

THE STATUS OF ARTICLE 5 OF THE OECD CONVENTION IN DOMESTIC LAW

JOINT OPINION

INTRODUCTION

1. On 17 December 1997 the United Kingdom signed the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (“the Anti-Bribery Convention”), depositing its instrument of ratification on 14 December 1998. The Anti-Bribery Convention is a multilateral treaty, the essence of which is to require an effective domestic remedy against foreign bribery and corruption by means of prosecution and enforcement by competent national authorities in accordance with the standards set out in the Convention. While certain aspects of the Convention have been incorporated into UK domestic law, other important aspects have not. This Opinion sets out the present position in relation to Article 5 of the Convention, and its implications for the Government’s draft Bribery Bill.

THE CONVENTION

2. Cross-border corruption is notoriously difficult to tackle, both because of problems defining corruption and problems targeting effectively the influential people often involved. The Anti-Bribery Convention seeks both to create standards for the criminalisation of bribery of foreign public officials, and to create the conditions for the enforcement of those standards.
3. By Article 1 of the Convention, states are required to take the necessary measures to criminalise the bribery and corruption of foreign public officials, both directly and through complicity in such acts. Articles 2, 3 and 4 lay down standards in relation to establishing liability, sanctions and jurisdiction, respectively, for such offences.

4. Article 5 of the Convention provides for the enforcement of the domestic criminal offence of bribery required by Article 1 of the Convention. It states:

“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 involved.”

The purpose of Article 5 is to remove barriers to the investigation and prosecution of international bribery and corruption. Signatories to the Anti-Bribery Convention agree not to accede to diplomatic threats and other forms of blackmail commonly used to frustrate international bribery prosecutions in exchange for a similar promise by other states. If all signatories maintain the same common high standard of refusing to abandon investigations, all states ultimately benefit. Each country therefore agrees to limit its freedom of action to individual cases in order to secure long-term benefits for all. Uniformity of the interpretation of Article 5 concepts like national security, together with consistent enforcement of that provision, are therefore essential.

THE STATUS OF THE CONVENTION IN DOMESTIC LAW

5. In the UK, Article 1 of the Anti-Bribery Convention has been incorporated through Part 12 of the Anti-terrorism, Crime and Security Act 2001, which confirms that the reach of existing anti-bribery and corruption laws extends to offences committed outside the UK and to the bribery of foreign public officials. These provisions would be superseded by Clause 4 of the draft Bribery Bill. Article 5 of the Convention, however, has not been incorporated into domestic law.
6. The effect of the failure to incorporate Article 5 of the Anti-Bribery Convention is that while the bribery of a foreign public official is a domestic criminal offence in the UK, there remain significant problems with its enforcement. Investigators and prosecutors can legally abandon an investigation into the criminal offence of

bribery overseas allegedly instigated by a UK corporate body if they perceive that the investigation might affect the UK's national interest, or the UK's relations with another country, or because the person or company being investigated has a high profile or position of influence. This is the case even if investigators and prosecutors have made statements to government departments, Parliament, the OECD and the general public that they will abide by Article 5. So much was made clear by the House of Lords' ruling in *R (Corner House Research and Campaign Against Arms Trade) v Director of the Serious Fraud Office* [2008] UKHL 60; [2008] 3 WLR 568 last year.

7. The *Corner House/CAAT* case was an application for judicial review of the decision of the Director of the Serious Fraud Office to stop an investigation into BAE System's alleged corruption in arms deals with Saudi Arabia. The Government argued that if a threat had been made to UK national security, as it contended had been, Article 5 of the Anti-Bribery Convention allowed a prosecution or investigation to be dropped as national security was not within the matters there mentioned. The Claimants argued otherwise (paragraph 159, Respondents' Printed Case for the Appellate Committee):

"...the ordinary meaning of the words of Article 5 is clear: ...

- c) *Article 5 provides that effects on relations with another state may not be taken into account when making investigation and prosecution decisions. This phrase must be construed in accordance with the object and purpose of the Convention, so as to ensure that the Convention has real and practical effect. The kinds of effects on relations that might occur of a bribery investigation is continued can easily be identified. They include a withdrawal of diplomatic co-operation, ending of co-operation on intelligence sharing, and other similar matters. These are precisely the matters relied upon by the Appellant in this case.*
- d) *Article 5 requires that these effects should be ignored because they are effects on the relationship between states...*
- e) *If Article 5 were to be read so as to permit the Director to take into account the alleged national security effects of damaged relations with Saudi Arabia, this would frustrate the purpose of Article 5 and undermine the entire Convention..."*

The House of Lords was therefore asked to adjudicate upon the meaning of Article 5 of the Convention.

8. Corner House and CAAT argued that the non-incorporation of Article 5 of the Anti-Bribery Convention was no bar to the House of Lords interpreting and applying the Article on the facts of that case. They drew attention to the fact that:

“...there are circumstances in which the domestic courts will consider and rule upon the meaning and effect of an international instrument. In particular, it is a well-established principle of public law that where a public body states that it has complied with, or taken into account, an international law obligation when making a decision, the court has the jurisdiction to review the decision to assess compliance with that obligation...”

Therefore, if a decision-maker purports to act on the basis of a particular international instrument and directs himself that he is acting in accordance with that instrument, but he misunderstands or misconstrues the instrument, then he has taken into account an irrelevant consideration, namely his erroneous understanding of the instrument. The instrument will be construed by the court applying ordinary public law principles. The court is doing no more than testing the rationality and legality of a decision against the standard which the decision-maker has chosen to adopt” (paragraphs 120 and 125 of the Respondents’ Printed Case for the Appellate Committee).

Corner House and CAAT also noted that the Government had publicly stated that it would comply with the Convention, including Article 5, when making prosecution decisions and that the Attorney-General had stated to Parliament and the OECD that the specific decision under challenge was taken in accordance with the Convention, without reference to the considerations precluded by Article 5 (paragraphs 129-136, Respondents’ Printed Case for the Appellate Committee).

9. The Divisional Court accepted the arguments advanced by Corner House and CAAT, both in relation to the jurisdiction to interpret the Convention (paragraphs 119-121) and the interpretation contended for (paragraphs 150-158).

As to the proper construction of Article 5, the Divisional Court concluded (at paragraph 148):

“The only way, as we see it, of achieving the purpose of Article 5 is to permit consideration of national security only in circumstances which on an international plane would be regarded as justifying the defence of state necessity. We can see no other way of distinguishing national security and relations with another state”.

10. In House of Lords, however, the Committee held that it could not rule on the interpretation of Article 5 because it formed no part of domestic law and, contrary to the view of the Divisional Court, it did not fall within any of the exceptional circumstances in which the Court would apply an unincorporated treaty (see, in particular, paragraphs 43-47 and 59-68 of the Judgment). The Divisional Court’s decision was therefore overturned.
11. As a result of the House of Lords’ ruling the Director of the SFO has no obligation to ignore the prohibited factors under Article 5 of the Anti-Bribery Convention (considerations of national economic interest, the potential effect upon relations with another State or the identity of the natural or legal persons involved) when taking a decision to investigate or prosecute.
12. Indeed, the effect of the decision of the House of Lords is that the courts cannot even consider whether or not a decision to stop an investigation or prosecution breaches Article 5 of the Anti-Bribery Convention.
13. We have been asked to consider whether reference to Article 5 of the Convention in the Code for Crown Prosecutors would be sufficient to ensure that Article 5 is complied with. The Code contains guidance for prosecutors and is not binding. It does not therefore ensure that Article 5 will be satisfied in every case and is no substitute for the incorporation of Article 5 of the Anti-Bribery Convention into primary legislation.

CONCLUSION

14. We consider that by failing properly to incorporate and enforce its obligations under Article 5 of the Convention the UK is and remains in breach of its international law obligations under the Convention.

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