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LEGAL COMMENTARY

'HOW WELL ARE WE DOING?' THE UNITED KINGDOM AND ITS IMPLEMENTATION OF THE OECD ANTI-BRIBERY CONVENTION

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1. INTRODUCTION

The Organisation for Economic Cooperation and Development (OECD) *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions* (the OECD Convention) entered into force on 15 February 1999. As at 31 May 2017, there were 41 State Parties (the Parties) comprising the thirty-five OECD member countries and six non-member countries. [1] The United Kingdom (UK) ratified the Convention in 1998. The OECD Convention is supplemented by the *Revised Recommendations of the Council of the OECD on Combating Bribery in International Business Transactions* (the 2009 Recommendations),[2] Annex I of which contains "Good Practice Guidance on Implementing Specific Articles of the Convention."

In March 2017, the OECD Working Group on Bribery in International Business Transactions (the WGB) published its Phase 4 Report on the United Kingdom's implementation of the OECD Convention (Phase 4 Report).[3] Having provided a short background section on the scope of the OECD Convention and the role of the WGB, the following section will review some of the key recommendations contained in the Phase 4 Report. In the final section, an assessment is made as to how well the UK is doing with regard to the implementation of its OECD Convention obligations.

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[1] Argentina, Brazil, Bulgaria, Colombia, the Russian Federation and South Africa. These countries are home to 95 of the largest 100 non-financial multinational enterprises and all the top 50 financial multinationals. Together they cover 64% of global outbound flows of foreign direct investment and over 50% of the world's exports: OECD *Fighting the Crime of Foreign Bribery* (OECD, Paris 2015) 3.

[2] Adopted by the Council on 26 November 2009.

[3] OECD, *Implementing the OECD Anti-Bribery Convention: Phase 4 Report, United Kingdom* (OECD, Paris 2017) <https://www.oecd.org/daf/anti-bribery/unitedkingdom-oecdanti-briberyconvention.htm> accessed 10 June 2017.

2. THE SCOPE OF THE OECD CONVENTION AND THE ROLE OF THE WGB

The OECD Convention is wholly concerned with bribery on the supply side. Thus Article 1 requires Parties to establish that it is a criminal offence for:

> …any person intentionally to offer, promise or give any undue pecuniary advantage or other benefit … to a foreign public official … in order to obtain or retain business or other improper advantage in the conduct of international business.[4]

As regards enforcement, Article 5 of the Convention states that:

> Investigation and prosecution of the bribery of a foreign public official … shall not be influenced by considerations of national economic interest, the potential effect upon relations with another State or the identity of the natural or legal persons concerned.

Article 3 provides that sanctions are to be "effective, proportionate and dissuasive."

Given the transnational nature of the offence, Parties to the OECD Convention are required to provide "to the fullest extent possible" prompt and effective mutual legal assistance.[5] Article 12 provides for a systemic monitoring and follow-up procedure. The purpose of monitoring is to:

> Ensure compliance with the Convention and implementation of the 2009 Recommendations. Monitoring also provides an opportunity to consult on difficulties in implementation and to learn from the experiences of other countries.

In order to enhance its effectiveness, "Monitoring must be systematic and provide a coherent assessment of whether a participant has implemented the Convention and 2009 Recommendations."[6]

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[4] In addition, Parties are required to introduce a series of accounting offences (Article 8) and to make the bribery of a foreign public official a predicate offence for the purpose of the application of its money laundering legislation (Article 7).
[5] Article 9.
[6] OECD, *Monitoring Implementation of the OECD Anti-Bribery Convention: Phase 4 Evaluation Procedures* (OECD, Paris 2016) para 5.

The monitoring is carried out by representatives of the Parties. The WGB publishes all its country reports and a Party has no right to veto the final report or the WGB recommendations.

The monitoring/review process has been divided into a series of "Phases" and all Parties have been subject to three rounds of review. Phase 4 was launched in 2016.[7] Phase 1 and Phase 2 reviews concentrated on assessing compliance by Parties with their responsibilities to have in place appropriate anti-corruption measures and legislation. The focus of the Phase 3 review included assessing progress made by Parties on addressing weaknesses identified in Phase 2 and enforcement efforts and results. Following each review of the UK, the WGB made a series of recommendations for improving the implementation of the Convention. However, not all of these have been complied with satisfactorily. For example, the Phase 3 evaluation in 2012 made 35 recommendations. The level of implementation was then evaluated in 2014 and it was found that 18 recommendations had been implemented. However, 7 had been partially implemented and there had been no implementation of 9 other recommendations.[8] These were re-visited in the Phase 4 review.

The Phase 4 Review focuses the progress made by Parties on weaknesses identified in previous evaluations; enforcement efforts and results; and any issues raised by changes in the domestic legislation or institutional framework of the Parties.[9] The UK is one of the first countries to be reviewed. The review itself was undertaken by WGB lead examiners from Norway and South Africa. They met with government officials, representatives from law enforcement agencies, including the Serious Fraud Office as well as representatives from a range of leading civil society organisations, the media and private sector organisations.

3. THE PHASE 4 REPORT

The following analysis of the Phase 4 Report focuses on seven key areas:

1. The independence of the Serious Fraud Office
2. Extension of the foreign bribery offence in the Crown Dependencies and Overseas Territories
3. Detection of foreign bribery offences
4. Identifying the beneficial ownership of companies
5. Multiple prosecutions in foreign bribery cases
6. The Bribery Act 2010 and the Ministry of Justice Guidance

[7] This is scheduled to take place between 2016 and 2024.
[8] For details see Phase 4 Report, Annex 1.
[9] See (n 6) 5.

7. The potential impact of Brexit.

1. The Independence of the Serious Fraud Office

The importance of maintaining the independence of specialised agencies involved in the investigation and prosecution of bribery cases is widely recognised and is a requirement in the United Nations Convention Against Corruption (UNCAC).[10]

In this regard, the Serious Fraud Office (SFO) is the leading UK law enforcement agency in the investigation and prosecution of foreign bribery cases.[11] Established in 1987, it has had a somewhat chequered history albeit in recent years it has obtained some notable successes[12] with the WGB lead examiners stating that "the SFO's record testifies to its independence and capacity to seriously investigate and prosecute foreign bribery allegations."[13] The independence and work of the SFO was thus a key area for consideration by the WGB lead examiners who raised several areas of concern.

i) SFO Funding

The general position regarding funding of such agencies is set out in Annex 1, paragraph D) to the 2009 Recommendations. This states that:

> Member countries should provide adequate resources to law enforcement authorities so as to permit effective investigation and

[10] Article 36 of the UNCAC provides that such a specialised agency "shall be granted the necessary independence … to be able to carry out its functions effectively and without undue influence." The UK became a party to the UNCAC in 2006. Paragraph 6 of the Annex to the 1999 Revised Recommendation states that "…public prosecutors should exercise their discretion independently, based on professional motives." Curiously, this was omitted in the 2009 Recommendation.

[11] As the Phase 4 report puts it: "A plethora of law enforcement agencies with potential competence in foreign bribery cases, but one essential actor: the SFO" 28.

[12] For example, in 2017 it secured the two largest criminal settlements in English legal history: £497,250,000 plus £13 million in costs from Rolls-Royce and £128,992,500 plus costs from Tesco: see, Bill Waite, 'Bill Waite: The SFO ain't Broke, so don't fix it…' (*The FCPA Blog*, 31 May 2017) <www.fcpablog.com/blog/2017/3/31/bill-waite-the-sfo-aint-broke-so-dont-fix-it.html#sthash.i7bOvSmt.dpuf> accessed 15 June 2017.

[13] Phase 4 Report, Commentary, 42.

> prosecution of bribery of foreign public officials in international business transactions.

However, in several previous reports the WGB had drawn attention to the lack of adequate funding of the SFO and this issue is highlighted once again in the Phase 4 Report. The issue concerning "blockbuster funding" is of particular concern. This is additional funding which the SFO may seek to obtain from HM Treasury on an annual basis for the purposes of investigating large or complex cases. The WGB lead reviewers noted that according to the Crown Prosecution Service Inspectorate:

> 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.[14]

This is hardly the point for any such ad hoc arrangement is liable to be subject to (or run the risk of being perceived as subject to) political interference. As a Transparency International report asserts:

> …the Serious Fraud office's budget remains a significant concern as it continues to be under-funded, and approval of supplementary funding needed for its functioning gives the UK government, effectively, a power of veto regarding which cases the office can take on, compromising its independence.[15]

The need to provide adequate and secure financial resources for the SFO without the need for it to go cap in hand to the Government for additional funding is reflected in the relevant recommendation in the Phase 4 Report:

> …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

[14] Phase 4 Report, para 100.

[15] Transparency International, *Exporting Corruption Progress Report 2015: Assessing Enforcement of the OECD Convention on Combating Foreign Bribery* (Transparency International, London 2015) 7.

> executive over law enforcement. The lead examiners believe that this risk exists and should be addressed.[16]

This is certainly an area that the WGB will need to keep under review.

ii) *Tenure of the SFO Director*

The independence of such agencies is further enhanced by providing senior officials with security of tenure. Yet in the case of the SFO the Director's contract can be of any duration and can be terminated by the Attorney General at any time. This was the subject of criticism by the WGB in its Phase 2 *bis* report in 2008 although it noted that draft legislation was pending to amend the conditions under which the Attorney-General may appoint and remove the Director of the SFO. Not surprisingly, in the WGB lead examiners expressed concern that such legislation was still awaited.[17]

The response of the UK to such concern was that it was 'inconceivable in practice' that an Attorney-General would dismiss the Director following a disagreement about the investigation of a case.[18] The lead examiners rightly did not accept this view and considered 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.[19]

This criticism is welcome. The SFO only investigates the most serious cases involving allegations of foreign bribery and these will often involve matters of the most sensitive political and economic nature. The effective enforcement of the Convention is dependent upon States adhering strictly to their obligation under Article 5 of the Convention.

Not surprisingly the lead examiners recommend that this is an issue that the WGB should continue to follow up on.[20]

iii) The Future of the SFO

It is disappointing that the UK continually fails to address the valid criticisms of the WGB concerning the SFO. The independence of

[16] Phase 4 Report, Commentary, 42.
[17] Ibid para 98.
[18] Ibid.
[19] Ibid Commentary, 42.
[20] Ibid para 133.

investigators and prosecutors can only be assured if they demonstrably have the right to exercise their discretion independently and enjoy adequate ring-fenced resources. The current ad hoc approach is unacceptable.

However, of greater concern is the future of the SFO itself. The WGB lead examiners recommended that the UK maintain the SFO's role in criminal foreign bribery-related investigations and prosecutions pointing out that the integrated approach (the 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."[21] It remains to be seen whether the pre-General Election pledge in May 2017 by the Prime Minister to merge the SFO with the National Crime Agency (NCA) will be carried out. This is a matter that raises very serious concerns not least because the NCA is directly responsible to the Secretary of State for Home Affairs and accordingly the prospect of potential or actual political interference in the investigation and prosecution of foreign bribery cases. No doubt the WGB will take a very active interest in what is a clear threat to the effective implementation of the Convention, and Article 5 in particular.

2. Extension of the Foreign Bribery Offence in the Crown Dependencies and Overseas Territories

Since the Phase 1 review in 1999, the WGB has consistently recommended that the UK extend the OECD Convention to the Crown Dependencies (CDs) and Overseas Territories (OTs). This recommendation was reviewed by the WGB lead examiners during their on-site visit.

The CDs comprise the Isle of Man, Jersey and Guernsey whilst there are 14 OTs including the key off-shore jurisdictions of the British Virgin Islands, Cayman Islands and Gibraltar. The financial services industry in each is the main contributor to their economies.[22] As emphasised in the Phase 4 Report the:

[21] Ibid Commentary, 33.

[22] It is noted in para 49 of the Phase 4 Report that "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."

> …attractiveness of [the United Kingdom's] financial sector, combined with close links to off-shore centres [i.e. the CDs and OTs], expose the UK to significant risks of corruption and foreign bribery-related money laundering.[23]

Further, that the "misuse of corporate vehicles, trusts and foundations registered in the [CDs and OTs] is seen as a significant barrier to tackling money laundering, corruption and asset recovery."[24]

The constitutional relationship between the UK and the CDs/OTs is curious. The UK remains responsible for their defence and foreign relations. However, they are not part of the United Kingdom, have the power to enact local legislation and are each responsible for executing mutual legal assistance and extradition requests within their own jurisdictions. Whilst the UK has the power to ratify international conventions on their behalf, in practice, the CDs and OTs are able to decide as to which treaties they wish to become a Party.[25]

In this regard, the WGB lead examiners highlight several areas of progress:

> Firstly, the Convention has been ratified in the three CDs and three key OTs (British Virgin Islands, Cayman Islands and Gibraltar) with work continuing in another four territories;
>
> Secondly, for the first time, representatives of the CDs, the British Virgin Islands, Cayman Islands and Gibraltar actively participated in the on-site visit;
>
> Thirdly, that the UK was monitoring the implementation of the Convention in the CDs and OTs in law and, in practice, is providing assistance to assist them in strengthening their capacity to investigate and prosecute foreign bribery.

It has taken the UK a number of years to reach this position but the recommendation of the WGB lead examiners that the Convention is to be extended to all the OTs is realistic and ever more likely.[26]

3. Detection of Foreign Bribery Offences

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[23] Phase 4 Report, 9.
[24] Ibid.
[25] Ibid para 54.
[26] See below as regards the sharing of beneficial ownership information between the UK and the CDs/OTs.

The Phase 4 Report highlights the significant progress made by the UK in the development of more effective mechanisms for the detection of foreign bribery offences.

i) Self-reporting by Companies

The introduction of deferred prosecution agreements (DPAs) has provided an opportunity for companies to self-report their involvement in foreign bribery cases.[27] Indeed according to the UK authorities, this has become a major source of detection of foreign bribery.[28] DPAs were introduced by section 45 and Schedule 17 of the Crime and Courts Act 2013 (CCA 2013). A DPA enables a body corporate, a partnership or an unincorporated association to avoid prosecution for a bribery-related case by entering into an agreement on negotiated terms with a prosecutor. A court is then required to approve the DPA in an open hearing giving a reasoned judgment.[29] The SFO has issued the *Deferred Prosecution Agreements Code of Practice* (the SFO Code of Practice) which states that the failure of a company to "notify prosecutors within a reasonable time of the offending conduct coming to light" is seen as a factor in favour of prosecution rather than the entering into a DPA.[30] Further, "considerable weight may be given to a genuinely proactive approach adopted by the [company's] management team when the offending is brought to their notice."[31] The element of self-reporting by the company is therefore central to the DPA mechanism and, as the Phase 4 Report puts it, "a suspect corporate must generally provide significant cooperation with law enforcement, including proactive self-reporting, to be entitled to seek a DPA…"[32]

The issue of self-reporting is explored in some detail in the Phase 4 Review through a consideration of the first DPA cases. The first DPA was entered into with Standard Bank in November 2015. Here the case arose as

[27] See John Hatchard, 'Combating the Bribery of Foreign Public Officials and the 'Art of Persuasion': The Case of Alstom and the Energy Sector' (2016) 28 Denning Law Journal 109.
[28] Phase 4 Report, para 21.
[29] For a detailed discussion on DPAs see C Nicholls, T Daniel, A Bacarese, J Maton and J Hatchard, *Corruption and Misuse of Public Office* (3rd edn, OUP 2017) para 8.44 et seq (hereafter Nicholls et al).
[30] SFO Code of Practice, para 2.8.1.
[31] Ibid para 2.8.2.
[32] Phase 4 Report, 16.

the result of a report made by Standard Bank's solicitors to the Serious and Organized Crime Agency. Having determined that there was sufficient evidence to charge Standard Bank with failing to prevent bribery contrary to section 7 of the Bribery Act 2010, the SFO determined that the public interest was likely to be met by a DPA and in *SFO v Standard Bank PLC* this was approved in the Crown Court by Sir Brian Leveson P.[33]

However, the approval of a DPA by Sir Brian Leveson P in the Crown Court in January 2017 in the case of Rolls-Royce plc and Rolls-Royce Energy Systems Inc caused the WGB lead examiners considerable concern. The case is controversial in that there were significant reasons for not agreeing to a DPA. In particular the WGB lead reviewers noted that the company had not self-reported but that the SFO had been alerted because of a public internet posting and only then had Rolls-Royce then supplied additional information to the SFO.[34] In addition, the criminality took place over several decades; vast bribes were paid to obtain business around the world; and vast profits obtained.[35] This raises the crucial question: if the SFO did not prosecute a company in such circumstances, when would it do so?

An attempt at answering this question was made by a senior SFO official who argued that:

> …one of the most fundamental features of the DPA regime … is the requirement that companies are frank about what has happened, and when it comes to putting it right, cooperate fully with the SFO's investigation" and that "this was exactly what Rolls-Royce had done.[36]

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[33] The judgment is available at <https://www.judiciary.gov.uk/wp-content/uploads/2015/11/sfo-v-standard-bank_Final_1.pdf>. Similarly in the case of XYZ Ltd, a DPA was approved by Sir Brian Leveson in the Crown Court with, once again, a key factor being the fact that company had self-reported to the SFO and had provided ongoing assistance: see *SFO v XYZ Ltd*. The judgment is available at <https://www.sfo.gov.uk/2016/07/08/sfo-secures-second-dpa/> accessed 15 June 2017.

[34] Phase 4 Report, para 2.

[35] According to the Phase 4 Report, the misconduct generated gross profits of £258,000,000 thus making it by far the largest foreign bribery case in UK history: see 12.

[36] See speech by Ben Morgan, Joint Head of Bribery and Corruption, SFO entitled "The Future of Deferred Prosecution Agreements after Rolls-Royce" dated 8 March 2017, <https://www.sfo.gov.uk/2017/03/08/the-future-of-deferred-prosecution-agreements-after-rolls-royce/> accessed 19 June 2017.

This reflects the view of Sir Brian Leveson P in approving the Rolls-Royce DPA: [37]

> The fact that an investigation was not triggered by a self-report would usually be highly relevant in the balance but the nature and extent of the co-operation provided by Rolls-Royce in this case has persuaded the SFO not only to use the word 'extraordinary' to describe it but also to advance the argument that, in the particular circumstances of this case, I should not distinguish between its assistance and that of those who have self-reported from the outset.[38]

Sir Brian Leveson P also noted the significant weight paid by the company to eliminating corrupt practices as well as the far-reaching consequences on the company's ability to trade. As a result of its cooperation, a significant reduction of 50% in its sentence was applied.

Understandably, the case led to a critical response from the WGB lead examiners who were concerned that the case provided a precedent for a company to obtain a DPA without self-reporting and, in addition, still able to obtain a substantial reduction in its sentence despite its failure to do so.[39] The concern is well-placed for these are the two key factors that are likely to persuade a company to seek a DPA.

"Persuading" companies to self-report their bribery activities to the law enforcement agencies represents a major breakthrough in combating foreign bribery and giving effect to the OECD Convention. Certainly the Rolls-Royce case should not overshadow the general view of the WGB lead examiners that the use of DPAs is an "interesting and effective feature for sanctioning legal persons in foreign bribery cases."[40] However, their further recommendations are very pertinent. Firstly, that the WGB follow up on the use of DPAs in foreign bribery cases:

> …to evaluate in particular the effective, proportionate and dissuasive character of sanctions [as required by Article 3 of the

[37] See *Serious Fraud Office v Rolls-Royce plc and Rolls-Royce Energy Systems Inc* <https://www.judiciary.gov.uk/judgments/serious-fraud-office-v-rolls-royce/> accessed 19 June 2017.

[38] Ibid para 22.

[39] The WGB lead examiners also point out that "this generous reduction contrasts with the 25 per cent reduction offered by the US Department of Justice in the context of its separate DPA": Ibid, para 22.

[40] Phase 4 Report, para 59.

> OECD Convention] imposed in that context, notably the reductions granted in the absence of self-reporting.[41]

Secondly, that the WGB follow up to ensure Rolls-Royce (and other companies) did not escape liability for any additional foreign bribery not covered by the DPA. This is important as it pressurises companies to "reveal all" about their involvement in foreign bribery.

ii) Whistleblowing

Whilst the issue of whistleblowing is not specifically addressed in the OECD Convention, it is now widely recognised that this is a key weapon in uncovering foreign bribery. The internet postings that led to the investigation into Rolls-Royce neatly illustrate the point[42] as does the impact of the "super-whistleblower" in the Panama Papers leaks in 2016. Its importance is reflected in the Phase 4 Report which notes the view of the SFO that whistleblower reports are a "valuable source of information relating to foreign bribery"[43] and that a "significant number of ongoing foreign bribery investigations and prosecutions also originated from whistleblower reports."[44]

Providing effective protection for whistleblowers remains a key issue. In the UK, the Public Interest Disclosure Act 1998 (PIDA) protects employees from detrimental treatment for disclosing wrongdoing. This includes corruption and any cover-up of such an offence.[45] As the WGB lead examiners noted, this legislation put the UK "at the forefront of developing model whistleblower legislation in the 1990s."[46] They also recognised that a "notable and positive amendment" introduced by the Enterprise and Regulatory Reform Act 2013 had improved the protection for whistleblowers.[47] However they noted the ongoing concerns raised by civil society groups which included the fact that the PIDA contains no direct civil or criminal penalties to stop, prevent or discourage bullying, victimisation or harassment of whistleblowers.[48] The WGB lead examiners

[41] Ibid.
[42] In 2012, the "SFO sought information from Rolls-Royce in respect of concerns regarding the operation of Rolls-Royce's civil business in China and Indonesia raised by certain internet postings": see *SFO v Rolls-Royce* (above) para 16.
[43] Phase 4 Report, para 24.
[44] Ibid para 25.
[45] For an analysis of the Act see Nicholls et al, para 7.119 et seq.
[46] Phase 4 Report, Commentary, 20
[47] Phase 4 Report, para 29. For details see Nicholls et al, para 7.139
[48] Ibid para 30.

also highlighted that at the time of the Phase 3 review, the PIDA did not protect many expatriate workers of UK companies who are based abroad and that this position remains the same. They noted that the UK Government had "so far resisted calls for reform of the law in this area" but that it would look at the matter again in the context of the Anti-Corruption Strategy to be published in 2017.[49]

In essence, the Phase 4 Report highlights important messages for both the UK and other Parties to the Convention. Firstly, the general point that it is vital for States to keep all relevant anti-corruption related legislation under regular review in order to ensure it remains fit for the purpose. Secondly, more specifically, there is a need to provide effective protection in practice for whistleblowers. As a Council of Europe Parliamentary Resolution has put it:

> Relevant legislation must first and foremost provide a safe alternative to silence, and not offer potential whistle-blowers a 'cardboard shield' which would entrap them by giving them a false sense of security.[50]

Thirdly, there is a need to consider adopting approaches being utilised successfully in other countries. For example, consideration might be given to following the lead of the United States where legislation provides that whistleblowers can receive significant financial benefits for having provided original information to the Securities Exchange Commission concerning corporate wrongdoing.[51]

iii) Detection of Foreign Bribery through Anti-Money Laundering Mechanisms

The Financial Action Task Force (FATF) was established in 1989 with the UK being a founding member. The FATF is "an inter-governmental body" with a mandate that includes setting standards and promoting effective implementation of legal and other measures for combating money

[49] Ibid para 33.

[50] Council of Europe Parliamentary Assembly Resolution 1729 (2010) "The Protection of Whistleblowers" para 5. The Resolution also contains a detailed list of "good practice" in the protection of whistleblowers. See also the Council of Europe Parliamentary Resolution 2060 (2015) on "Improving the Protection of Whistleblowers."

[51] See section 21F(b)(1) of the Securities Exchange Act 1934 as amended.

laundering.[52] These standards are set out in the FATF Recommendations, the first set of which were drawn up in 1990.

In 2012 the FATF issued a new set of Recommendations[53] with Recommendation 20 being of particularly significance here. It states:

> If a financial institution suspects or has reasonable grounds to suspect that funds are the proceeds of a criminal activity, or are related to terrorist financing, it should be required, by law, to report promptly its suspicions to the financial intelligence unit (FIU).

This reporting obligation extends to "designated non-financial businesses and professions" (DNFBPs), including real estate agents, dealers in precious metals and precious stones, lawyers; accountants and trust and company service providers.[54]

In the case of the UK, the relevant law implementing the FATF Recommendations is found in the Proceeds of Crime Act 2002[55] with financial institutions and DNFBPs being required to make suspicious activity reports (SARs) to the UK Financial Intelligence Unit (UKFIU). As the SFO confirmed to the WGB lead examiners, such reports are potentially an invaluable source of information about the movement of the proceeds of crime and "may uncover underlying predicate offences such as foreign bribery and trigger investigations."[56]

Between June 2015 and October 2016, the UKFIU referred 130 bribery-specific SARS to the National Crime Agency.[57] Even so, in the Phase 4 Report the WGB lead examiners highlight the concerns of both law enforcement agencies and civil society organisations about the effectiveness of the SARs regime in practice, particularly with respect to the lack of reports from key non-financial sectors.[58] This point is starkly highlighted in the 2015 Transparency International (TI) report entitled *Don't Look, Won't Find* (TI Don't Look Report) which found that the current regulatory system for financial services, accountancy, legal services, luxury goods, property and trust and company service providers

[52] *The FATF Recommendations: International Standards on Combating Money Laundering and the Financing of Terrorism and Proliferation*, (FATF, 2012) 7.
[53] Ibid.
[54] Ibid, see Recommendations 22 and 23.
[55] These provisions reflect similar requirements to Recommendation 20 contained in an earlier set of FATF Recommendations.
[56] Phase 4 Report, para 39.
[57] Ibid para 40.
[58] In this context the "designated non-financial businesses and professions."

"relies on a patchwork of 22 different supervisors – mostly private sector institutions – to ensure that firms abide by the rules. It is this system that is structurally unsound."[59]

This point is taken up by the WGB lead examiners who note that "the absence of detection of foreign bribery cases by the UKFIU is of great concern, considering the money laundering and bribery risks in the UK" and that this is a "further demonstration of the lack of effectiveness of the reporting regime as it stands."[60]

Reflecting the recommendations in the TI Don't Look Report, the WGB lead examiners called upon the UK to "respond to the concerns voiced on the effectiveness of the SARs regime…" [61] In this regard, a key recommendation in the TI Don't Look Report is particularly helpful:

> The UK Government should review the arrangements for supervision in the UK and evaluate options for consolidating the number of anti-money laundering supervisors. The review should examine the merits of replacing the existing patchwork and inconsistent structure of multiple supervisors with a single, well-resourced 'super' supervisor.[62]

This is yet another area where the WGB is likely to carry out a follow-up study.

4. Identifying the Beneficial Ownership of Companies

In 2015, Transparency International published a report entitled *Corruption on Your Doorstep*[63] (TI Doorstep Report). Its key findings highlighted the significance of property holdings by companies registered in off-shore jurisdictions, and particularly in the CDs/OTs:

- 40,725 London property titles were held by foreign companies.
- 89 per cent of these titles were held by companies incorporated in secrecy jurisdictions, covering approximately 2.25 square miles of London property.

[59] Transparency International, *Don't Look, Won't Find: Weaknesses in the supervision of the UK's anti-money laundering rules* (Transparency International, London 2015) 2.
[60] Phase 4 Report, Commentary, p 22.
[61] Ibid.
[62] Transparency International (n 59) 6
[63] Transparency International, *Corruption on Your Doorstep: How Corrupt Capital is Used to Buy Property in the UK* (Transparency International, London 2015)

- More than one third of all foreign companies holding London property were incorporated in the British Virgin Islands (13,831 properties), this was followed by Jersey with 14 per cent (5,960 properties), the Isle of Man with 8.5 per cent (3,472 properties) and Guernsey with 8 per cent (3,280 properties).
- Almost one in ten properties in the City of Westminster (9.3 per cent), 7.3 per cent of properties in Kensington & Chelsea and 4.5 per cent in the City of London were owned by a company registered in an offshore secrecy jurisdiction.[64]

Whilst it is perfectly lawful for an off-shore company to be the registered owner of real estate in the UK, it was argued in the TI Doorstep Report that:

> [T]he prevalence of UK property holdings by companies incorporated in secrecy jurisdictions is a major barrier to law enforcement investigations of grand corruption and effectively prevents estate agents' due diligence checks for money laundering and their compliance with international sanctions.[65]

The crucial challenge here is seeking to identify the beneficial ownership of companies incorporated in the off-shore secrecy jurisdictions. This is emphasised in Phase 4 Report, where the WGB lead examiners highlighted the views of UK law enforcement agencies 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."[66] In this respect, the WGB lead examiners noted two "welcome developments."

Firstly, the Small Business, Enterprise and Employment Act 2015 provides for the establishment of a public register of "persons with significant control" which is designed to identify the ultimate beneficial owner(s) and controllers of most UK companies and limited liability partnerships (LLPs).[67] As from 30 June 2016, this information must be declared in the annual return or "confirmation statement" of such

[64] Ibid 3.
[65] Ibid 4.
[66] Phase 4 Report, para 116. The WGB lead examiners quote the Metropolitan Police Service as estimating 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'": see Phase 4 Report, para 92.
[67] Incorporated as Part 21A of the Companies Act 2006.

companies and LLPs. Whilst not commenting on the point, the WGB lead examiners also noted that the views of several civil society organisations of the need to further regulate beneficial ownership of land and real estate.[68] This reflects the helpful recommendation in the TI Doorstep Report that any foreign company intending to hold a property title in the UK should be held to the same standards of transparency required of UK registered companies.[69] A recommendation to the UK from the WGB to implement this approach would have been helpful.

Secondly, in 2016 a series of Exchange of Notes (EN) was signed between the UK and each individual CD and several OTs in respect of the sharing of beneficial ownership information. Each CD and OT (referred to as a 'participant' in each EN) agrees to:

> [E]stablish a central database of beneficial ownership which will contain adequate, accurate and current beneficial ownership information on corporate and legal entities.

In addition, each participant is to establish a "designated point of contact" to receive and respond to requests for beneficial ownership information. Unless otherwise agreed, such information must be provided within twenty-four hours of receiving the request or within an hour if the matter is urgent.[70]

Whilst there is currently no move for CDs and OTs to introduce a public register of beneficial ownership (however desirable this will be), this is a major step forward towards assisting law enforcement agencies to investigate allegations of foreign bribery and money laundering through facilitating the identification of the beneficial ownership of off-shore companies and trusts.

These are major achievements which were rightly welcomed by the WGB lead examiners. However, the effectiveness of the arrangements in practice remains to be seen and the recommendation that the WGB follow-up on the implementation of the information exchange is entirely appropriate.

5. Multiple Prosecutions in Foreign Bribery Cases

Investigating the bribery of foreign public officials inevitably requires cooperation between several jurisdictions. This emphasises the importance

[68] Phase 4 Report, para 118.

[69] Transparency International (n 63) 4.

[70] See, for example, the *Exchange of Notes between the Government of the United Kingdom and the Government of Jersey* which came into force on 4 April 2016, paras 4 and 7.

of effective mutual legal assistance arrangements between States. It also raises the question as to which is the most appropriate jurisdiction for prosecuting (or agreeing settlements with) those corporate entities allegedly involved in paying the foreign bribes. This is particularly relevant in the case of the UK Bribery Act 2010 and the United States Foreign Corrupt Practices Act 1977 (FCPA), both of which contain wide jurisdictional provisions.[71]

In cases where a number of States have the right to prosecute a corporate entity, Article 4(3) of the OECD Convention provides that the "Parties involved shall, at the request of one of them, consult with a view to determining the most appropriate jurisdiction for prosecution." There is no *obligation* to consult and the provision does not apply to non-Parties. This raises the possibility of a corporate entity facing "carbon copy prosecutions" (or other enforcement action) in multiple States, including the State or States most affected by the bribe payments with the prospect of the company facing significant multiple financial penalties.[72]

This risk was duly noted by the WGB lead examiners who emphasised that there was a need for active collaboration between jurisdictions to agree a global settlement. However, they took the view that the issues and challenges were beyond the scope of the evaluation and was a matter for the Parties to the Convention to address. This is a curious approach particularly because the issue is directly connected to Article 4(3) of the Convention. It is certainly one that is likely to raise concerns for corporate legal advisers when advising their corporate clients on whether or not to self-report.

6. The Bribery Act 2010 and the Ministry of Justice Guidance

In line with the requirements of Article 1 of the OECD Convention, section 6 of the Bribery Act 2010 (BA 2010) creates a discrete offence of bribing a foreign official. Section 7 makes it an offence for a commercial organisation to fail to prevent bribery by a person associated with it. This is subject to the defence that the commercial organisation had adequate

[71] For a full discussion see Nicholls et al, Ch 3, paras 3.17 et seq and Ch 20, paras 20.21 et seq.

[72] Indeed this may have a chilling effect on self-reporting of foreign bribery by companies in circumstances where they are required to reveal full details of their bribe-paying activities and may then face the prospect of the information being used against them in other States affected by their criminal activities: see further Hatchard (n 27) 131 where examples of the issue are discussed. See generally, Andrew S Boutros and T Markus Frank, "'Carbon Copy' Prosecutions: A Growing Anti-Corruption Phenomenon in a Shrinking World" [2012] University of Chicago Legal Forum 259.

procedures in place to prevent bribery. Section 9 requires the Secretary of State to publish "Guidance" about procedures that commercial organisations can put in place to prevent bribery. In March 2011 2011 the Ministry of Justice published its *Guidance to Commercial Organisations* (MOJ Guidance) with a view to the Act coming into effect on 1 July 2011.[73]

In its Phase 3 Report on the UK, the WGB had made a series of recommendations concerning two aspects of the MOJ Guidance.[74] These recommendations were re-visited in the Phase 4 Report. The first addressed issues relating to the treatment of hospitality and promotional expenditures with a recommendation that the UK clarify problematic hypothetical examples in the MOJ Guidance. Here the WGB lead examiners noted that the MOJ Guidance had not been amended in line with the Phase 3 recommendation.

The second recommendation concerned the need for a consistent definition of facilitation payments. Here they noted that in response to the Phase 3 recommendation, in 2012 the SFO had issued new guidance regarding facilitation payments[75] and that the UK continues to provide no exception for facilitation payments. However, they expressed concern that the UK had not amended the different definitions of facilitation payments found in other documents such as the MOJ Guidance. They therefore considered the WGB recommendation to be partially implemented.

On a more positive note, the WGB lead examiners note that section 7 BA 2010 has been the basis for criminal liability in four cases, with three companies entering into DPAs and a fourth pleading guilty. Perhaps more significantly, they recognise that the section appeared to have had a positive influence with UK companies adopting "sophisticated compliance measures to prevent bribery."[76] This is encouraging as it highlights the crucial importance of having anti-bribery measures in place that are sufficiently persuasive that even the most economically powerful

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[73] Ministry of Justice, *The Bribery Act 2010: Guidance about procedures which commercial Organisations can put into place to prevent persons associated with them from bribing (section 9 of the Bribery Act 2010).*
<https://www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdf> accessed 19 June 2017.

[74] OECD *Phase 3 Report on Implementing the OECD Anti-Bribery Convention in the United Kingdom* (OECD, Paris 2012) paras 20-26.
<http://www.oecd.org/daf/anti-bribery/UnitedKingdomphase3reportEN.pdf> accessed 19 June 2017.

[75] SFO *Bribery Act Guidance* 2012.
Available at <https://www.sfo.gov.uk/publications/guidance-policy-and-protocols/bribery-act-guidance/> accessed 19 June 2017.

[76] Phase 4 Report, Commentary, 80.

companies are prepared to introduce and maintain effective corporate compliance regimes.

7. The Potential Impact of Brexit

The UK is closely involved with the European Union policies on law enforcement. For example, the UK is part of networks such as Europol and Eurojust whilst in May 2017 the European Investigation Order came into force which promises to enhance the effectiveness of mutual legal assistance between EU States.[77] There is no doubt that such cooperation has greatly assisted in the investigation of foreign bribery and money laundering cases.

Given this background, it is not surprising that the potential impact of Brexit on the ability of the UK to carry out its OECD Convention obligations was viewed by the WGB lead examiners with great concern. They emphasised 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)." In particular they noted that "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."[78]

More generally, it might be added that there is a clear danger that in order to find new business, UK companies may be forced to move into new markets and countries which carry with them a greater risk of foreign bribery.

Only time will tell as to the extent of the impact of Brexit and in view of this, the WGB lead examiners recommended that the WGB "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"[79]

4. "HOW WELL ARE WE DOING?": THE VERDICT

Transparency International has rightly stated that the WGB review process is "the 'gold standard' of monitoring and evaluation to ensure that governments stick to their commitments to enforce anti-corruption

[77] For details see European Commission press release 22 May 2017.
[78] Phase 4 Report, para 198.
[79] Ibid Commentary, 74.

legislation."[80] This view is reinforced in the WGB Phase 4 review of the UK. Just as with the previous WGB reviews on the UK, the Phase 4 Report is an impressive document providing a detailed analysis of the position regarding the UK's compliance with its OECD Convention obligations, as well as providing a critical review on its response to earlier WGB recommendations.

Overall, the Phase 4 Report demonstrates that the UK continues to make progress in implementing the Convention. This echoes the response of the UK to the Phase 4 questionnaire that the 2017 UK Anti-Corruption 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." Further, that 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."[81]

A recurring feature of the Phase 4 Report is its recognition of the importance and increasing effectiveness of the SFO in tackling foreign bribery and the laundering of the proceeds of corruption as well as the fact that it receives widespread support from the legal profession and civil society organisations. As a result, some of the most significant recommendations in the Phase 4 Report are designed to protect the independence of the SFO and to further enhance its effectiveness. It is to be hoped that the UK will not tarnish its commitment to the OECD Convention by rejecting these views and proceeding to incorporate the SFO into the NCA.

The development of mechanisms to facilitate the detection of foreign bribery offences is also highlighted in the Phase 4 Report. Of particular note here is the self-reporting of wrongdoing by companies and the use of DPAs; the introduction of a public register of beneficial ownership of UK based companies; and the taking of steps to ensure the CDs and OTs are more actively involved in tackling foreign bribery and money laundering. These are dramatic and very positive developments which promise both to deter, and to facilitate the detection of, foreign bribery. Even so, questions remain as to how and when DPAs will be approved.

The failure of the UK to address fully some previous WGB recommendations continues to cause concern. In one way, this demonstrates the weakness of the entire review process i.e. the fact that the WGB cannot require Parties to implement its recommendations. However,

[80] Referred to in the OECD Working Group on Bribery, *Annual Report 2006*, (OECD, 2007) 2.
[81] Phase 4 Report, para 12.

the on-going follow-up process at least ensures that pressure is maintained on the UK to take the necessary steps to implement the recommendations.

During the on-site visit to the UK, the WGB lead examiners met with a wide range of civil society organisations.[82] Indeed frequent reference is made in the Phase 4 Report to their views with their role in investigating and exposing foreign bribery being warmly praised.[83] This highlights the vital contribution that such organisations can make not only towards a transparent and effective review process but also to keeping the UK's commitment to the Convention under constant scrutiny. This point takes on a wider significance in that there is a continued reluctance on the part of some States Parties to the United Nations Convention Against Corruption to enable civil society organisations to play a full part in the work of the Conference of the States Parties (CoSP)[84] and the convention review process known as the Implementation Review Mechanism (IRM). This is particularly disappointing especially in that the IRM is a far less intrusive exercise than that undertaken by the WGB. Indeed the positive contribution of such organisations to individual country reviews is also a feature of other regional anti-corruption review mechanisms.[85] Hopefully, this will encourage all State Parties to the UNCAC to strengthen the IRM by enabling civil society organisations to play an effective role in the operation, oversight and implementation of the Convention.

So, in answer to the question "How well are we doing", the response is that the UK has made some encouraging progress since the Phase 3 review. However, the WGB is not going to go away and the UK is now required to submit a written report to it in two years on the implementation of all the recommendations in the Phase 4 Report as well as its enforcement efforts. It would be good to report in 2019 that the UK has fully implemented all the WGB recommendations.

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[82] Annex 2 to the Phase 4 Report contains a list of participants in the on-site visit. These include a wide range of private sector organisations; business associations, civil society organisations, the media and academics.

[83] See, for example, para 50.

[84] The CoSP was established under Article 63 of the UNCAC to "improve the capacity of and cooperation between States Parties to achieve the objectives set forth in the Convention and to promote and review its implementation": see further Nicholls et al, Chapter 16, para 16.178 et seq.

[85] Civil Society Organisations are deeply involved in the MESICIC monitoring process of the Inter-American Convention against Corruption and the monitoring of the Council of Europe anti-corruption conventions by Group of States Against Corruption (GRECO): see further Nicholls et al Chapter 24, para 24.30.