implement these since the UK's Written Follow-Up in 2014. Although the UK has fully implemented recommendations 5(d) and 10(a), recommendations 1(a), 5(c), 11 and 12(a) remain partially implemented and recommendations 2(a) and (b), 6(c), 8(a) and (b), 9(b), 12(c), and 13(a) and (b) remain unimplemented. These partially and unimplemented Phase 3 recommendations are reflected below in the Phase 4 recommendations to UK.

### Positive achievements and good practices

238. Throughout this report, several good practices and positive achievements by the UK have been identified, which have proved effective in combating bribery of foreign public officials and enhancing enforcement.<sup>213</sup> In particular, the "Clearing House" mechanism, through which foreign bribery cases are regularly discussed, supports stronger and more efficient cooperation and information exchange among the key agencies that play a role in the detection, investigation and prosecution of foreign bribery cases. The integrated law enforcement approach (or "Roskill model") within the SFO further enables the pooling of a wide range of expertise – including prosecutors, investigators, forensic accountants, and other specialists – from the law enforcement community, which is particularly valuable to the investigation and prosecution of complex economic and financial crime such as foreign bribery. Furthermore, the high priority given to foreign bribery cases and the pragmatic approach taken by the SFO with respect to many aspects of foreign bribery investigations and prosecutions has contributed to the significant increase in enforcement in the UK. This includes the development of an intelligence unit within the SFO, the effective approach taken regarding foreign bribery cases involving multiple jurisdictions, including relying on JITs, and the use of DPAs as an effective feature for incentivising self-reporting by companies and resolving foreign bribery cases against legal persons. Finally, the SFO sets a good standard by publishing clear and comprehensive information about concluded cases.

239. The UK's positive achievements also relate to certain aspects of detection of foreign bribery. The UK was at the forefront in developing model whistleblower protection legislation in the 1990s, and elements of the *Public Interest Disclosure Act 1998* continue to constitute good practices in this

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<sup>213</sup> In defining the parameters for Phase 4, the Working Group agreed that Phase 4 evaluations should also reflect good practices and positive achievements which have proved effective in combating foreign bribery and enhancing enforcement. See [Phase 4 Monitoring Guide](#).

field, although the Working Group notes that its application in practice may pose problems. The recently reformed SFO reporting portal – which enables the SFO to treat whistleblower reports as confidential sources of information – has been effective in increasing the quality of reports in foreign bribery cases. The UK also deserves credit for enhancing the reporting mechanisms for British embassies. Finally, the tracking system developed to streamline and improve the management of MLA requests, and to maintain more detailed and comprehensive statistics, constitutes a successful feature that facilitates international cooperation in foreign bribery cases.

240. In conclusion, based on the findings in this report, the Working Group makes the recommendations set out in Part 1 below. The Working Group will also follow-up on the issues identified in Part 2 below. The Working Group invites the UK to submit a written report on the implementation of these recommendations and issues for follow-up in two years (i.e. in March 2019). The Working Group also invites the UK to provide detailed information on its foreign-bribery enforcement actions when it submits this report.

## **Recommendations of the Working Group on Bribery to the United Kingdom**

### **Recommendations regarding detection of foreign bribery**

1. Regarding whistleblower protection, the Working Group recommends that the UK:
  - a) Proceed with its intention expressed in the 2014 Anti-Corruption Action Plan to review whistleblowing provisions with a view to their possible improvement [2009 Recommendation IX and X.C.v]; and
  - b) Raise public awareness of the utility of whistleblower reports in finalised cases with a view to bolstering the confidence of potential whistleblowers in the value of their reports [2009 Recommendation IX and X.C.v].
2. Regarding detection of foreign bribery through anti-money laundering reporting measures, the Working Group recommends that the UK:
  - a) Implement the announced reform of the UKFIU through the adoption of the Criminal Finances Bill and adopt further reforms of the UKFIU and the reporting regime, with a view to ensuring that detection of foreign bribery through suspicious activity reports is improved [Convention, Article 7; 2009 Recommendation III.i and IX.i]; and
  - b) Raise awareness among reporting professions, including non-financial professions, about red flags that may indicate foreign bribery [Convention, Article 7; 2009 Recommendation III.i].
3. Regarding enhancing detection of foreign bribery through other sources, the Working Group recommends that the UK:
  - a) Consider ways to further mobilise UK agencies with particular potential for detecting foreign bribery committed by UK companies operating abroad [2009 Recommendation III, and IX.ii]; and
  - b) Ensure that existing sources of foreign bribery allegations (including in the media and the WGB matrix) are properly exploited in due time by the competent authorities [Convention Article 5; 2009 Recommendation V and Annex I D].

## **Recommendations regarding enforcement of the foreign bribery offence**

4. Regarding investigation and prosecution of foreign bribery, the Working Group recommends that the UK:
  - a) Develop, and regularly review, the necessary mechanisms to ensure that all credible allegations of foreign bribery with a connection to the UK are promptly and fully assessed by competent law enforcement agencies [Convention Article 5; 2009 Recommendation XIII and Annex I D];
  - b) Where the UK does not take enforcement action on a foreign bribery case because another country is investigating or prosecuting the case, ensure the matter remains under review with a view to running a UK investigation or prosecution if necessary [Convention Article 4(3) and 2009 Recommendation XIII]; and
  - c) Review on a regular basis the SFO case acceptance policy to ensure that it achieves expected results, i.e. that the SFO follows up all the allegations that fall under its remit, in accordance with its capacities and resources [Convention Article 5; 2009 Recommendation XIII and Annex I D].
5. Regarding the interagency cooperation in foreign bribery cases, the Working Group recommends that the UK:
  - a) Maintain the SFO's role in criminal foreign bribery-related investigations and prosecutions as a priority [Convention Article 5; Phase 3 recommendation 7a];
  - b) Ensure law enforcement authorities from England and Wales as well as those in Scotland are appropriately involved in mechanisms for sharing of information on foreign bribery cases, such as the MOU and/or the Clearing House [Convention Article 5];
  - c) Consider including other relevant agencies such as Her Majesty's Revenue and Customs and the UK financial intelligence unit in mechanisms for sharing of information on foreign bribery cases, such as the MOU and/or the Clearing House [Convention Articles 5 and 7 and 2009 Recommendation V and VIII]; and
  - d) Ensure the FCA, where appropriate, considers the opportunity of conducting co-ordinated enforcement actions with the SFO, and the imposition of administrative sanctions for companies for failure to guard against bribery under the FSMA in foreign bribery cases [Convention Articles 3, 5 and 8].
6. Regarding resources for foreign bribery enforcement, the Working Group recommends that the UK:
  - a) Ensure the SFO's core budget is sufficient to allow the SFO to adequately and independently carry out its role [Convention Article 5]; and
  - b) Provide the NCA ICU with specialised foreign bribery training and adequate resources to enable it to efficiently carry out foreign bribery investigations and to effectively support foreign bribery prosecutions conducted by the CPS [Convention Article 5].

7. Regarding the independence of investigation and prosecution of foreign bribery, the Working Group recommends that the UK:
  - a) Ensure that Article 5 of the Convention is clearly binding on investigators, prosecutors (including in Scotland), the Attorney General and the Lord Advocate at all stages of a foreign bribery investigation or prosecution [Convention, Article 5; Phase 3 recommendation 8(a)];
  - b) Raise awareness among all relevant parts of the government of the duty to respect the principles in Article 5 of the Convention, so that they can assist investigators and prosecutors to act in accordance with that Article [Convention, Article 5; Phase 3 recommendation 8(b)];
  - c) Ensure that the use of Shawcross exercises in foreign bribery cases is publicised and transparent, as the circumstances permit [Convention, Article 5]; and
  - d) Ensure sufficient safeguards are in place regarding the appointment and dismissal of the SFO Director [Convention, Article 5].
8. Regarding the conclusion of foreign bribery cases, the Working Group recommends that:
  - a) UK law enforcement authorities, particularly in Scotland, exercise considerable caution in deciding whether to resolve foreign bribery cases through civil settlements to ensure cases result in effective, proportionate and dissuasive sanctions [Convention Articles 3, 5; Annex I D];
  - b) Scotland consider adopting a scheme comparable to the DPA scheme in the UK to overcome the weaknesses apparent in civil settlements and to achieve consistency across the UK with regard to the tools available to law enforcement authorities for the resolution of foreign bribery cases [Convention Article 3, 5; Annex I D];
  - c) The UK ensure that court sentencing remarks and judgments in foreign bribery cases are routinely published and available [Convention Article 3, 5; 2009 Recommendation III.i]; and
  - d) The UK ensure that legal persons are subject to confiscation and/or other financial sanctions, as appropriate, in foreign bribery cases [Convention Article 3; Annex I D].
9. Regarding sanctions through public procurement measures, the Working Group recommends that the UK:
  - a) Consider adopting a systematic approach to allow contracting authorities to easily access information on companies or individuals sanctioned for foreign bribery, including companies sanctioned through court orders, DPAs and other settlements [Convention, Article 3(4); 2009 Recommendation XI.i; Phase 3 recommendation 6(c)]; and
  - b) Provide suitable training and guidance to contracting authorities on mandatory and discretionary exclusion of economic operators including with regard to companies convicted under section 7 of the Bribery Act. [Convention, Article 3(4); 2009 Recommendation XI.i; Phase 3 recommendation 6(c)]
10. Regarding international cooperation, the Working Group recommends that the UK improve the tools available to measure MLA performance, to systematically gather information on the actual

amount of time taken to execute incoming MLA requests in relation to foreign bribery and related offences [Convention Article 9(1)].

11. Regarding UK Crown Dependencies and Overseas Territories, the Working Group recommends that the UK:
  - a) Proactively engage with the Overseas Territories to accelerate and finalise the extension of the Convention to the Overseas Territories that have not yet ratified it [Convention, Article 1];
  - b) Work in collaboration with the Crown Dependencies and Overseas Territories to enforce the Convention, including by ensuring appropriate resources, training, expertise and capacity to investigate and prosecute foreign bribery and related offences [Convention, Article 5 and Annex I D];
  - c) Regularly review, in collaboration with the Crown Dependencies and Overseas Territories, the status of enforcement of the foreign bribery and related offences, and promote any corrective measures or actions, where necessary [Convention, Article 5 and Annex I D];
  - d) Extend, as a matter of priority, the jurisdiction of the Bribery Act to legal persons incorporated in the Crown Dependencies and Overseas Territories, or ensure in any other way that legal persons incorporated in the CDs and OTs can be held liable for foreign bribery [Convention, Article 4(2); Phase 2bis recommendation 3(b); and Phase 3 recommendation 9(b)];
  - e) Review, in collaboration with the Crown Dependencies and Overseas Territories, their institutional framework and arrangements to respond to international cooperation requests [Convention Article 9 and 2009 Recommendation XIII]; and
  - f) Compile, in collaboration with the Crown Dependencies and Overseas Territories, relevant MLA statistics, with a view to identifying any obstacle or difficulty in delivering international assistance by such Territories in foreign bribery cases, and to possibly providing support for any necessary corrective measure [Convention Article 9(1)].

### **Recommendations regarding liability of, and engagement with, legal persons**

12. Regarding liability of legal persons, the Working Group recommends that the UK:
  - a) Clarify in the Guidance to Commercial Organisations “reasonable and proportionate” hospitality and promotional expenditure, and to note that certain examples in the Guidance represent a high risk of bribery [Convention, Articles 1, 2 and 5; 2009 Recommendations VI and X.C.i.; Phase 3 recommendation 2(a)]; and
  - b) Clarify in the Guidance the significance of indirect benefits for the purpose of determining liability under section 7 of the Bribery Act [Convention, Articles 2 and 5; Phase 3 recommendation 2(b)].
13. Regarding engagement with the private sector, the Working Group recommends that the UK:
  - a) Raise awareness of the Guidance to Commercial Organisations among SMEs that have overseas operations [2009 Recommendation X.C., and Annex II]; and

- b) Facilitate the publishing and dissemination of more targeted information for SMEs on setting up anti-bribery compliance measures to effectively prevent and detect foreign bribery [2009 Recommendation X.C., and Annex II].

### **Recommendations regarding other measures affecting implementation of the Convention**

14. Regarding tax-related measures, the Working Group recommends that the :

- a) Ensure Her Majesty's Revenue and Customs (HMRC) engages in a more proactive approach in enforcing the non-tax deductibility of bribe payments against the defendants in past and future foreign bribery enforcement actions, including by systematically re-examining defendants' tax returns for the relevant years to verify whether bribes have been deducted [2009 Recommendation, VIII.i; 2009 Tax Recommendation; Phase 3 Recommendation 12(a)];
- b) Ensure that the mechanisms in place for HMRC to be routinely informed of foreign bribery convictions are efficient and used in practice [2009 Recommendation, VIII.i; 2009 Tax Recommendations];
- c) Collect data on instances where HMRC re-examines tax returns of individuals and corporations sanctioned for foreign bribery [2009 Recommendation, VIII.i; 2009 Tax Recommendations];
- d) Ensure HMRC conducts as a matter of priority a comprehensive review of its methods and capacity to detect and report foreign bribery, including to examine why HMRC has failed to detect proven cases of foreign bribery [2009 Recommendation, VIII.i; 2009 Tax Recommendation; Phase 3 Recommendation 12(a)];
- e) Provide regular training to tax inspectors on the detection of bribe payments disguised as legitimate allowable expenses [2009 Recommendation, VIII.i; 2009 Tax Recommendations]; and
- f) Ensure that there is an adequate framework in place which enables HMRC to provide information for use in foreign bribery investigations upon request, and report suspicions of foreign bribery to the SFO [2009 Recommendation, VIII.i; 2009 Tax Recommendation; Phase 3 Recommendation 12(c)].

15. Regarding export finance credit, the Working Group recommends that UKEF:

- a) Undertake a comprehensive review of its policies to identify how they could be better applied in practice to enable detection of foreign bribery [Convention Article 3(4); 2009 Recommendation XI.i. and 2006 Export Credit Recommendation]; and
- b) Where appropriate, take a firmer stance against exporters and applicants engaging in corrupt behaviour, by making vigorous use of all its powers, including its audit powers, to carry out due diligence with a view to refusing, suspending or withdrawing support if applicable [Convention, Article 3(4); 2009 Recommendation XI.i; 2006 Export Credit Recommendation].



## Follow-up issues

16. The Working Group will follow up as case law and practice develop with regard to the following issues:
- a) Implementation by the UK Crown Dependencies and Overseas Territories of beneficial ownership registers for companies, including the adequacy and accuracy of the beneficial ownership information kept on those registers, and automatic rights of access to the registries by UK law enforcement authorities [Convention Articles 5 and 7 and Annex I D];
  - b) The manner in which the UK “Persons with Significant Control” register, and similar registers developed in the UK Crown Dependencies and Overseas Territories, are relied on in practice in cases of foreign bribery and related offences [Convention Articles 5 and 7 and Annex I D];
  - c) Whether natural persons are effectively prosecuted for foreign bribery by the SFO [Convention Articles 3, 5];
  - d) Whether Scotland makes public all relevant details about finalised foreign bribery cases, including information about the value of the bribe and advantage received, natural and legal persons involved, and the location and time of offending [Convention Article 3, 5; 2009 Recommendation III.i];
  - e) The use of DPAs in foreign bribery cases to evaluate in particular (i) the application of the public interest factor, and (ii) the effective, proportionate and dissuasive character of sanctions imposed in that context, notably the reductions granted in the absence of self-reporting [Convention Articles 3 and 4 and Annex I D];
  - f) The assurance provided by the SFO to Rolls-Royce in the context of its DPA, to ensure that the company does not escape liability for any additional foreign bribery not covered by the DPA, and whether similar assurances are given in the context of future settlements [Convention Article 5; Annex I D];
  - g) Whether confiscation continues to be effective in foreign bribery cases, in light of concerns raised regarding the UK’s capacity to freeze and confiscate the proceeds of crime more generally [Convention Article 3(3)];
  - h) Implementation of the new features and arrangements concerning the “forum bar” to extradition [Convention Article 10];
  - i) The ability of the Crown Dependencies and Overseas Territories to provide MLA to the UK and to other Parties to the Convention [Convention Article 9 and 2009 Recommendation XIII];
  - j) Developments regarding Brexit to review its possible impact on the UK’s foreign bribery enforcement, in particular in relation to international cooperation arrangements with EU countries [Convention Article 9 and 2009 Recommendation XIII];
  - k) The application in practice of the written law exception in Section 6 of the Bribery Act [Convention Articles 1, 2; Phase 3 recommendation 14(a)].
  - l) The ongoing work looking at the UK’s response to economic crime, to assess whether and how it may affect foreign bribery detection, investigation and prosecution.

## Annex 1: Phase 3 Recommendations as of 2014 Written Follow-Up

Recommendations of the Working Group in Phase 3		<i>Written follow-up</i> <sup>*</sup>
<b>Recommendations for ensuring effective investigation, prosecution and sanctioning of foreign bribery</b>		
1.	With respect to <u>facilitation payments</u> , the Working Group recommends that the UK:	
	a) co-ordinate its approach to facilitation payment cases to ensure a coherent approach across the SFO, CPS and other UK prosecuting agencies, such as the Scottish Crown Office and Procurator Fiscal Office, as well as use a consistent definition of facilitation payments in its published guidance including the JPG, GCO and Quick Start Guide (Convention Article 5; 2009 Recommendation VI, X.C.i);	<i>Partially implemented</i>
	b) develop firm criteria for assessing whether companies are moving towards a “zero tolerance” policy within a reasonable timeframe (Convention Article 5; 2009 Recommendation VI, X.C.i).	<i>Fully implemented</i>
2.	With respect to the <u>Guidance to Commercial Organisations (GCO)</u> , the Working Group recommends that the UK:	
	a) concerning hospitality and promotional expenditures, (i) clarify the significance of “reasonable and proportionate” in the GCO, including the reference to industry norms; and (ii) amend the GCO to note that certain examples represent a high risk of bribery (Convention Articles 1, 5; 2009 Recommendation, X.C.i);	<i>Not implemented</i>
	b) clarify the significance of indirect benefits in determining whether persons may be an “associated person” under section 7 of the Bribery Act (Convention Articles 2, 5).	<i>Not implemented</i>
3.	With respect to <u>investigation and prosecution</u> , the Working Group recommends that the UK:	
	a) ensure that the Bribery Act applies equally to joint ventures that were created before and after the entry into force of the Act (Convention Article 5);	<i>Fully implemented</i>
	b) continue prosecuting both natural and legal persons in a foreign bribery-related case whenever appropriate (Convention Article 5);	<i>Fully implemented</i>
	c) consider removing the reference in the Code for Crown Prosecutors to mandatory exclusion from EU public procurement contracts (Convention Article 5).	<i>Fully implemented</i>
4.	Regarding the <u>attribution and assignment of cases</u> , the Working Group recommends that:	
	a) the UK update the 2008 Memorandum of Understanding to clarify attribution rules for Scotland and to account for the Bribery Act’s broader jurisdictional rules (Convention Article 5);	<i>Fully implemented</i>
	b) where appropriate, the SFO and FSA conduct co-ordinated enforcement actions, and consider seeking criminal and/or civil sanctions in addition to FSA penalties (Convention Articles 3, 5, 8(2)).	<i>Fully implemented</i>
5.	With respect to the <u>settlement of cases</u> , the Working Group recommends that the UK:	
	a) reconsider the SFO’s policy of systematically settling self-reported foreign bribery cases “civilly wherever possible”, and ensure that self-reported cases result in effective, proportionate, and dissuasive sanctions (Convention Articles 3, 5; 2009 Recommendation, IX.i);	<i>Fully implemented</i>

<sup>\*</sup> The right-hand column sets out the findings of the Working Group on Bribery on the UK’s written follow-up report to Phase 3, considered by the Working Group in June 2014.

<b>Recommendations of the Working Group in Phase 3</b>		<b><i>Written follow-up</i></b>
5.	b) amend the SFO's Approach to Dealing with Overseas Corruption to distinguish between cases reported directly by the company prior to investigation, and cases where a company admits guilt after the commencement of an investigation (Convention Article 5; 2009 Recommendation, IX.i);	<i>Fully implemented</i>
	c) make public, where appropriate and in conformity with the applicable rules, as much information about settlement agreements as possible, including on the SFO's website (Convention Articles 1, 3, 8);	<i>Partially implemented</i>
	d) avoid entering into confidentiality agreements with defendants that prevent disclosure of information to the public about case resolutions (Convention Articles 3, 8);	<i>Partially implemented</i>
	e) establish clear procedures and criteria for communicating with companies which clearly distinguish between companies seeking advice and those that self-report wrongdoing, as well as make public (where appropriate and in conformity with the applicable procedural rules) in a more detailed manner sufficient information to increase transparency of written advice and provide guidance to companies and decisions not to prosecute in cases of self-reported misconduct (Convention Article 5);	<i>Fully implemented</i>
	f) ensure that its settlements agreements (i) explicitly reserve the right to provide MLA, and (ii) are not overbroad, including by explicitly reserving the right to prosecute the defendant for conduct unknown to the UK authorities at the time of the settlement (Convention Articles 3, 5, 9(1)).	<i>Fully implemented</i>
6.	With respect to <u>sanctions</u> , the Working Group recommends that the UK:	
	a) regarding corporate monitors, (i) provide guidance on when and on what terms the UK authorities would seek a monitor; (ii) make public where appropriate the monitoring agreement, the reasons for imposing a monitor, and the basis for the scope and duration of the monitoring; and (iii) ensure that breaches of monitoring agreements result in effective sanctions (Convention Article 3);	<i>Fully implemented</i>
	b) ensure that (i) payments of reparations and compensation to foreign countries by defendants are not lost to corruption; and (ii) plea and settlement agreements impose further specified sanctions if defendants fail to make the required payments by a specified deadline (Convention Article 3);	<i>Fully implemented</i>
	c) regarding public procurement, (i) consider undertaking a systematic approach to allow relevant agencies to easily access information on companies sanctioned for corruption such as through the establishment of a national debarment register; (ii) train public contracting authorities to carry out this due diligence more effectively, including by checking for any convictions of the tenderer awarded the contract; and (iii) make available on the Cabinet Office's website guidance on excluding economic operators, including factors to be considered in deciding whether to exclude a company convicted under Section 7 of the Bribery Act (Convention Article 3(4); 2009 Recommendation, XI.i).	<i>Not implemented</i>
7.	With respect to <u>resources and priority</u> , the Working Group recommends that the UK:	
	a) maintain the SFO's role in criminal foreign bribery-related investigations and prosecutions as a priority (Convention Article 5);	<i>Fully implemented</i>
	b) ensure that other government departments assume a greater responsibility in assisting companies to prevent corruption (Convention Article 5);	<i>Fully implemented</i>
	c) ensure that SFO and police resources for foreign bribery-related cases are adequate (Convention Article 5).	<i>Partially implemented</i>

Recommendations of the Working Group in Phase 3		Written follow-up
8.	With respect to <u>Article 5 of the Convention</u> , the Working Group recommends that the UK:	
	a) take steps to ensure that Article 5 is clearly binding (though not necessarily through legislation) on investigators, prosecutors (including Scotland), the Attorney General and the Lord Advocate at all stages of a foreign bribery-related investigation or prosecution, and in respect of all investigative and prosecutorial decisions (Convention Article 5);	<i>Not implemented</i>
	b) ensure that all relevant parts of the government are fully aware of their duty to respect the principles in Article 5, so that they can assist investigators and prosecutors to act in accordance with that Article (Convention Article 5).	<i>Not implemented</i>
9.	With respect to <u>Crown Dependencies (CDs) and Overseas Territories (OTs)</u> , the Working Group recommends that the UK:	
	a) promptly adopt a roadmap setting out specific goals, concrete steps, deadlines, and the provision of technical assistance for implementing the Convention in the OTs (Convention Article 1);	<i>Fully implemented</i>
	b) extend jurisdiction of the Bribery Act to legal persons incorporated in the CDs and OTs (Convention Article 4(2)).	<i>Not implemented</i>
10.	With respect to measures for <u>mutual legal assistance (MLA)</u> , the Working Group recommends that the UK:	
	a) produce more detailed statistics on formal MLA requests received, sent and rejected, so as to identify more precisely the proportion of those requests that concern foreign bribery (Convention Article 9(1));	<i>Partially implemented</i>
	b) ensure, where possible, that pending MLA requests are not adversely affected by the UK's conclusion of its own investigations.	<i>Fully implemented</i>
<b>Recommendations for ensuring effective prevention and detection of foreign bribery</b>		
11.	With respect to <u>awareness-raising</u> , the Working Group recommends that the UK continue its efforts, in co-operation with business associations, to encourage companies in particular SMEs to develop internal control and compliance mechanisms; raise awareness of the FSA's foreign bribery-related enforcement actions, the UK Corporate Governance Code, and the FSA's Listing Principles (2009 Recommendation X.C., and Annex II).	<i>Partially implemented</i>
12.	With respect to <u>tax-related measures</u> , the Working Group recommends that the UK:	
	a) ensure that Her Majesty's Revenues and Customs (HMRC) proactively enforces the non-tax deductibility of bribe payments against defendants in past and future foreign bribery-related enforcement actions, including by systematically re-examining defendants' tax returns for the relevant years to verify whether bribes had been deducted, and examining why HMRC failed to detect proven cases of bribery (2009 Recommendation, VIII.i; 2009 Tax Recommendations);	<i>Partially implemented</i>
	b) strengthen HMRC's training and awareness-raising programmes for tax examiners to detect, prevent and report foreign bribery (2009 Recommendation, VIII.i; 2009 Tax Recommendations);	<i>Fully implemented</i>
	c) ensure that HMRC is obliged to provide information for use in foreign bribery-related investigations upon request and report suspicions of foreign bribery to the SFO (2009 Recommendation, VIII.i; 2009 Tax Recommendations);	<i>Not implemented</i>
	d) ensure that the SFO continues to share information on foreign bribery-related enforcement actions with HMRC (2009 Recommendation, VIII.i; 2009 Tax Recommendations).	<i>Fully implemented</i>

**Recommendations of the Working Group in Phase 3**

<b>Recommendations of the Working Group in Phase 3</b>		<i>Written follow-up</i>
13.	Regarding <u>export credits</u> , the Working Group recommends that Export Credits Guarantee Department (ECGD):	
	a) in any case where a criminal investigation into a transaction supported by ECGD has been blocked for reasons other than on the merits, make vigorous use of all of its powers, including notably its audit powers, to investigate whether the transaction involves foreign bribery (Convention Article 3(4); 2009 Recommendation, XI.i);	<i>Not implemented</i>
	b) review its general contracting policies for future transactions to address policy issues raised by cases that cannot be investigated by criminal law enforcement authorities (Convention Article 3(4); 2009 Recommendation, XI.i).	<i>Not implemented</i>

**Follow-up by the Working Group**

14. The Working Group will follow up the issues below as case law and practice develops:
- a) the following matters under the Bribery Act and associated guidance: facilitation payments; hospitality payments; the written law exception; corporate liability; and the interpretation of “carries on a business or part of a business, in any part of the United Kingdom” (Convention Articles 1, 2; 2009 Recommendation, VI);
  - b) legislative and other efforts concerning plea negotiations, civil settlements, deferred prosecution agreements and plea agreements (Convention Article 5);
  - c) impact of the National Crime Agency on the UK’s priority, co-ordination, resources and framework for investigating and prosecuting foreign bribery-related cases (Convention Article 5);
  - d) impact of the UK’s disclosure framework on the enforcement of foreign bribery-related offences (Convention Articles 3, 5);
  - e) whistleblower protection to determine if whistleblowers who report in good faith and on reasonable grounds are protected under the Public Interest Disclosure Act (PIDA) (2009 Recommendation, IX, X.C.v);
  - f) implementation of the “forum” bar to extradition (Convention Article 10).

## Annex 2: List of participants in Phase 4 on-site visit to the UK

### UK Government representatives, ministries and agencies

- Attorney General Office
- Cabinet Office
- Crown Commercial Service
- Department for Business, Energy & Industrial Strategy
- Foreign and Commonwealth Office
- HM Revenues and Customs
- 
- HM Treasury
- Home Office
- Ministry of Justice
- Ministry of Defence
- Rt Hon Sir Eric Pickles MP, Prime Minister's Anti-Corruption Champion
- UK Central Authority
- UK Export Finance

### Law enforcement authorities, regulators and judiciary

- City of London Police
- Crown Office and Procurator Fiscal Service (Scotland)
- Crown Prosecution Service
- Financial Conduct Authority
- Ministry of Defence Police
- National Crime Agency
- Police Service Scotland
- Serious Fraud Office
- Southwark Crown Court

### Overseas Territories and Crown Dependencies

- British Virgin Islands
- Cayman Islands
- Gibraltar
- Guernsey
- Isle of Man
- Jersey

### Private Sector

#### *Private enterprises*

- BAE
- Balfour Beatty
- Barclays
- BDO
- BNP Paribas
- Citi
- Dechert
- Deloitte
- Freshfields
- Grant Thornton
- HSBC
- KPMG
- Norton Rose Fulbright
- Pinset Mason
- PWC
- Rio Tinto
- Simmons and Simmons
- Standard Chartered
- Santander
- Thales Group
- Vodafone

#### *Business associations*

- British Bankers Association
- Federation of Small Businesses
- Institute of Directors
- International Chamber of Commerce
- International Forum on Business Ethical Conduct for the Aerospace and Defence Industry

#### *Civil society and journalists*

- Catholic International Development Charity
- Corruption Watch
- Global Witness
- Private Eye
- Publish What You Pay
- Transparency International

#### *Academia*

- University of London
- University of Wolverhampton

### Other

All-Party Parliamentary Group on Anti-Corruption

## Annex 3: Ongoing foreign bribery investigations and prosecutions

### *Investigations*

The UK explained that it has a number of ongoing foreign bribery investigations at the pre-charge stage (not including the allegations that are under preliminary assessment), some of which law enforcement authorities have announced publically and others for which confidentiality should be maintained to preserve the integrity of the investigation.

#### *SFO*

- *Airbus* – In August 2016, the SFO announced that it has opened a criminal investigation into allegations of fraud, bribery and corruption in the civil aviation business of Airbus Group in relation to irregularities concerning third party consultants.
- *ENRC Ltd* – In September 2014, the SFO announced that it is conducting a criminal investigation into ENRC Ltd (previously ENRC PLC). The investigation is focused on allegations of fraud, bribery and corruption around the acquisition of substantial mineral assets. The SFO has multiple investigations in relation to this matter.
- *Glaxo Smith Kline (GSK)* – In May 2014, the SFO announced that it is conducting a criminal investigation into the commercial practices of GSK and its subsidiaries.
- *GPT Special Project Management* – In August 2014, the SFO announced that it is conducting a criminal investigation into allegations concerning GPT and aspects of the conduct of its business in the Kingdom of Saudi Arabia.
- *Rolls Royce* – In September 2014, the SFO announced that it is conducting a criminal investigation into allegations of bribery and corruption at Rolls-Royce. The SFO has multiple investigations in relation to this matter, some of which were resolved in January 2017 by DPA between the SFO and the legal persons involved (as described in the report). Investigations into the natural persons involved are ongoing.
- *Unaoil* – In July 2016, the SFO announced it is conducting a criminal investigation into the activities of Unaoil, its officers, its employees and its agents in connection with suspected offences of bribery, corruption and money laundering.
- The UK has at least seven additional ongoing foreign bribery investigations at the pre-charge stage; the details of which are confidential.

#### *NCA/CPS*

- *Money laundering case* – the NCA is leading an investigation in relation to corruption in Nigeria. The case is primarily a money laundering case but foreign bribery is also being assessed in the investigation.

#### *COLP/CPS*

- *Vessels case* – In January 2015, the COLP commenced an investigation in relation to bribery of officials in Western Europe and West Africa in relation to the sale of naval vessels.

#### *Scottish authorities*

- *LA Recruitment* – Scottish authorities are investigating this company in relation to business dealings in the Middle East. Although the investigation is ongoing, the employees of the company have also been charged (see prosecutions below).

### *Ongoing prosecutions*

#### *SFO*

- *Alstom* – The SFO has three separate prosecutions against Alstom group companies: Alstom Power, Alstom Network and a second prosecution against Alstom Network. The SFO has also charged 7 natural persons in connection with this case (Nicholas Reynolds, Johannes Venskus, Robert Hallett, Graham Hill, Jean-Daniel Laine, Michael Anderson and Terence Watson). The defendants have been charged under the pre-Bribery Act legislation. The SFO alleges that from 2000-2010 Alstom committed bribery in Hungary, India, Poland, Lithuania and Tunisia which led to the award of valuable contracts in the transport and power sectors in several countries.
- *FH Bertling* – The SFO has charged FH Bertling and 7 natural persons (Peter Ferdinand, Marc Schweiger, Stephen Emler, Joerg Blumberg, Dirk Juergensen, Giuseppe Morreale, and Ralf Peterson) under the pre-Bribery Act legislation in connection with payments made to secure a freight forwarding contract in Angola in 2005.
- *Griffiths Energy International* (civil case) – The SFO’s role in this case follows from a prosecution of a Canadian oil and petroleum company formerly known as Griffiths Energy International (GEI) by Canadian authorities in 2013. In the Canadian proceedings, the company pleaded guilty to corruption charges regarding payments made to promote its interests in developing two oil blocks in Chad. In 2014, the SFO took steps to freeze GBP 4 400 000 contained in a UK bank account which represented the proceeds of sale of shares in GEI, alleged to be the proceeds of corruption. The appellant challenged the SFO’s freezing order and, on 23 January 2017, the Court of Appeal ruled in favour of the SFO. The SFO is pursuing the civil recovery order in this case.
- *Sarclad* – The SFO has charged 2 natural persons (Adrian Leek and Michael Sorby) under the pre-Bribery Act legislation in connection with payments made from 2004-2012 to officials in various overseas jurisdictions. The natural persons are awaiting trial.

#### *Scotland*

- *LA Recruitment* – Scottish authorities have charged 2 natural persons, both directors of the company, under the Bribery Act in connection with payments made to officials in the Middle East concerning taxation liability.



## Annex 4: Abbreviations and acronyms

AG	Attorney General	MDP	Ministry of Defence Police
AML	anti-money laundering	MER	mutual evaluation report (FATF)
APPG	All-Party Parliamentary Group	MLA	mutual legal assistance
BEIS	Department for Business, Energy and Industrial Strategy	MOD	Ministry of Defence
BVI	British Virgin Islands	MOJ	Ministry of Justice
CDs	Crown Dependencies	MOU	memorandum of understanding
COPFS	Crown Office and Procurator Fiscal Service (Scotland)	NCA	National Crime Agency
COLP	City of London Police	NCA ICU	NCA International Corruption Unit
CPS	Crown Prosecution Service	NGO	non-governmental organisation
DFID	Department for International Development	OACU	Overseas Anti-Corruption Unit (City of London Police)
DPA	Deferred Prosecution Agreement	ODA	official development assistance
DPP	Director of Public Prosecutions	OECD	Organisation for Economic Cooperation and Development
ECGD	Export Credit Guarantee Department (renamed UKEF)	OTs	Overseas Territories
EUR	euro	PIDA	Public Interest Disclosure Act 1998
FATF	Financial Action Task Force	POCA	Proceeds of Crime Act 2002
FCA	Financial Conduct Authority	PSC	persons with significant control
FCO	Foreign Commonwealth Office	SAR	suspicious activity report
FIU	Financial Intelligence Unit	SFO	Serious Fraud Office
FSMA	Financial Services and Markets Act 2000	SME	small- and medium-sized enterprise
GBP	pound sterling	UK	United Kingdom of Great Britain and Northern Ireland
GCO	Guidance to Commercial Organisations (Bribery Act)	UKCA	UK Central Authority
HMRC	Her Majesty's Revenues and Customs	UKEF	UK Export Finance
JIT	Joint Investigation Team	USD	United States dollar
JPG	Joint Prosecution Guidance of the Director of the Serious Fraud Office and the Director of Public Prosecutions	WGB	Working Group on Bribery in International Business Transactions

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