

## Submission to the Joint Committee on the draft Bribery Bill

### Introduction

1. The Corner House is a non-governmental organisation focusing on environment, development and human rights. It has a track record of detailed policy research and analysis on overseas corruption and on corporate accountability.<sup>1</sup> It has brought two judicial reviews on corruption-related decisions by public bodies: one, by the Export Credits Guarantee Department to weaken in November 2004 its rules aimed at reducing corruption;<sup>2</sup> the other by the Director of the Serious Fraud Office (SFO) in December 2006 to terminate the SFO investigation into alleged bribery and false accounting by BAE Systems in relation to the Al Yamamah deals with Saudi Arabia.<sup>3</sup>
2. The Corner House welcomes the invitation from the Joint Committee to give evidence on the draft Bribery Bill.<sup>4</sup>
3. The Corner House also welcomes the various aims of the draft Bribery Bill, namely:
  - to consolidate, remove inconsistencies and fill gaps in the existing criminal law of bribery;
  - to reform and modernise the legislation so as to bring “transparency and accountability to [the UK’s] international business transactions”<sup>5</sup>;
  - to make anti-bribery legislation easier for the public to understand and for prosecutors and the courts to apply.<sup>6</sup>
4. The Corner House supports the desired result of the reforms:

“a modern, clear and consolidated law that complements and supports [the UK’s] international efforts and equips [the UK’s] courts and prosecutors to deal effectively with bribery of all kinds, wherever it occurs”.<sup>7</sup>
5. The Corner House broadly welcomes several clauses in the draft Bribery Bill, in particular:
  - coverage of payments made through third parties (Clause 1, Subsection 5);
  - the new discrete offence of bribery of foreign public officials (Clause 4);

–extra-territorial jurisdiction to prosecute bribery committed abroad not just by UK nationals and bodies incorporated under UK law (as provided for in Part 12 of the Anti-terrorism, Crime and Security Act 2001) but also by persons ordinarily resident in the UK (Clause 7); and

–removing the existing requirement for the Attorney General’s consent to prosecute a bribery offence, so that consent in future will be required only from the Director of the relevant prosecuting authority (Clause 10).

6. The Corner House has reservations and concerns, however, about several other clauses in the draft Bill and about some significant omissions.
7. **This submission focuses on the investigation and prosecution of the new discrete offence of bribery of foreign public officials (Clause 4). The Corner House believes that if this clause is to be effective in tackling foreign bribery, well-founded allegations of bribing a foreign public official must be investigated properly and, if the evidence so warrants, prosecuted.**

**The Corner House therefore believes that additional clauses are needed in the draft Bribery Bill to ensure that such investigations and prosecutions are carried out. In particular, clauses are needed to ensure that those investigating and prosecuting the bribery of foreign public officials are not influenced by considerations of national economic interest or the potential effect upon relations with another state or the identity of the natural or legal persons involved. These clauses should reflect Article 5 of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.**

**Without such clauses, the draft Bribery Bill is highly unlikely to be effective in tackling foreign bribery and will fail to achieve the objective of making the law easier for prosecutors and the courts to apply. It may result in the law not being applied equally across the board to all, and it may (ironically) even encourage cross-border bribery.**

#### **Investigation and prosecution of bribery of foreign public officials**

8. Cross-border corruption is notoriously difficult to tackle. This is particularly so if the bribed foreign public official is senior in status and is in a position to blackmail or otherwise threaten adverse consequences if his/her conduct is exposed through an investigation or prosecution or to protect the interests of the company or individual that bribed.

Tackling cross-border corruption is particularly difficult if the bribing company, or individual acting on a company’s behalf, is able to exert undue or improper influence over those investigating and prosecuting bribery, or is able to persuade others to exert such influence, such as other public officials, whether domestic or foreign. Larger companies are more likely to be in a

position to exert such influence than are small and medium enterprises (SMEs).

Investigators, prosecutors and the Courts need to have legislative, Parliamentary and Executive support and backing to resist such threats, blackmail or other undue or improper influence. Without such backing, the demands of *realpolitik* often mean that bribery investigations and prosecutions do not take place or are terminated.

If investigators, prosecutors and the courts capitulate to such threats, blackmail or influence, the end result is that bribery flourishes.

Article 5 of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (“the OECD Convention”)<sup>8</sup> is intended to address this mischief.

#### **Article 5 of the OECD Convention and its status in UK law**

9. The essence of the OECD Convention 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.
10. Article 5 of the OECD Convention provides for the enforcement of Article 1<sup>9</sup> (which relates to creating the domestic criminal offence of foreign bribery<sup>10</sup>). Article 5 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 involved.”

The purpose of Article 5 is to remove barriers to the investigation and prosecution of international bribery and corruption. Signatories to the OECD Convention agree not to accede to diplomatic threats and other forms of blackmail commonly used to frustrate embarrassing international bribery prosecutions in exchange for a similar promise by other states. If all signatory countries maintain the same common high standard of refusing to abandon bribery investigations and prosecutions on the basis of diplomatic and economic threats (real or bluffed), all states ultimately benefit. Each country agrees to limit its freedom of action individual cases in order to secure long-term benefits for all. To do so, uniformity of interpretation of the Convention and of enforcement is essential.

11. The United Kingdom signed the OECD Convention on 17 December 1997 and deposited its instrument of ratification on 14 December 1998.
12. But the current legal situation is that the provisions of Article 5 are completely unenforceable in the UK. Investigators and prosecutors do not need to apply its requirements in practice. They can therefore legally abandon an investigation

into the criminal offence of bribery overseas allegedly instigated by a UK corporate body or individual if they perceive that the investigation or prosecution might affect the UK's national economic 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.

13. This legal status was made clear as a result of the House of Lords ruling in the Appeal of the Director of the Serious Fraud Office against the High Court judgment of the judicial review application brought by The Corner House and Campaign Against Arms Trade of the Director's decision to stop the investigation into BAE System's alleged corruption in arms deals with Saudi Arabia.<sup>11</sup>
14. The House of Lords ruling means that there is an entirely inadequate level of protection in domestic law to ensure that *all* the factors highlighted in Article 5 (national economic interest; relations with another State; the identity of those involved) do not influence investigations and prosecutions of bribery of foreign public officials.
15. Public assurances by government officials, investigators and prosecutors that the UK will abide by Article 5 even though it has not been incorporated into UK law cannot be trusted and have been shown to have no validity.

During the Serious Fraud Office's BAE-Saudi investigation and after its termination, the Director of the Serious Fraud Office and the Attorney General informed government departments, Parliament, the OECD and the general public that they intended to abide by Article 5.<sup>12</sup>

Yet during the judicial review of his decision to stop the investigation, the SFO Director stated that he was prepared to ignore Article 5 and the UK's international legal obligations, even if he was in breach of them, so as to stop the investigation.<sup>13</sup>

### **Consequences of failure to incorporate Article 5**

16. As a result of the current status of the UK law to ensure that considerations of national economic interest, relations with another state or the identity of those involved do not influence investigations and prosecutions of bribery of foreign public officials, all foreign states and officials know that they can dispose of an embarrassing or awkward bribery prosecution in the UK and protect the interests of the company that purchased their cooperation through the bribe if they can construct a credible threat to the UK's economic interest or diplomatic relations.

The more ruthless and powerful the recipient of the bribe, the less likely that the bribe payer will ever be prosecuted. As larger companies are more likely than small and medium enterprises to have "friends in high places" who can bring sufficient pressure to bear, the notion of equality before the law is turned on its head.

By not applying Article 5 of the OECD Convention, moreover, the UK is currently jeopardising the whole Convention.

17. As UK companies become aware that investigations into bribing a foreign public official can be scotched in the UK if they might be construed as jeopardising relationships with another country or the UK's interests, some companies may believe that they can bribe with impunity. In the current economic recession and resulting higher unemployment, arguments about potential job losses, or loss of orders and contracts may be more persuasive and readily accepted as reasons not to investigate or prosecute.
18. Knowing that an investigation or prosecution of a foreign bribery allegation can be scuppered in the UK may also encourage foreign public officials to demand bribes from UK companies, UK nationals and UK residents.
19. It could therefore be said that, unless additional clauses are included in this draft Bribery Bill, the proposed legislation could have the bizarre effect of encouraging bribery of foreign public officials rather than having a preventive effect.

#### **OECD calls for Article 5 to be clearly binding in the UK**

20. The OECD Working Group on Bribery<sup>14</sup> has urged the UK since December 1999 “to enact appropriate legislation and to do so as a matter of priority”<sup>15</sup> in order to implement the OECD Convention.

It has made several comments, observations and recommendations about the status of Article 5 in the UK's domestic legal order<sup>16</sup> and its application in practice.

21. In 2005, it noted that the Crown Prosecution Service (CPS) and the Serious Fraud Office appeared to follow the Code for Crown Prosecutors (CCP)<sup>17</sup> – the principles guiding decision making in whether to prosecute a criminal offence or not – which, it observed, contains public interest criteria that could be read as inconsistent with Article 5.<sup>18</sup> The Working Group urged the UK to amend the Code, the Crown Prosecution Service Manual and other documents so as:

“to clarify that the investigation and prosecution of bribery of foreign public officials 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.”<sup>19</sup>

In other words, the OECD urged the UK to clarify the Code for Crown Prosecutors to ensure that improper factors were not taken into account when deciding whether to prosecute or not.

22. In 2007, the OECD Working Group noted that the UK had still not done so.<sup>20</sup> In October 2008, however, it acknowledged that the UK had indicated that “it amended the CPS [Crown Prosecution Service] Manual in January 2008 to include a reference to Article 5”.<sup>21</sup>

The Working Group acknowledged this to be a “significant step”<sup>22</sup> but nevertheless pointed out that:

–the manual is addressed only to the Crown Prosecution Service and not to other key agencies, such as the SFO, the police or the Attorney General’s Office. The SFO has its own manual, which does not refer to Article 5, and there is no evidence that relevant police manuals refer to Article 5.<sup>23</sup>

–the CPS Manual refers to Article 5 only with regard to prosecution and does not refer to its application in investigations.<sup>24</sup>

23. It should also be noted that the Code for Crown Prosecutors provides only guidance to prosecutors, is not binding and lacks the effective force of primary legislation. Given that the Director of the Serious Fraud Office declared in his first witness statement in the BAE-Saudi judicial review that he would have ignored the OECD Convention’s Article 5 even if he thought his decision breached it,<sup>25</sup> he would presumably have done the same if the excluded considerations had been included in the Code.
24. The Working Group’s current position therefore is that “modification of the CCP [Code for Crown Prosecutions] . . . continues to be necessary, particularly in light of the Al Yamamah case.”<sup>26</sup>
25. Furthermore, in October 2008, the OECD Working Group on Bribery continued to highlight the “inadequate status of Article 5 in the domestic legal order”<sup>27</sup> governing both investigations and prosecutions of alleged foreign bribery.<sup>28</sup>

It noted that:

“Because Article 5 has not been incorporated in UK domestic legislation or in the CCP [Code for Crown Prosecutors], the Director of the SFO is not generally subject to Article 5 with regard to the exercise of his/her discretionary powers over investigations and prosecutions under the CJA [Criminal Justice Act] 1987.”<sup>29</sup>

It stressed that:

“Neither the application of Article 5 nor its binding nature in the UK domestic sphere should depend on a discretionary decision to consider it in an individual foreign bribery case. *Article 5 does not leave any room for discretion with regard to its prohibited considerations.*” (emphasis added)<sup>30</sup>

It pointed out that if the Director of the Serious Fraud Office “considered Article 5, but decided that in his/her view the national economic interest nonetheless prevailed”, s/he could make the same argument as that made by the Director in the BAE-Saudi judicial review: that he would have taken the

same decision to stop the investigation even if he had thought that his decision ran contrary to Article 5.<sup>31</sup>

26. The OECD Working Group on Bribery recapped that the Attorney General had made a commitment to it in 2005 that “Article 5 will apply”<sup>32</sup> in the UK and observed that, as of October 2008, the commitment has not been modified.<sup>33</sup> It therefore held that:

“the UK recognition that Article 5 imposes obligations that directly address a critical issue of domestic policy – whether to prosecute in individual foreign bribery cases – underlines *the need for the provision to be clearly binding in the UK domestic sphere.*” (emphasis added)

It concluded that “introducing Article 5 as a limit on prosecutorial discretion should not be difficult.”<sup>34</sup>

27. In sum, the current position of the OECD Working Group on Bribery concerning the UK’s implementation of Article 5 the OECD Convention is that:

“ . . . Article 5 must be equally applicable in all member states of the Working Group. Because the Article addresses investigation and prosecution decisions taken in the domestic legal order, it must apply with full force and effect in that sphere, both as a practical and legal matter, in order for its purposes to be achieved.

“The lead examiners consider that the uncertain application of Article 5 in the domestic sphere [in the UK] as a substantive matter is inconsistent with the Convention . . . They note the January 2008 amendments to the CPS Manual to refer to Article 5, but . . . do not consider this to sufficiently address the need for effective application of Article 5. The lead examiners accordingly recommend that the UK take all necessary measures to ensure that Article 5 applies to all investigation and prosecution decisions in foreign bribery cases.”<sup>35</sup>

28. In addition to amending the Code for Crown Prosecutors, as the OECD has indicated repeatedly, a necessary (and simple) measure would be to incorporate Article 5 in primary legislation as a limit on investigatory and prosecutorial discretion in bribery cases. The draft Bribery Bill is the most appropriate and opportune place to do so. It would also clearly demonstrate the UK’s commitment to proper and effective anti-bribery provisions in the future.

In his role as “anti-corruption champion”, Jack Straw MP (also Lord Chancellor and Secretary of State for Justice) stresses in his Foreword to the draft legislation that “concerted international action” is a key element in tackling foreign bribery, that “the UK is determined to work closely with its international partners to tackle bribery” and that “The UK is . . . supporting the implementation of . . . the OECD Bribery Convention . . .”<sup>36</sup>

## Conclusion

29. The new Bribery law needs to lead to both effective enforcement and to have a preventative effect. The Corner House believes that additional clauses must be included in the draft Bill requiring that considerations of national economic interest, relations with other states or the identity of the persons at issue shall not influence decisions to investigate or prosecute the new criminal offence of bribery of foreign public officials. Such clauses would directly and expressly implement Article 5 of the OECD Convention into UK law.
30. Without such additions, the new law will not lead to effective enforcement or have a preventative effect – rather the reverse. There is a high risk that it will not in practice be applied to those for whose benefit and on whose behalf most large-scale bribery and corruption crime is committed: companies.

Without such additions, the result will be a new bribery law that will be just as difficult for investigators, prosecutors and the courts to apply as the existing “old and anachronistic” law with its “significant gaps”.

Without these additional clauses, the inclusion of the new offence in the draft Bribery Bill will, at best, amount to little more than a box-ticking exercise encompassing just a part of the OECD Convention and will make little practical difference to tackling large-scale bribery; at worst, it will allow bribery in international business transactions to flourish.

Without these additions, the UK will not have properly implemented the OECD Convention more than ten years after its ratification.

31. Jack Straw also states in his Foreword to the draft legislation that:

*“As . . . all economies become increasingly more inter-reliant, we must ensure that the law provides our courts and prosecutors with the tools they need to tackle bribery effectively, whether it occurs at home or abroad”.*<sup>37</sup> (emphasis added)

An essential and readily available tool that would assist the UK’s investigators, prosecutors and courts to tackle bribery effectively is to incorporate Article 5 of the OECD Convention in domestic law. The draft Bribery Bill is the most appropriate place to do so because of its stated aims and objectives in filling gaps in the law, modernising the legislation to bring transparency and accountability to the UK’s international business transactions, and equipping the courts and prosecutors “to deal effectively with bribery of all kinds, wherever it occurs”.<sup>38</sup>

The Corner House  
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<sup>1</sup> <http://www.thecornerhouse.org/uk/corruption>

<sup>2</sup> In December 2004, The Corner House instituted legal proceedings after the Export Credits Guarantee Department (ECGD) significantly weakened its rules aimed at reducing corruption in November 2004. On 13 January 2005, the government agreed to instigate a full public consultation on these changes to the anti-corruption rules and to make public the correspondence between the ECGD and Airbus, BAe Systems, Rolls Royce and the Confederation of British Industry (CBI) that had led to the weakening of the anti-corruption rules.

See “Corner House Double Victory on UK Government Department's Anti-Bribery Rules and Public Interest Litigation”, 25 January 2005, <http://www.thecornerhouse.org.uk/item.shtml?x=107362>.

<sup>3</sup> The judicial review brought by The Corner House jointly with Campaign Against Arms Trade was taken on the two main grounds that stopping the BAE-Saudi investigation was unlawful because: –it contravened Article 5 of the OECD Anti Bribery Convention, which prevents signatories from terminating an investigation because of its “potential effect upon relations with another State”; and –an independent prosecutor had surrendered the rule of law in permitting threats or blackmail to influence his decision.

For further information and links to legal documents and arguments, see: <http://www.controlbae.org>.

<sup>4</sup> <http://www.justice.gov.uk/publications/docs/draft-bribery-bill-tagged.pdf>

<sup>5</sup> Jack Straw MP, Lord Chancellor and Secretary of State for Justice, “Foreword”, *Bribery: Draft Legislation*, Ministry of Justice, 25 March 2009, p.3, <http://www.justice.gov.uk/publications/docs/draft-bribery-bill-tagged.pdf>.

<sup>6</sup> *Ibid.*

<sup>7</sup> *Ibid.*, p.4.

<sup>8</sup> The OECD Convention is a multilateral treaty aiming to ensure that all 30 OECD countries and 8 other non-member signatory countries present a combined and united front against the bribery and corruption of foreign public officials. The non-member signatory countries are Argentina, Brazil, Bulgaria, Chile, Estonia, Israel, the Slovak Republic and South Africa. [http://www.oecd.org/document/21/0,3343,en\\_2649\\_34859\\_2017813\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/21/0,3343,en_2649_34859_2017813_1_1_1_1,00.html)

<sup>9</sup> OECD Convention, Article 1:

1. Each Party shall take such measures as may be necessary to establish that it is a criminal offence under its law for any person intentionally to offer, promise or give any undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign public official, for that official or for a third party, in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business.
2. Each Party shall take any measures necessary to establish that complicity in, including incitement, aiding and abetting, or authorisation of an act of bribery of a foreign public official shall be a criminal offence. Attempt and conspiracy to bribe a foreign public official shall be criminal offences to the same extent as attempt and conspiracy to bribe a public official of that Party.
3. The offences set out in paragraphs 1 and 2 above are hereinafter referred to as “bribery of a foreign public official”.
4. For the purpose of this Convention:
  - a. “foreign public official” means any person holding a legislative, administrative or judicial office of a foreign country, whether appointed or elected; any person exercising a public function for a foreign country, including for a public agency or public enterprise; and any official or agent of a public international organisation;
  - b. “foreign country” includes all levels and subdivisions of government, from national to local;
  - c. “act or refrain from acting in relation to the performance of official duties” includes any use of the public official’s position, whether or not within the official’s authorised competence.

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*OECD Convention*, <http://www.oecd.org/dataoecd/4/18/38028044.pdf>

<sup>10</sup> The UK gave effect to Article 1 by means of Part 12 of the Anti-terrorism, Crime and Security Act 2001, which extended the reach of existing (anti) bribery and corruption laws to offences committed outside the UK and to the bribery of foreign public officials. According to the Law Commission, this “was intended as a temporary measure, pending the introduction of comprehensive corruption legislation” (*Reforming Bribery*, Law Commission, 19 November 2008, p.63. <http://www.lawcom.gov.uk/docs/lc313.pdf>).

Clause 4 of the draft Bribery Bill gives effect to Article 1. The first Explanatory Note (Paragraph 29, page 9) produced by the Ministry of Justice accompanying the draft (anti) Bribery Bill explains that Clause 4:

“creates a separate offence of bribery of a foreign public official. This offence closely follows the requirements of the *OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*.”

Paragraph 31, page 10, of the Explanatory Notes indicates that the definition of a foreign public official in the draft Bribery Bill “draws on Article 1.4(a) of the *OECD Convention*”. It also states “similarly, the definition of ‘public international organisation’ in subsection (7) draws on Commentary 17 to the *OECD Convention*”.

Other Explanatory Notes also refer to the OECD Convention. Paragraph 37, page 10, in describing what a person will have done to be construed as committing an offence of bribing a foreign official – the conduct element – states that:

“The language of the *OECD Convention* is mirrored in the phrases ‘obtain or retain business’ and ‘offers, promises or gives’ and in the word ‘advantage’ in subsection (3), and in the words ‘public function’ in subsection 96)(b).”

Paragraph 59, page 14, explaining the Clauses that would authorise the UK’s security services to bribe – clauses that The Corner House believe should be removed in their entirety – indicates that such authorisation does *not* extend to authorising the bribery of a foreign public official because of concerns raised in 2003 on an earlier draft (anti) Corruption Bill about “compliance with the UK’s obligations under the OECD Convention”.

*See Bribery: Draft Legislation*, Ministry of Justice, 25 March 2009, <http://www.justice.gov.uk/publications/docs/draft-bribery-bill-tagged.pdf>.

The Law Commission, in its November 2008 report, *Reforming Bribery*, that forms the basis for this draft Bribery Bill, supported the case for a discrete offence of bribing a foreign public official on the grounds that it would not only be “demonstrating a commitment to our international obligations” [the OECD Convention] but would also be “making it easier to interpret the law in the light of international obligations”. (Law Commission, *Reforming Bribery*, 19 November 2008, p.80. <http://www.lawcom.gov.uk/docs/lc313.pdf>).

<sup>11</sup> “R (Corner House Research & Campaign Against Arms Trade) v Director of the Serious Fraud Office [2008] 3 WLR 568”, *Opinions of the Lords of Appeal* by Lord Bingham, Lord Hoffmann, Lord Rodger, Baroness Hale and Lord Brown, 30 July 2008, <http://www.thecornerhouse.org.uk/pdf/document/Lords-Judgment.pdf>.

<sup>12</sup> *See*, for example:

–*Index to Exhibit RW2-Redacted Documents*, CO/1567/07 (correspondence between the Prime Minister and/or Cabinet Office and the Attorney General dating from December 2005 to December 2006), <http://www.thecornerhouse.org.uk/pdf/document/RedactedDocsRW2.pdf>.

–SFO Press Release, 14 December 2006, [http://www.sfo.gov.uk/news/prout/pr\\_497.asp?id=497](http://www.sfo.gov.uk/news/prout/pr_497.asp?id=497).

–Attorney General statement to House of Lords, 14 December 2006, <http://www.publications.parliament.uk/pa/ld200607/ldhansrd/text/61214-0014.htm#06121476000283>

<sup>13</sup> SFO Director Robert Wardle stated that although he “did not specifically consider the question at the time” of making his decision to stop the BAE-Saudi investigation as to whether it was contrary to Article 5 or not, he would have taken the same decision even if he had thought that it was contrary. He stated that “Article 5 was not a critical or decisive matter for me”.

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See *First Witness Statement of Robert Wardle*, CO/1567/07, 17 December 2007, paragraphs 50-51, <http://www.thecornerhouse.org.uk/pdf/document/WardleWitState.pdf>

<sup>14</sup> The OECD Working Group on Bribery comprises public servants from the 38 country signatories to the OECD Convention. It monitors parties' performance in implementing the Convention through a peer review process to which parties agree when they sign and ratify the Convention. The monitoring process usually comprises two stages: Phase 1 assesses legislation and Phase 2 examines overall implementation. In cases where countries fail to meet their commitments, a follow-up evaluation of key weaknesses, Phase *1bis* and Phase *2bis*, is carried out.

<sup>15</sup> OECD Working Group on Bribery, *United Kingdom, Review of Implementation of the Convention and 1997 Recommendation*, Phase 1 Report, December 1999, <http://www.oecd.org/dataoecd/8/24/2754266.pdf>

<sup>16</sup> When some countries sign or ratify an international treaty, that treaty immediately comes into effect within that country. In the UK, however, the treaty has to be incorporated by an Act of Parliament – that is, Parliament has to pass or amend a law so as to give it domestic legal effect. But it has been a well-established principle of UK public law that where a public body had stated that it has complied with, or taken into account, an international law obligation when making a decision, the court has jurisdiction to review the decision so as to assess whether the public body has correctly interpreted that law or not.

The Opinions of the Lords of Appeal (*see* note 11 above) has the effect of ruling that unincorporated treaties (international treaties for which an Act of Parliament has not been passed) do not limit the statutory discretion of decision-makers such as the Director of the Serious Fraud Office.

<sup>17</sup> The Code for Crown Prosecutors (CCP) was issued pursuant to section 10 of the Prosecution of Offences Act 1985. <http://www.cps.gov.uk/publications/docs/codeeng.pdf>.

The Crown Prosecution Service is the government department responsible for prosecuting criminal cases investigated by the police in England and Wales.

<sup>18</sup> “ . . . public interest factors that can affect the decision to prosecute . . . also include such matters as the impact of the case on international relations, which raises concerns about compliance with Article 5 of the Convention.”

See Paragraph 163, OECD Working Group on Bribery, *United Kingdom: Phase 2, Report on the Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 1997 Recommendation on Combating Bribery in International Business Transactions*, 17 March 2005, <http://www.oecd.org/dataoecd/6/2/32/34599062.pdf>.

<sup>19</sup> On 17 March 2005, the OECD Working Group on Bribery issued its *Phase 2 Report* examining the UK's overall implementation of the OECD Convention. Paragraphs 158 to 167 concern “Prosecutor decisions about the appropriateness of prosecution”.

158. “The Code for Crown Prosecutors, which is a public statement of the principles which guide decision making in every case, set forth a two part test for the evaluation of the appropriateness of prosecution. The same tests appear to be applied by both the CPS [Crown Prosecution Service] and the SFO [Serious Fraud Office]. The first part of the test examines if there is sufficient evidence to provide a realistic prospect of a conviction. If so, it is decided whether the prosecution is required in the public interest . . .”

Paragraphs 163 and 164 focus on this subsequent public interest test.

163. “The public interest test must be considered in each case where there is enough evidence to provide a realistic prospect of conviction. The Code for Crown Prosecutors states that a prosecution will take place unless there are public interest factors tending against prosecution which clearly outweigh those tending in favour. As set forth in the Code, public interest factors that can affect the decision to prosecute usually depend on the seriousness of the offence and the circumstances of the suspect, but . . . they also include such matters as the impact of the case on international relations, which raises concerns about compliance with Article 5 of the Convention.”

164. “The examiners consider that the Code should be amended to clarify that, consistent with Article 5, investigation and prosecution of foreign bribery cases shall not be influenced by considerations of national economic interest or the potential effect upon relations with another

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state. The UK authorities have indicated that the Code is not intended to be case specific and is a general statement of principles, and suggest that guidance be included in the CPS Manual of Legal Guidance. However, in light of the importance of Article 5 on the one hand, and of the Code in UK practice on the other hand, the examiners consider that, while retaining its general nature, the Code should reflect in some manner that Article 5 limits exist. The Manual and other relevant documents (including documents used by the SFO) should then address the applicable limitations in detail.”

The OECD Working Group on Bribery concluded this section of its 2005 report as follows:

“The examiners note that the Code for Crown Prosecutors can be read to suggest consideration of public interest factors that are not permitted to be considered in foreign bribery cases under Article 5 of the Convention. The lead examiners urge the UK authorities to amend where appropriate the Code, the CPS Manual and other documents to clarify that the investigation and prosecution of bribery of foreign public officials 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 . . .”

See: OECD Working Group on Bribery, *United Kingdom: Phase 2, Report on the Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 1997 Recommendation on Combating Bribery in International Business Transactions* 17 March 2005, <http://www.oecd.org/dataoecd/62/32/34599062.pdf>

<sup>20</sup> “The 2007 Working Group Summary and Conclusions with regard to the UK Phase 2 Follow-up Report noted that the UK had not implemented the recommendation. The CCP had not been amended. The Working Group noted that ‘particularly in light of intervening events since the Phase 2 Report, the text of the CCP remains of concern’. The UK intended to amend the CPS Manual, but had not done so.”

Paragraph 101, OECD Working Group on Bribery, *United Kingdom: Phase 2bis, Report on the Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 1997 Recommendation on Combating Bribery in International Business Transactions*, 16 October 2008, <http://www.oecd.org/dataoecd/23/20/41515077.pdf>. (hereafter *OECD United Kingdom: Phase 2bis Report*)

<sup>21</sup> Paragraph 102, *OECD United Kingdom: Phase 2bis Report*, 16 October 2008, <http://www.oecd.org/dataoecd/23/20/41515077.pdf>.

<sup>22</sup> Ibid.

<sup>23</sup> Paragraph 103, *OECD United Kingdom: Phase 2bis Report*, 16 October 2008, <http://www.oecd.org/dataoecd/23/20/41515077.pdf>.

Paragraph 103 continues to note that after the OECD’s Working Group on Bribery made an on-site visit to the UK to conduct its *Phase 2bis Report*, “the SFO stated that it was about to update its own manual and would look into including Article 5 in the manual. It also stated that it would raise the issue of Article 5 with the police through a Home Office circular.”

The paragraph also states that “The AGO [Attorney General’s Office] indicated in 2005 that it generally relies on the CCP [Code for Crown Prosecutors]; while the previous Attorney General then clarified to the Working Group that Article 5 would be respected, that commitment is not reflected in any internal AGO rule or document.”

<sup>24</sup> Ibid.

<sup>25</sup> SFO Director Robert Wardle stated that although he “did not specifically consider the question at the time” of making his decision to stop the BAE-Saudi investigation as to whether it was contrary to Article 5 or not, he would have taken the same decision even if he had thought that it was contrary. He stated that “Article 5 was not a critical or decisive matter for me”.

See *First Witness Statement of Robert Wardle*, CO/1567/07, 17 December 2007, paragraphs 50-51, <http://www.thecornerhouse.org.uk/pdf/document/WardleWitState.pdf>

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<sup>26</sup> Paragraph 102, *OECD United Kingdom: Phase 2bis Report*, 16 October 2008, <http://www.oecd.org/dataoecd/23/20/41515077.pdf>.

<sup>27</sup> Page 95, *OECD United Kingdom: Phase 2bis Report*, 16 October 2008,, <http://www.oecd.org/dataoecd/23/20/41515077.pdf>.

<sup>28</sup> “Under current law, the Director of the SFO [Serious Fraud Office] makes decisions about investigations of foreign bribery allegations in accordance with section 1(3) of the CJA [Criminal Justice Act] 1987. It gives him/her a broad discretion, stating that the Director may investigate any suspected offence which appears to him on reasonable grounds to involve serious or complex fraud. It does not refer to Article 5 or require that considerations of national economic interest, relations with other states or the identity of the persons at issue not influence the Director’s decisions. Prosecutors in the CPS [Crown Prosecution Service] and SFO make decisions concerning foreign bribery prosecutions in accordance with the Code for Crown Prosecutors (CCP), which was issued pursuant to section 10 of the Prosecution of Offences Act 1985. As noted in the Phase 2 Report [*see note 19 above*], the CCP contains public interest criteria that can be read to be inconsistent with Article 5.”

Paragraph 94, *OECD United Kingdom: Phase 2bis Report* 16 October 2008, <http://www.oecd.org/dataoecd/23/20/41515077.pdf>.

<sup>29</sup> Paragraph 95, *OECD United Kingdom: Phase 2bis Report*, 16 October 2008, <http://www.oecd.org/dataoecd/23/20/41515077.pdf>.

<sup>30</sup> Paragraph 97, *OECD United Kingdom: Phase 2bis Report*, 16 October 2008, <http://www.oecd.org/dataoecd/23/20/41515077.pdf>.

<sup>31</sup> Paragraph 98, *OECD United Kingdom: Phase 2bis Report*, 16 October 2008, <http://www.oecd.org/dataoecd/23/20/41515077.pdf>.

Paragraph 98 continues:

“The UK government has not explained how such action would be consistent with the Attorney General’s commitment to the Working Group that Article 5 will apply (see Phase 2 Report, para. 171).”

Paragraph 171 of the OECD’s March 2005 Phase 2 Report reports that:

“. . . the Attorney-General . . . confirmed that none of the considerations prohibited by Article 5 would be taken into account as public interest factors [in the Code for Crown Prosecutors] not to prosecute. Moreover, the Attorney General noted that public interest factors in favour of prosecution of foreign bribery would include its nature as a serious offence and as an offence involving a breach of the public trust. In addition, the UK authorities note that by acceding to the Convention, the UK has confirmed that the circumstances covered by the Convention are public interest factors in favour of a prosecution. The UK authorities also emphasised that the Code is a general document and does not mandate any particular decision. The lead examiners take note of the Attorney General’s clarification and the UK’s commitment to comply fully with Article 5.”

*See: OECD Working Group on Bribery, United Kingdom: Phase 2, Report*, 17 March 2005, <http://www.oecd.org/dataoecd/62/32/34599062.pdf>

<sup>32</sup> Paragraph 98, *OECD United Kingdom: Phase 2bis Report*, 16 October 2008, <http://www.oecd.org/dataoecd/23/20/41515077.pdf>.

<sup>33</sup> Paragraph 99, *OECD United Kingdom: Phase 2bis Report*, 16 October 2008, <http://www.oecd.org/dataoecd/23/20/41515077.pdf>.

<sup>34</sup> *Ibid.*

<sup>35</sup> After paragraph 108, *OECD United Kingdom: Phase 2bis Report*, 16 October 2008, <http://www.oecd.org/dataoecd/23/20/41515077.pdf>.

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<sup>36</sup> Jack Straw, “Foreword”, *Bribery: Draft Legislation*, Ministry of Justice, 25 March 2009, p.4, <http://www.justice.gov.uk/publications/docs/draft-bribery-bill-tagged.pdf>

<sup>37</sup> *Ibid.*, p.3.

<sup>38</sup> *Ibid.*, p.4.