

Enforcing the law on overseas corruption offences: Towards a model for excellence

A discussion paper¹

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This paper looks at why enforcement of overseas corruption offences involving British companies and individuals under the UK's anti-corruption legislation is crucial to the international fight against corruption. It goes on to explore the following questions:

- Are the current arrangements between the various law enforcement agencies to tackle overseas corruption offences the most appropriate and effective means of ensuring that these offences are investigated and prosecuted?
- Have sufficient resources been made available for enforcing these offences?
- Is it possible to establish a more proactive enforcement regime that can detect offences as and when they occur and that acts on credible suspicions of bribery?

1. Background

1.1 Overseas bribery is a significant problem.

By its very nature, bribery is very hard to measure. But many, not least within the business community, believe it to be widespread. The World Bank estimates that \$1 trillion worth of bribes are paid annually. Price Waterhouse Cooper's 2003 *Global Economic Crime Survey* found that 29% of all companies surveyed considered corruption and bribery to be prevalent – a higher percentage than any other economic crime asked about in the survey. One in 20 companies surveyed estimated that they had paid out more than \$10 million in bribes over the previous two years.³ The US government monitors international bribery from reports received from competitor firms and intelligence sources and receives credible information about bribery on an average of 60 large contracts every year, worth in total around \$35 billion.⁴

³ Price Waterhouse Cooper, *Global Economic Crime Survey*, 2003. The *Survey* found, however, that only 6% of companies interviewed reported any actual incidence of corruption and bribery. It noted that “the high perceived prevalence of corruption and bribery reflects the hard work of governments, regulators and certain NGO's to raise public awareness; an important factor in helping to reduce actual incidence.” The gap between “actual incidence” and “perceived prevalence” may also be because the Chief Executive Officers interviewed are unlikely to admit to actual incidence, given that bribery is now almost universally a criminal offence.

⁴ US Department of Commerce, “Addressing the Challenges of International Bribery and Fair Competition, 2003”, July 2003. In 2003, the number of reports dropped to 40 contracts worth \$23 billion. It was not clear whether this was a one-off drop or evidence that the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, which came into force in 1999, was having an effect.

1.2 It is hard to ascertain how much bribery involves UK companies.

In Transparency International's 2002 Bribe-Payers' Index, the UK was placed 8 out of 21 countries, scoring 6.9 out of 10 on a scale in which 10 represented the least likely to pay bribes. World Bank research in 2000 indicated that 14% of British companies operating in the countries of the former Soviet Union admitted to paying bribes to obtain government contracts.⁵ Several recent cases reported in the press suggest that UK subsidiaries of foreign-based multinationals have been implicated in bribery allegations. This may imply that foreign companies have regarded the UK as a low-enforcement environment.⁶

1.3 There are now a significant number of cases on the UK's national register of overseas corruption allegations, but few investigations are underway.

As of June 2004, the register held by the National Criminal Intelligence Service (NCIS) had 22 cases of alleged bribery and corruption involving UK organisations or individuals. Law enforcement agencies believe that between five and nine of these allegations required investigation within the UK.⁷ As of March 2004, three investigations were under way: two by the Metropolitan Police's Public Sector Fraud and Corruption Unit and one by the Serious Fraud Office (SFO). The two Metropolitan Police investigations were scoping studies rather than full investigations. The Metropolitan Police has subsequently approached the Serious Fraud Office to determine whether several of the allegations it was dealing with, including the two under investigation, would in fact fall within the SFO's remit.

1.4 It is not clear what level of evidence law enforcement agencies require in order to initiate an investigation into an overseas bribery allegation.

Law enforcement agencies have suggested that in general they would initiate an investigation only where there was sufficient evidence for doing so. The nature of corruption, however, means that suspicions will always arise long before any hard evidence emerges. There is a risk of a Catch-22 situation developing whereby sufficient evidence would emerge only from an investigation – but an investigation would be launched only if there was sufficient evidence. This could easily lead to a vicious circle

⁵ Joel Hellman, Geraint Jones and Daniel Kaufmann, "Are Foreign Investors and Multinationals Engaging in Corrupt Practices in Transition Economies?" *Transition*, May-July 2000, pp.5-6.

⁶ In particular, the French authorities are currently investigating allegations that a consortium, including France's Technip and the US firm, Halliburton, paid \$180 million in irregular payments to a UK lawyer, through an offshore company majority owned by Halliburton's UK-based subsidiary, which may have been used to pay bribes in connection with the construction of a Liquefied Natural Gas plant at Bonny Island in Nigeria. Reports in *The Guardian* newspaper, meanwhile, have suggested that a UK consultancy company and the UK subsidiary of a Norwegian company are implicated in allegations relating to payments made in Uganda with respect to the building of a dam. Investigations in Norway into the parent company have now been dropped, but it is not clear whether investigations are continuing into the UK companies concerned.

⁷ Different law enforcement agencies have suggested different numbers.

of non-enforcement. Law enforcement agencies say, however, that they are now accepting a lower burden of proof when considering whether or not to investigate a corruption allegation. The Serious Fraud Office now accepts that corruption allegations will often entail anecdotal evidence and will rarely be accompanied by concrete evidence. Their approach in future will be to assess whether such anecdotal evidence is credible and can be corroborated.

1.5 There is still some uncertainty within law enforcement agencies as to whether allegations of overseas bribery and corruption made before the Anti-Terrorism Crime and Security Act 2001 can or should be investigated.

Part 12 of the Anti-Terrorism, Crime and Security Act (ATCSA) 2001 extended the jurisdiction of the English and Welsh courts over corruption offences occurring wholly overseas, and put beyond doubt that the UK's 1889, 1906 and 1916 anti-corruption laws apply to the bribery of foreign public office holders. Up to six of the allegations of overseas corruption on the NCIS register relate to events that occurred before 14th February 2002 when Part 12 ATCSA came into force.⁸ Allegations lodged before this date require either a relevant act of bribery to have occurred within the UK to trigger an investigation,⁹ or they would need to be investigated as other offences, such as false accounting, deception or money-laundering.

There are differing views as to whether these allegations can or should be investigated. The Home Office has argued consistently that cases involving a relevant act of bribery or corruption in the UK could have been investigated prior to the ATCSA under existing legislation. The Serious Fraud Office, however, believes that there remains a fundamental 'uncertainty' over whether the 1906 Prevention of Corruption Act applied to foreign public officials, therefore making it doubly hard and potentially high-risk to prosecute an allegation that occurred before February 2002. Some observers within the law enforcement agencies suggest that, from a pragmatic point of view, there is an argument for regarding 14th February 2002 as the start date from which allegations should be investigated, given their limited resources and the difficulty of proving that a relevant act took place in the UK. But cases with clear evidence and an obvious and substantial territorial link, they contend, should and would be investigated.

1.6 Allegations of overseas corruption to date have come from a limited but consistent number of sources.

The sources of allegations so far on the NCIS register have been overseas diplomatic missions (10 allegations), the Export Credits Guarantees Department (ECGD)

⁸ Hansard, 10/6/04, Col 526W, Reply from Caroline Flint to Malcolm Bruce MP.

⁹ There are questions, however, as to what would constitute a relevant act. According to some legal interpretations, it would have to be a substantial component of the offence. Others have suggested that as little as a telephone call would be necessary.

(8 allegations),¹⁰ and overseas authorities (3 allegations). There are other possible sources of allegations that do not yet appear to have led to any information being forwarded to the police. None of the allegations so far, for instance, appear to have come directly from whistleblowers, competitors,¹¹ the Inland Revenue, internal or external company audits, reports by companies to the Financial Service Authority under the special reporting requirement (SUP 15.3.17),¹² or Suspicious Activity Reports (SARs), which are forwarded to the National Criminal Intelligence Service by financial institutions and other professional bodies required by law to do so.¹³

1.7 Overseas bribery and corruption offences are likely to involve lengthy and costly investigations, which have significant resource implications for law enforcement agencies.

Typically, offences may take up to three or four years to investigate and involve overseas travel and substantial staffing. They require expertise in areas such as forensic accounting, mutual legal assistance and cooperation with foreign jurisdictions.

1.8 The Home Office has not so far made additional resources available to law enforcement agencies to investigate overseas bribery offences.¹⁴

The Home Office has provided £206 million to the Police Service for policing international terrorism, for the period 2002-2005.¹⁵ None of this money has been earmarked for overseas bribery offences, however, and should be seen in the context of significant resource constraints faced by law enforcement agencies, and the pressure on local law enforcement agencies to deliver highly visible local policing.

¹⁰ One of these allegations is the same as one forwarded to NCIS by an overseas diplomatic mission.

¹¹ A very small number of allegations do appear to relate to concerns raised initially by competitors, which were then picked up and forwarded to NCIS through other channels.

¹² SUP 15.3.17 requires that companies notify the Financial Service Authority immediately if a significant event arises, such as that it “identifies irregularities in its accounting or other records, whether or not there is evidence of fraud; or it suspects that one of its employees may be guilty of serious misconduct concerning his honesty or integrity and which is connected with the firm’s regulated activities or ancillary activities”. The FSA notes, however, that it receives a limited number of reports under this requirement, because firms are either not aware of the requirement or interpret ‘significant’ very narrowly. (*See* Financial Services Authority, “Developing our policy on fraud and dishonesty”, Discussion Paper 26, December 2003, para 3.16.)

¹³ Current allegations are, however, checked by NCIS against these Suspicious Activity Reports.

¹⁴ Hansard, 10/2/04, Column 1418W, Response from Paul Goggins to Simon Thomas MP. The Home Office stated that “no specific targets have been set by the Home Office for the investigation and prosecution of the offence of bribery of a foreign public official, nor have any additional funds been allocated”.

¹⁵ In addition to this, the Home Office provided £15 million to Police Special Branches in 2004-5 (*See* Hansard, 19/4/04, Col 85W, Response from Hazel Blears to Miss McIntosh MP).

2. Why is enforcement of anti-corruption legislation essential?

2.1 Proactive enforcement of anti-corruption legislation is the best form of prevention.

Anti-corruption laws will be a deterrent only as long as they are enforced. They will swiftly lose their credibility if serious allegations of bribery and corruption are not fully investigated, if cases are continuously dismissed, or if few or no prosecutions are brought. A private sector representative pointed out during the OECD's review of Norway's implementation of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (henceforth OECD Convention),¹⁶ that "a growing dismissal of cases ... could undermine the deterrent effect of the harsher sanctions introduced by the new legislation [against bribery] and cause a decrease in reports, notably from the private sector."¹⁷ For this reason, any policy focusing on educating the business community, emphasised by some government departments, will be of limited and short-lived value unless it is backed up by proactive enforcement.

2.2 Overseas bribery will be combated effectively only when the costs of sanctions and the risk of detection outweigh the benefits of paying bribes.

As Price Waterhouse Cooper's 2003 *Global Economic Crime Survey* pointed out, if real decreases in economic crime are to be achieved, the roots of economic crime have to be addressed: "motive, opportunity and a clearly perceived benefit of reward over punishment."¹⁸

2.3 Tackling overseas corruption is part of a broader agenda of tackling white-collar crime that needs as much commitment as tackling any other crime.

The UK's Attorney General, Lord Goldsmith, has said on various occasions that social equality requires that law enforcement agencies "bear down on white collar crime" as seriously and effectively as on ordinary crime.¹⁹

¹⁶ The OECD Convention is accompanied by two stages of monitoring that are carried out by "peer" review. Phase 1 monitoring assesses whether the legislation passed in each country to implement the Convention is adequate. Phase 2 monitoring assesses how countries are enforcing this legislation, and complying with the broader non-criminal aspects laid out in the 1997 OECD Revised Recommendations on Combating Bribery.

¹⁷ OECD Working Group on Bribery, "Norway: Phase 2", 12 April 2004, p.36, para. 117.

¹⁸ Price Waterhouse Cooper, *Global Economic Crime Survey*, 2003.

¹⁹ See Lord Goldsmith, "Tackling Fraud in 2002", KPMG Law Lecture 2002; Home Office, "Cash Boost to Fight Fraud", 8/12/03.

2.4 Enforcing bribery laws is in the broader international interests of the UK and will in the long run bring benefits to the UK.

From a purely self-interested point of view, politicians around the world have started to recognise that corruption has a role in creating unstable environments that lead to weak and failing states; repressive or conflict situations that generate flows of refugees and asylum seekers; regional instability; and even havens for terrorists and organised crime gangs. The UK government has taken a strong stand on requiring developing countries to tackle corruption in their countries. But as Lord Goldsmith has stated, “our own house has to be in order or we have no legitimacy to tell others to sort themselves out as a condition of aid”.²⁰ At the same time, UK firms that resort to bribery are likely to be less competitive and innovative and to have higher overall operating costs. It is in the long-term business interests of British companies to stamp out bribery.

2.5 Other OECD countries are now taking enforcement action on overseas bribery cases, so the argument that British companies will be disadvantaged by enforcement no longer applies.

(See Annex 1 for a list of actions taken so far by OECD countries.)

3. What enforcement has the UK committed itself to under international conventions against corruption?

3.1 The UK is committed, under three international conventions against corruption, to investigating, prosecuting and sanctioning corruption offences effectively.

3.2 All the conventions emphasise that a country should ensure it has competent and specialised authorities or staff to investigate corruption offences and that adequate resources and training are available to those authorities or staff.

Two of the international conventions (EU and UN) require a country to investigate corruption in general, both domestic and overseas. The commitment in the OECD Convention refers specifically to bribery of a foreign public official. (See Annex 2 for full details of relevant articles in each Convention.)

²⁰ Lord Goldsmith, “Tackling Fraud in 2002”, KPMG Law Lecture 2002.

- The OECD 1997 Revised Recommendations that accompany the OECD Convention state that:
“complaints of bribery of foreign public officials should be seriously investigated by competent authorities and that adequate resources should be provided by national governments to permit effective prosecution of such bribery”.
- Under the EU Criminal Law Convention on Corruption, the UK is required to:
“ensure that persons or entities are specialised in the fight against corruption ... [and] that the staff of such entities has adequate training and financial resources for their tasks”.
- Under the UN Convention Against Corruption, the UK is committed to:
“ensur[ing] the existence of a body or bodies or persons specialized in combating corruption through law enforcement ... Such persons or staff of such body or bodies should have the appropriate training and resources to carry out their tasks”.

3.3 The competence and specialisation for dealing with international corruption offences is distributed among several different agencies in the UK.

With respect to its international commitments on enforcement, the UK government has said that “there are persons specialised in combating corruption in a number of law enforcement authorities which have responsibility for investigating or prosecuting corruption offences, such as the CPS [Crown Prosecution Service] and the Metropolitan Police”.²¹ Two officers in the National Criminal Intelligence Service, one a senior manager, work on suspected cases of overseas bribery “as part of a wider set of responsibilities they have”.²² Within the CPS, “in view of the very small number of cases so far referred to CPS Casework Directorate, no prosecutor currently specialises exclusively in dealing with overseas corruption,” although most prosecutors have experience either of corruption prosecutions or international work, or both.²³ At the Serious Fraud Office, all lawyers and investigators are required to have a thorough knowledge of fraud-related offences, including offences of overseas bribery that fall under Part 12 of the ATCSA.²⁴ The Metropolitan Police has a Public Sector Fraud and Corruption Unit, which is responsible for dealing with domestic and international corruption cases that fall within the London area.

²¹ Hansard, 11/3/04, Col 1668W, Response from Caroline Flint to Malcolm Bruce MP.

²² Hansard, 30/3/04, Col 1346W, Response from Hazel Blears to Malcolm Bruce MP.

²³ Hansard, 29/3/04, Col 1145W, Response from the Solicitor-General to Malcolm Bruce MP.

²⁴ Ibid.

4. Why should the UK exercise its jurisdiction over overseas corruption offences?

4.1 The UK government's position outlined in the "Memorandum of Understanding on Implementing Part 12 of the Anti-Terrorism, Crime and Security Act 2001" is somewhat ambivalent as to whether the UK should automatically exercise its jurisdiction over overseas corruption offences.

The Memorandum states that:

“the existence of a new UK jurisdiction over corruption offences does not mean that it will always be appropriate for the UK to exercise it in any given case. *The decision as to which jurisdiction is the best placed to pursue each case will depend on where the main evidence and witnesses are likely to be located.* Also, a bribery case is likely to involve at least two parties, one of whom at least may not be prosecutable in the UK. It would be undesirable for these parties to escape prosecution by the proper authority” (emphasis added).

Some within government, meanwhile, are not convinced that the UK should as a matter of course seek to exercise its jurisdiction.

4.2 The issue as to where evidence and witnesses are based is rarely likely to be simple in an overseas corruption case.

Evidence and witnesses are likely to be in multiple jurisdictions, including in offshore territories. Evidence may include money-laundering reports; bank accounts of companies headquartered in the UK, their subsidiaries and offshore companies; representative or agency agreements held by companies either in the UK or in other jurisdictions; and internal board minute meetings or correspondence from both the UK and other jurisdictions.

Witnesses may also reside in multiple jurisdictions, and may include intermediaries based in a third country, or employees of the company concerned, based either in the UK or abroad. Norway's economic crime unit, Økokrim regards corporate employees as one of the main sources of information for such offences.²⁵ In France, the main source of evidence has been from money-laundering reports received by TRACFIN (Unit for Intelligence Processing and Action against Secret Financial Channels).

²⁵ OECD Working Group on Bribery, "Norway: Phase 2", April 2004, p.19, para. 62.

4.3 Another issue is the location of the victim of an overseas corruption offence. Once again, this will rarely be simple in overseas corruption offences.

The victim may be a competitor from a third country, or a foreign state, or the public at large in a foreign country. This has been the view taken in the recent and ongoing prosecutions of foreign companies for bribery in the small African kingdom of Lesotho. The presiding judge in these prosecutions has ruled that, since the harmful effects of the offence were experienced within Lesotho, Lesotho could have jurisdiction for trying it.²⁶ The chief prosecutor in the Lesotho trials, Guido Penzhorn, has stated that the victim in bribery cases “is society”.²⁷ In France, as the OECD peer review for Phase 2 noted, “the offence of bribery is an attack on the authority of the state [meaning that] the status of ‘victim’ would seem to be reserved to the foreign state”.²⁸ The victim might also be a government institution from the country in which the bribing company is based, which might have given financial or other assistance to the company in good faith that bribery would not take place. Indeed, in the United States, prior to the Foreign Corrupt Practices Act 1977, the state brought cases against companies for making false statements to the US government’s Export-Import Bank. Or the victim may be a combination of these various legal personalities.

4.4 There are at least five reasons why the UK should exercise its jurisdiction over overseas bribery allegations.

- While it is clearly not the job or the responsibility of UK law enforcement agencies to prosecute foreign nationals for taking bribes or to ensure that they are prosecuted in their respective jurisdictions, it is their responsibility to prosecute British nationals and companies who engage in illegal behaviour, which overseas corruption now clearly is.
- Bringing a multinational company to court is likely to involve huge expenses and highly skilled legal counsel, as the bribery trials in Lesotho have shown. Multinationals are well resourced and able to mount vigorous defences. There is a real question whether poorer countries with scarce resources can afford to bring such prosecutions and have the required legal experience and skills to do so (Lesotho, for instance, had to call in South African expertise). It is also arguable that poorer countries should not have to pick up the expense of bringing foreign multinationals to court when the country from which the multinational company

²⁶ Fiona Darroch, “The Lesotho Corruption Trials – A Case Study”, paper prepared for Transparency International. Interestingly, the companies facing prosecution sought to argue that Lesotho did not have jurisdiction on the grounds that the agreement reached between the parties who received and paid the bribes did not take place in Lesotho and that the payments had been made in Switzerland, which is outside Lesotho’s territorial jurisdiction.

²⁷ Paper delivered by Guido Penzhorn to Institute of Security Studies Seminar, “Three strikes against graft: assessing the impact of high-profile corruption”, March 2004

²⁸ OECD Working Group on Bribery, “France: Phase 2”, p.45, para. 121.

comes has the authority and jurisdiction to do so. The UK is usually likely to have more resources for investigation and prosecution than the other country concerned, particularly where it is a developing country with few resources, and to have greater access to prompt international cooperation and appropriate expertise.

- A conviction in the country of residence of a company is likely to act as a far greater deterrent and lead to other economic sanctions, such as possible debarment. In addition, a developing country with an under-resourced legal system will always find it harder than a Western one to prove to the international community that any trial has been fair.
- In the past, developing countries have come under pressure from the international community, including Britain, to drop their investigations into allegations of corruption by OECD companies.²⁹ The argument that litigation against OECD companies will deter further, much desired and needed foreign investment has probably been internalised by many officials in developing countries, lowering the probability of bribery prosecutions in these countries.
- Where the independence of the judiciary and of law enforcement is weak, and a serving high-level government official is implicated in the allegations, prosecutions will inevitably be rare. It is unrealistic to expect prosecutions in these environments. It would be undesirable, however, for British individuals and companies to escape justice for offences in these jurisdictions, even where the person taking the bribe is unlikely to be prosecuted.

5. Is the current UK enforcement set-up the most appropriate and effective one?

5.1 Under the current arrangement outlined in the “Memorandum of Understanding on Implementation of Part 12 of the Anti-Terrorism, Crime and Security Act”, no single agency or police force in the UK has overall responsibility for dealing with overseas corruption offences.

Under the terms of the Memorandum, the National Criminal Intelligence Service (NCIS) acts as a central focal point for receiving allegations. NCIS then assesses and forwards allegations to the ‘relevant UK agency’. This is either the Serious Fraud Office or the

²⁹ For example, in 1998, various foreign governments put pressure on the government of Pakistan to abandon investigations by Pakistan’s Accountability Bureau into allegations of corruption surrounding the Hubco Power Plant, built in 1997. One UK government minister suggested publicly that Pakistan’s actions were a step backwards for ‘investor confidence’ (See Kirstine Drew, “Corruption and Corporate Social Responsibility”, UNICORN, 9/1/02, and also *Financial Times*, 27/10/1998).

local police force with responsibility for the area in which a company is geographically based. In practice, all the allegations that have been forwarded so far by NCIS to other law enforcement agencies for investigation (9 in total) have been sent to the Metropolitan Police's Public Sector Fraud and Corruption Unit. According to the Home Office, "it looks like that will be the general trend."³⁰ The Serious Fraud Office will not take on any allegation unless it has previously been passed to and recorded by a local police force.

5.2 Overseas corruption features in the plans of both the police and the Serious Fraud Office.

Overseas corruption is included in the National Policing Plan 2004-2007, which states that "while it is anticipated that the number of cases [of international corruption] will be small, the issue is important and forces should be ready to deal with any cases referred to them by NCIS".³¹ A responsibility for dealing with cases of overseas corruption is also recognised in the Serious Fraud Office's April 2004 Departmental Report, which states that "changes to the rules or jurisdiction for trying corruption offences and to the scope of money laundering offences are likely to increase the SFO caseload".³²

5.3 There are real questions whether the current arrangement is firstly, realistic, and, secondly, the most effective and appropriate one for dealing with international corruption.

There are three main reasons why:

- Local police forces have local priorities. They may not have the level of expertise or resources to carry out an international investigation.³³ They are responsible to local communities, local police authorities, and ultimately local council taxpayers for how they spend their resources. Spending a significant percentage of their budget on expensive overseas investigations is unlikely to fit with this reality,

³⁰ Letter from Caroline Flint, Parliamentary Under Secretary of State at the Home Office, to Simon Thomas MP, 26/2/04.

³¹ National Policing Plan 2004-2007, November 2003, para 4.32.

³² The Law Officers' Departments, "Departmental Report", April 2004, para 21.

³³ The number and size of local police fraud squads have declined in recent years. The number of police fraud investigators fell from 869 in 1995 to 600 in 2003. Of these 600, it has been estimated that, at any one time, half of them are diverted to deal with other forms of crime. According to the independent Fraud Advisory Panel, many police forces have cut back on specially trained fraud officers and "some local stations feel compelled to turn away significant complaints of fraud because of their lack of specialist manpower" (Fraud Advisory Panel, "5th Annual Report", September 2003, p.23). Many experienced officers have been retiring and are not being replaced. At the same time, police officers are increasingly encouraged to move on after three years to other departments, meaning that the expertise and skills needed for fraud investigations is being lost. The Financial Services Authority, in its 2003 report on fraud, noted that "a significant number of fraud cases reported to law enforcement agencies are never investigated and prosecuted. Firms express considerable frustration with the limited response of law enforcement to reports made" (Financial Services Authority, "Developing our policy on fraud and dishonest", Discussion Paper 26, December 2003, para 3.5).

especially when there are already resource constraints on enforcing domestic crime.

- Enforcing the law on overseas corruption offences is a national priority rather than a local one. It would be more appropriate for enforcement to be the responsibility of a national law enforcement agency rather than local police forces.
- The opportunity for building up experience and specialist institutional knowledge within one agency is being lost with the current geographically based arrangement.

6. What would be a better arrangement?

6.1 Giving responsibility to one agency for enforcing overseas corruption would ensure clarity and consistency and would enable specialised knowledge to be built up in one institution.

6.2 The most appropriate agency to be responsible for enforcing anti-corruption laws (given present structures³⁴) is the Serious Fraud Office.

This is because:

- One of the SFO's main aims is to maintain confidence in the UK's business and financial institutions. Combating bribery and overseas corruption clearly fits with this aim;
- The SFO has a national role;
- Most overseas corruption offences fall well within the remit of the SFO's acceptance criteria (*see* Annex 3);
- The SFO has the most appropriate powers (granted under Section 2 of the 1987 Criminal Justice Act, *see* Annex 3) and expertise (forensic accountants and lawyers) to investigate overseas corruption offences;
- The SFO has experience of investigating and prosecuting both domestic and international corruption cases;
- The SFO has strong links with overseas authorities, particularly their fraud sections;
- The SFO can more easily get additional funding from the Treasury for large cases;³⁵

³⁴ Alternatives are to expand the proposed Serious Organised Crime Agency (SOCA) to include a specific remit for, and a unit dealing with, financial and economic crime, or to establish a National Fraud Squad, a proposal that has long been lobbied for by those active in the field of fraud but has been rejected by the government.

- The SFO has experience in putting complex cases before juries; and
- The SFO has more flexible performance targets, giving it greater leeway for taking on high-risk cases.³⁶

6.3 The Serious Fraud Office has said, in June 2004, that it is actively considering taking a lead role in enforcing anti-corruption legislation, which is a very positive step.

Details of what kind of role the SFO will take have yet to be announced. It was reported in June 2004 that Ministers were considering giving the SFO a proactive role in vetting allegations of bribery and corruption at an early stage, with a view to whether it would be appropriate for the SFO to take on the case for investigation.³⁷

6.4 The Serious Fraud Office should ensure that it maintains a core of personnel who are regularly trained in the latest and most effective ways of investigating and gathering evidence for overseas corruption offences.

The SFO should consider ensuring that at least two case controllers (out of a total of 16) and their teams have specific responsibility to deal with these offences in order to build up the appropriate specialised knowledge for dealing with corruption offences. The SFO is reported to have a fairly rapid staff turnover.³⁸ At the same time, the SFO tends to have a generalist approach to assigning responsibility for cases rather than doing so according to categories of offence. There is a danger that experience and specialised knowledge may be lost unless staff are specifically assigned the responsibility of enforcement in this area.

The SFO believes that overseas corruption offences are not complicated to prosecute, but it does acknowledge that investigating such offences requires experience and subtlety. A consistent theme of OECD reviews of individual countries' application of the OECD Convention has been that specialised knowledge is required. It is worth noting that in the US, where there have been regular albeit few prosecutions, there is a "cadre of highly trained FCPA [Foreign Corrupt Practices Act] prosecutors" in the Criminal Division Fraud Section of the Department of Justice.³⁹ At the time of the OECD's review of US

³⁵ The SFO makes no specific provision in its budget for very large cases, as these are "the subject of individual negotiation with the Treasury" (The Law Officers' Departments, "Departmental Report", April 2004, para 29).

³⁶ According to the Treasury Solicitor's Department and Serious Fraud Office "Autumn Performance Reports 2002-2003", November 2002, the SFO's targets are "devised carefully to avoid placing undue emphasis on any one aspect of the SFO's work, for instance, conviction rates" and does not "set targets for [its] outcomes".

³⁷ *Financial Times*, "Ministers consider bribery crackdown", 25/6/04.

³⁸ Brendan Malkin, "What's wrong with the Serious Fraud Office?" *The Guardian*, 23/3/04.

³⁹ OECD Directorate for Financial, Fiscal and Enterprise Affairs, "United States: Phase 2", October 2002, para 78.

implementation of the Convention on Combating Bribery, the US had 11 attorneys working on overseas bribery cases out of a total of 60 in the Section, many of whom were working on other non-bribery cases at the same time. (See Annex 4 for a list of the enforcement arrangements in other OECD countries.)

6.5 The Serious Fraud Office will need to be able to work with a police force that has the capacity and the expertise to help investigations of this kind.

This could be either the City of London Police, which has been assigned ‘lead force’ status for fraud in the South-East, will be relocating its offices with the SFO and is the only police force in the UK that makes fraud a priority. Or it could be the Metropolitan Police Public Sector Fraud and Corruption Unit, which has been dealing with all the cases of overseas corruption forwarded by NCIS so far. A third option is some combination of the two. Whichever police force is involved is likely to end up investigating those cases that are relatively simple and that fall below the £1 million threshold of the SFO’s acceptance criteria.⁴⁰ There are differing views within the law enforcement agencies as to how this arrangement might work best.

- One option involves having a specific police unit to work with the SFO on overseas corruption offences, modelled along the lines of the Dedicated Cheque and Plastic Card Unit (DCPCU), which is based in London and staffed by officers seconded from both the Metropolitan Police and City of London Police, and from industry. The DCPCU has 20 staff, including a detective chief inspector, 12 detective constables and two administrative staff. It receives significant funding from the private sector. An overseas corruption unit would probably need less staff than the DCPCU, but would use more resources for overseas travel and international work.
- Another option is a more flexible one, whereby police officers (probably two or three a year) are made available to the SFO, primarily on a case-by-case basis.

6.6 A decision as to which option to pursue will depend upon a realistic estimate of the number of allegations of overseas corruption that are likely to be received each year.

The Home Office has suggested that that only one or two cases are likely to be worth investigating each year, a view that is held by others within the law enforcement community. This assumption, however, would appear to be based less on experience in the UK than on the record in the US, where one to two cases are brought annually. It may also be based on a perception, albeit unconscious, that there is no reason to enforce overseas corruption offences more rigorously than the US does. But the high number of

⁴⁰ The SFO has stated that the £1 million mark is “simply an objective and recognisable signpost of seriousness and likely public concern, rather than the main indicator of suitability” (See Annex 3, Acceptance Criteria).

cases on the UK's NCIS register as of June 2004 would suggest that there are many more potential cases for investigation. In the eight months from October 2003 to June 2004 alone, UK diplomatic missions forwarded six new allegations. Some within the law enforcement community suggest that successful prosecutions and proactive enforcement would probably increase reporting.

Given that the number of allegations each year is a relative unknown, a dedicated anti-corruption unit may well be under-used and therefore constantly diverted to non-corruption related offences.⁴¹ On the other hand, having a flexible approach could well mean that, if there were more than one to two allegations of overseas bribery and corruption each year that should be investigated, a decision to investigate may depend upon whether sufficient police can be diverted from other core tasks to deal with the allegations. The projection of one to two cases a year could then become a self-fulfilling prophecy: if provision is made for a maximum of two cases a year, it is unlikely that more than two cases will be investigated each year.

Whatever is agreed, it is essential that a realistic appraisal of the number of potential allegations is undertaken, that provisions are made for an appropriate number of police to be available for such investigations, and that specialisation within the police in dealing with investigations of this kind is encouraged. This of course has resource implications (*see below*).

6.7 Transparency regarding decisions as to whether to investigate and prosecute allegations or not should be enhanced.

A lack of transparency as to why investigations involving overseas corruption have or have not been pursued could fuel suspicions that the UK's commitment to enforcing fully its anti-corruption legislation is half-hearted. It may also give rise to a perception that certain allegations involving politically influential companies or important allies from foreign governments may be left uninvestigated, in contravention of Article 5 of the OECD Convention. To avoid this, the national register of allegations could be expanded to include information on why particular investigations are launched, and why some allegations are not investigated. Ideally, and where possible, full reasons for not pursuing investigations, particularly on well-publicised cases, should be made public.

6.8 Establishing a central contact point and ensuring that allegations of overseas corruption can be reported directly to the agency that will deal with the offence could help establish public confidence that such allegations will be treated seriously.

Currently, whistleblowers and ordinary members of the public who wish to pass on allegations or information about overseas corruption offences to the law enforcement agencies have to report them to their local police station. This approach may not be

⁴¹ This has been the experience in The Netherlands. *See* Kieron Sharp, forthcoming dissertation for MA in Fraud Management, Teeside University, Autumn 2004.

conducive to ensuring that such allegations are dealt with as quickly and effectively as they should be, nor to enabling whistleblowers, such as employees who may be a source of invaluable information for an investigation, to report their concerns. Consideration should be given to setting up a staffed telephone and email hotline for overseas corruption offences, as has been done in the US. Within the UK, the City of London Police fraud hotline could provide a model for this.⁴²

7. Are there sufficient resources?

7.1 The Serious Fraud Office faces significant resource constraints and will need additional resources to be able to hold responsibility for enforcing overseas corruption offences.

The SFO has said that, if and when it takes the lead responsibility for dealing with these offences, it would expect to do so 'within existing resources'. But the SFO can take on only a limited number of cases each year (between 70 and 90). According to the National Audit Office (NAO), the Serious Fraud Office was unable to meet its targets for 2003/04 for increasing its caseload to 110, and decreasing the time for both investigation and prosecution per case to 16.5 months and 14.5 months respectively. The main reason behind this was lack of resources available to the SFO from police forces on a reliable and consistent basis. The SFO has lost the equivalent of 135 police officers because of falling police resources available for tackling fraud. The extra resources it has received since 2000 have enabled it only to increase staff numbers by 72, leaving an effective shortfall of 63 staff. The Serious Fraud Office has been assigned an increase in funding of £9.5 million for 2004-05 and £14.5 million for 2005-06 (a 40% increase in real terms).⁴³ But according to the NAO, "the Office cannot tell whether these additional resources will be sufficient to fill the gap left by the withdrawal of police support".⁴⁴ In addition, much of the increase in resources will go towards tackling new cartel offences under the Enterprise Act 2002, for which the SFO is now responsible and for which it has express jurisdiction.⁴⁵ Robert Wardle, the SFO's Director, has warned in a recent interview of the dangers of the SFO taking on too many cases and spreading itself too thinly.⁴⁶

⁴² The City of London Police 'Fraud Desk' was set up in 1998. It is a telephone service to deal with enquiries about fraud in the City of London, and is staffed by a team of experienced Fraud Squad detectives. The City of London Police has reported that the creation of the desk has "streamlined the way incoming enquiries and cases are dealt with and has improved the immediate police response when a fraud is reported" (See <http://www.cityoflondon.police.uk/crime/fraud.htm>).

⁴³ The Law Officers' Departments, "Departmental Report", April 2004, para 12.

⁴⁴ National Audit Office, "Case Studies: Managing resources to deliver better public services", 12 December 2003, pp.21-4.

⁴⁵ Fraud Advisory Panel, "5th Annual Report", September 2003, p.24. There is a question as to whether the SFO should also be given express jurisdiction to deal with international corruption offences. This would certainly ensure that such offences are given priority status at the SFO, and that an adequate slice of the SFO's resources are consistently assigned to such offences.

⁴⁶ *Accountancy Age*, "Profile: Robert Wardle, Head of the Serious Fraud Office", 11/3/04.

7.2 Unless enforcement of overseas corruption is specifically resourced and assigned as a priority, it risks being squeezed out by other priorities and offences.

Because of resource constraints and to enable it to meet its targets, the SFO is rigorously vetting cases referred to it and terminating investigations that are unlikely to lead to speedy prosecution.⁴⁷ There is a danger, particularly given that there is little case law relating to overseas corruption, that the SFO may take a very cautious approach to taking on and prosecuting corruption cases, and make take on only clear-cut and easy cases in order to meet its targets. Until case law is established in this area, prosecuting corruption cases is likely to be seen as high risk, particularly since cases will inevitably rest largely on circumstantial evidence and inference. Unless the enforcement of corruption offences is clearly resourced, it may well drop off the priority list because of these difficulties.

7.3 The police force or forces assigned to assist the SFO with overseas corruption investigations will also need additional resources for similar reasons.

The City of London Police received just over half the resources that it asked for to enable it to take on ‘lead role’ responsibility for fraud – £3 million instead of the £5 million requested.⁴⁸ It is now recruiting 35 new full-time police officers as a result. Funding to tackle fraud has, however, been under-resourced for some years now. The increased funding for both the SFO and the City of London still falls well short of the £85 million that was estimated to be required to set up a National Fraud Squad, as proposed by various fraud experts within the law enforcement community. If overseas corruption offences are not to compete with pressing domestic demands for fraud investigations, additional resources should be assigned to the police, not least to ensure that it is recognised as a priority.

7.4 The extra resources needed to ensure that overseas corruption offences are enforced are relatively small.

Investigating two allegations of overseas corruption a year would require an estimated £1 million a year. As noted above, however, this is an unrealistically low estimate of the number of likely allegations that should be investigated. The estimated funding would certainly not allow for the number of allegations currently on the register to be investigated properly. If a small police unit were set up along the lines of the Dedicated Cheque and Plastic Card Unit, the resources likely to be needed by the police alone is in the region of £2.7 million per year. Assigning between £2-3 million additional resources per year specifically for overseas corruption offences would send a strong message that the government regards enforcement of anti-corruption laws as a priority. The government should examine whether some of these resources could come from assets

⁴⁷ The Law Officers’ Departments, “Departmental Report”, April 2004, para 10.

⁴⁸ £2 million of this came from the Home Office and £1 million from the Corporation of London.

recovered under the Proceeds of Crime Act, or through award of the costs of investigation and prosecution as an additional sanction for such offences.

7.5 Given the relatively recent emphasis on reporting overseas corruption offences, any estimate of resources at this stage can only be provisional and should be reviewed regularly.

A regular review on a yearly or two-yearly basis of how enforcement of overseas anti-corruption legislation is progressing and of whether sufficient resources are available is necessary to ensure that resources match reality. Input for this review should be received from a wide variety of stakeholders, including outside organisations such as NGOs. In Canada, an annual report to Parliament is made on the country's implementation of the OECD Convention and its 1998 Corruption of Foreign Public Officials Act. One of the OECD's recommendations to the US, meanwhile, in its review of the US's implementation of the OECD Convention, was that it should introduce a mechanism for periodic review of enforcement of the 1977 Foreign Corruption Practices Act.⁴⁹ A system of annual reporting and review in the UK may well prove useful, and a good opportunity to assess resource issues.

8. Can a more pro-active enforcement regime be developed for dealing with overseas corruption offences?

8.1 Any enforcement of anti-corruption legislation will need to draw on intelligence and covert policing functions.

The Serious Fraud Office, according to a recent interview with its Director, Robert Wardle, tends to be "reactive, looking at cases of suspected fraud that have already been uncovered".⁵⁰ Furthermore, the SFO does not have any intelligence-gathering function. If the SFO is to take a lead role in investigating alleged overseas corruption offences, consideration needs to be given to how a pro-active approach to enforcement of anti-corruption legislation can be developed.

8.2 The proposed new Serious Organised Crime Agency (SOCA) is likely to have some role to play in ensuring proactive enforcement of overseas anti-corruption legislation.

The two national organisations that currently provide national intelligence and covert policing functions are the National Criminal Intelligence Service (NCIS) and the National Crime Squad (NCS). Under new proposals put forward by the government in March 2004, both these bodies will be incorporated into a new Serious Organised Crime Agency

⁴⁹ OECD Working Group on Bribery, "USA: Phase 2", October 2002, p.27.

⁵⁰ *Legal Week*, "White Collar Crime: The Quiet Man", 13/5/04.

(SOCA) in 2006. SOCA will include “a cadre of financial investigators capable of working closely with colleagues in SFO and forces’ fraud squads”⁵¹ in relation to serious organised crime. It is likely that cases of corruption involving organised crime gangs will be investigated by SOCA.

The Director of the SFO, Robert Wardle, has said that he sees the circumstances in which the SFO would work with SOCA as “relatively few.”⁵² But with regard to overseas corruption offences, SOCA is likely to hold responsibility for receiving Suspicious Activity Reports (SARs) and money-laundering intelligence, currently held by NCIS – both of which may prove vital sources of information for overseas corruption offences. It will therefore be essential that there are clear memoranda of understanding and gateways for disclosure of information between the Serious Organised Crime Agency and the Serious Fraud Office in order to ensure that the SFO is able to draw on intelligence gathered by SOCA.⁵³ It is likely that the covert policing powers of the National Crime Squad that will be incorporated into SOCA will end up being entirely dedicated to organised crime. It may therefore be more appropriate to ensure that whichever police force is assigned to lead with the SFO on overseas corruption is able and ready to take on this function.

8.3 The law enforcement agencies involved in investigating and prosecuting overseas corruption offences will need to have the flexibility to act on credible suspicions of bribery, and should explore all the investigative techniques available to them for enforcing legislation against this offence.

Overseas corruption allegations rarely come packaged with hard evidence. Unless proactive investigation of credible suspicions and allegations of bribery is undertaken, there is a danger that, as already noted, a vicious circle of non-enforcement might develop, and suspicions will remain merely that. The SFO’s Section 2 powers (*see* Annex 3), which may be invaluable for assessing the credibility of an allegation, cannot be used until the decision has been taken by the SFO to initiate an investigation. But an investigation can be initiated by the SFO only if there are ‘reasonable grounds’ for suspecting an offence. The relevant law enforcement agencies should also examine whether and how they might be able to use investigative techniques such as witness protection programmes and surveillance for these offences.

8.4 Careful thought needs to be given to ways of ensuring that effective impunity in certain jurisdictions does not develop.

Currently, many within law enforcement agencies are of the opinion that if they are unable to get cooperation with the foreign jurisdiction concerned in an overseas

⁵¹ Home Office, “One Step Ahead: a 21st Century Strategy to Defeat Organised Crime”, March 2004, p.32.

⁵² *Legal Week*, “White Collar Crime: The Quiet Man”, 13/5/04.

⁵³ That is unless the structure of SOCA is reconsidered, as some recommend, so that its jurisdiction is widened to embrace corruption and other serious economic crimes, and the SFO is incorporated into it.

corruption allegation, it will be almost impossible to conduct an investigation. The current “Memorandum of Understanding on Part 12 of the Anti-Terrorism, Crime and Security Act” between government departments and law enforcement agencies states that NCIS should report allegations worthy of investigation to the foreign jurisdiction concerned, except where “it is clear in advance that this avenue will be fruitless” and where “the jurisdiction imposes the death penalty for corruption”. The implication is that, in these instances, investigation and prosecution of overseas corruption will be improbable. Jurisdictions meeting these descriptions, however, are among those where British companies and individuals may be highly likely to pay bribes. China, Saudi Arabia, Vietnam, Nigeria and Iran all have the death penalty for corruption offences – and are all countries in which regular and significant British business deals and operations take place. There are no quick and easy answers to this issue. It would, however, be undesirable for a company or individual paying a bribe in these countries to escape justice, particularly where it may be possible to make a strong circumstantial case without necessarily getting the full cooperation of the foreign jurisdiction concerned, or where there is potential for cooperation with a foreign jurisdiction to be developed.

8.5 The development of a pro-active enforcement regime is not just the responsibility of the law enforcement agencies. Various government departments and regulatory bodies have important roles to play both in detecting and sanctioning overseas bribery.

These departments and bodies include the Inland Revenue, the Department of Trade and Industry (DTI), the Export Credits Guarantees Department (ECGD), the Foreign and Commonwealth Office (FCO), UK Trade International and the Financial Services Authority (FSA). The FSA and Companies Act Inspectors at the DTI, for instance, have similar powers to the Serious Fraud Office to compel individuals to cooperate with investigations – powers that could be used to help gather evidence that may build up the case for an investigation by law enforcement agencies. The potential for the Financial Service Authority’s special reporting requirement (SUP 15.3.17), which requires companies to report to the FSA any irregularities it finds in its records or suspicions of serious misconduct by an employee, to be used in detecting overseas corruption should be explored.

8.6 Enhancing the role of the Inland Revenue in detecting overseas corruption should be given particularly careful consideration.

The OECD reviews of countries’ implementation of its Convention on Combating Bribery have highlighted the important role that tax inspectors can play in detecting bribery. In both Norway’s and France’s reviews, the examiners noted that tax authorities could be a “useful” and “excellent” source of information and reporting about bribery of foreign public officials. Several countries, including France and Italy, have mandatory reporting by companies to their tax authorities of all payments of commissions, fees and similar payments to both residents and non-residents. Within the UK, there are several ways in which the Inland Revenue’s role in detecting bribery could be enhanced.

- The Anti-Terrorism, Crime and Security Act 2001 in the UK provides for a gateway to allow the Inland Revenue to pass on information about a possible criminal offence to law enforcement agencies. Previously, it had been unable to do so.⁵⁴ Since the ATCSA came into force, the Inland Revenue has not used this gateway to refer any information relating to a case of suspected bribery.⁵⁵ Under the ATCSA, the disclosure of such information is not mandatory and is subject to an assessment by the Inland Revenue of the ‘proportionality of disclosure’, that is, whether disclosure is proportionate to the purposes for which it was made. Consideration should be given to making disclosure mandatory. With regard to overseas corruption, consideration should also be given to producing a memorandum of understanding between the SFO and the Inland Revenue to allow much greater cooperation.
- The Inland Revenue should consider the possibility of requiring companies that operate in particular sectors and particular jurisdictions to make annual reports of all commission payments backed up with full documentation, including invoices and agency agreements.
- With regard to the tax deductibility of bribes, the Inland Revenue has recently stated that “the onus is upon the taxpayer not to claim a deduction on ... expenditure”.⁵⁶ This does not suggest a robust approach to preventing the tax deductibility of bribes. The Inland Revenue should ensure that overseas bribery is included as a priority factor in its risk assessment when considering whether to request further documentation from a company for detailed examination.

8.7 Certain changes in the criminal justice system currently being considered by the government will help considerably to develop a proactive approach to enforcing anti-corruption legislation. In particular, the introduction of plea-bargaining is generally considered by law enforcement agencies to be essential for prosecuting these offences.

In the US, plea-bargaining has been crucial to successful prosecutions of overseas bribery. According to the UK government’s March 2004 white paper on combating organised crime, plea-bargaining for the UK is now under consideration.⁵⁷ It is to be hoped that this will be brought forward in the near future. Consideration is also being given, under the government’s organised crime strategy, to whether UK courts can admit

⁵⁴ Under Section 3 of the 1987 Criminal Justice Act, however, the Inland Revenue has been allowed to pass information to the Serious Fraud Office for the purposes of an Inland Revenue investigation, and the SFO has been able to use that information for any prosecution.

⁵⁵ Hansard, 28/1/04, Column 353W, Reply from Dawn Primarolo to Simon Thomas MP.

⁵⁶ Hansard, 28/1/04, Column 355 W, Reply from Dawn Primarolo to Simon Thomas MP.

⁵⁷ Home Office, “One Step Ahead: a 21st Century Strategy to Defeat Organised Crime”, March 2004, p.46. The paper states that “arrangements for sentence indication to be given would not require legislation but could be established by the judiciary.”

evidence obtained overseas, which will also be of direct relevance. The government should consider undertaking a full review of which current rules for the admission of evidence may be impeding the enforcement of anti-corruption legislation along with investigating and prosecuting other international offences.

Conclusions

Enforcement is at the heart of whether international efforts to combat corruption will be effective. The UK government has stated on various occasions that it wishes to be a leader in these efforts. To be one requires making a clear choice to pursue excellence in the field of enforcing anti-corruption legislation. It is to be hoped that the UK authorities will make this choice, in particular by giving careful consideration to the most appropriate enforcement structures, the need for more resources, and the possibilities for pro-active enforcement.

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The Corner House is a UK research and advocacy group focusing on human rights, the environment and development. Since its founding in 1997, it has aimed to support democratic and community movements for environmental and social justice, and aims to pay constant attention to issues of social, economic and political power and practical strategy. As part of its solidarity work, The Corner House carries out analyses, research and advocacy with the aim of linking issues, of stimulating informed discussion and strategic thought on critical environmental and social concerns, and of encouraging broad alliances to tackle them.

Annex 1

Action being taken in other OECD countries in relation to overseas bribery

Despite the fact that the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions has been in force five years (since 1999) and in existence for seven (since 1997), there have been very few prosecutions in OECD countries so far, with the exception of the US, which has had legislation in place since 1977. This is changing, however. It is clear from the OECD Phase 2 reviews carried out so far of eight countries that investigations and prosecutions are underway.

Canada

- One company, the Hydro Kleen Group Inc, has been charged with paying bribes to a US immigration official for favourable treatment. The US immigration official has already been sentenced for receiving the bribes.⁵⁸

France

- Several bribery cases relating to events that pre-date France's 2000 anti-bribery law have been followed up, including a judicial investigation into bribes paid by the formerly state-owned oil company, Elf, around the world and an ongoing enquiry into commissions paid by defence equipment manufacturer Thomson for the sale of frigates to Taiwan.
- There have been no convictions under the new law passed on 30th June 2000 for offences of bribing a foreign public official. But the following investigations and prosecutions have been reported:
 - a French businessman is being brought to court in a case involving bribery of a foreign government minister (who has also been charged in France with receiving bribes) following the discovery of the movement of funds in French bank accounts belonging to the minister;
 - a preliminary investigation was opened in October 2003 into payments of \$180 million through a UK-based lawyer by a consortium involving French company Technip in relation to the construction of a Liquefied Natural Gas (LNG) plant at Bonny Island in Nigeria;⁵⁹ and
 - four potential cases are at the preliminary enquiry stage.

⁵⁸ OECD Working Group on Bribery, "Canada: Phase 2", March 2004, p.22, footnote 62; Department of Foreign Affairs and International Trade, Canada, "Fourth Report to Parliament" on Bribery and Corruption, October 2003, http://www.dfait-maeci.gc.ca/tna-nac/DS/4-report_parliament-en.asp.

⁵⁹ OECD Working Group on Bribery, "France: Phase 2", January 2004, p.7, para. 9.

Italy

- A parliamentary committee of inquiry has been created to inquire into a case about possible bribes paid during Telecom Italia's acquisition of a share in Telekom Serbia.
- The press reported in June 2003 a case involving an Italian energy company allegedly paying bribes through intermediaries in at least three countries in the Middle East.⁶⁰

Norway

- The Norwegian oil company, Statoil, was found guilty and fined \$2.9 million on 29th June 2004 under Norway's 2003 anti-bribery legislation for paying consultancy fees to an intermediary to secure contracts in Iran.
- Prior to this new anti-bribery legislation, Norway had one conviction for a breach of trust offence that concerned acts of bribery of a foreign public official.
- At the time of the OECD's Phase 2 review in September 2003, three cases were being investigated:
 - Four Norwegian citizens were charged with bribing a Swedish public official for inspection certificates for sailing ships for private use;
 - A foreign subsidiary of a Norwegian company was suspected of having hired a consultancy company to facilitate bribes to Ugandan officials in relation to the construction of a hydropower dam (the investigation has since been dropped);
 - Statoil's consultancy payments in connection with Iran (*see above*).⁶¹

USA

- Since 1977, only 30 bribery cases have been prosecuted under the Foreign Corrupt Practices Act (FCPA). The bribes in these cases ranged from \$16,000 to \$9.9 million, representing, in some cases, commission payments of up to 40% of the whole contract price. In all, 23 companies and 54 individuals have been charged, and received fines ranging from \$10,000 to \$3,450,000 (although Lockheed paid a fine of \$21.8 million). Three executives have been imprisoned, and several received home confinement orders. Six individuals have been acquitted.⁶² In a couple of cases, the sanctions have included payment towards prosecution and investigation costs.⁶³
- Prior to the 1977 FCPA, prosecutors used mail and wire fraud statutes, conspiracy and false statements statutes, and other federal criminal provisions to prosecute improper payments to foreign officials. Of some 15 pre-FCPA prosecutions, three

⁶⁰ OECD Working Group on Bribery, "Steps taken and planned future actions by participating countries to ratify and implement the convention on combating bribery of foreign public officials in international business transactions", Information as of 17th December 2003.

⁶¹ OECD Working Group on Bribery, "Norway: Phase 2", April 2004, p.21, para. 67.

⁶² Danforth Newcomb, "Digests of Cases and Review Releases Relating to Bribes to Foreign Officials under the Foreign Corrupt Practices Act of 1977 (as of January 31, 2002), Shearman and Sterling, 2000.

⁶³ OECD Working Group on Bribery, "United States: Phase 2", October 2002, pp.43, 50.

were for false statements given to the US Export-Import Bank, among other offences.

- A court case pending – for which proceedings are due to start in October 2004 – relates to a US citizen, James Giffen, a merchant banker who acted as adviser to the government of Kazakhstan. Giffen is being tried for FCPA violations including, among other offences, diverting fees paid by oil companies into Swiss bank accounts held by the President and Prime Minister of Kazakhstan.⁶⁴
- A Swiss lawyer has been charged with conspiring to violate the FCPA for his alleged role in bribing senior officials of the government of Azerbaijan. The US has asked that Korea extradite the lawyer, Hans Bodmer.⁶⁵
- Several other investigations have been reported in the press, including one by the Securities and Exchange Commission (SEC) into Baker Hughes, an oilfield services company, stemming from a complaint made in March 2002 by a former employee that he was fired for not agreeing to a bribery scheme to win a contract from Shell Nigeria.⁶⁶ Baker Hughes has been investigated by the SEC in relation to payments in Indonesia, Angola, Kazakhstan, India and Brazil. Halliburton, another oilfield services provider, is also under investigation by the SEC in relation to bribery allegations relating to the construction of a LNG plant at Bonny Island in Nigeria.

⁶⁴ KUB, “U.S. vs. James H.Giffen”, 21/5/04; OECD Working Group on Bribery, “Steps taken and planned future actions by participating countries to ratify and implement the convention on combating bribery of foreign public officials in international business transactions”, Information as of 17th December 2003.

⁶⁵ OECD Working Group on Bribery, “Steps taken and planned future actions by participating countries to ratify and implement the convention on combating bribery of foreign public officials in international business transactions”, Information as of 17th December 2003.

⁶⁶ *Energy Compass*, “US authorities broaden probe into Baker Hughes”, 14/8/03

Annex 2

Relevant international commitments on enforcement of corruption

1. The OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions

Article 3 (Sanctions)

“The bribery of a foreign public official shall be punishable by effective, proportionate and dissuasive criminal penalties.” This should include civil or administrative sanctions, according to the commentaries, such as “exclusion from entitlement to public benefits or aid; temporary or permanent disqualification from participation in public procurement or from the practice of other commercial activities; placing under judicial supervision; and a judicial winding-up order”.

Article 4 (Jurisdiction)

“1. Each Party shall take such measures as may be necessary to establish its jurisdiction over the bribery of a foreign public official when the offence is committed in whole or in part in its territory.

3. When more than one Party has jurisdiction over an alleged offence described in this Convention, the Parties involved shall, at the request of one of them, consult with a view to determining the most appropriate jurisdiction for prosecution.”

Article 5 (Enforcement)

“investigation and prosecution of the bribery of a foreign public official shall be subject to the applicable rules and principles of each Party. They 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”. According to commentaries: “Article 5 is complemented by paragraph 6 of the Annex to the 1997 OECD Revised recommendation on combating bribery in International Business Transactions which recommends, inter alia, that complaints of bribery of foreign public officials should be seriously investigated by competent authorities and that adequate resources should be provided by national governments to permit effective prosecution of such bribery”.

2. UN Convention Against Corruption

Article 6 (Preventive anti-corruption body or bodies)

“Each state party shall, in accordance with the fundamental principles of its legal system, ensure the existence of a body or bodies, as appropriate, that prevent corruption The necessary material resources and specialized staff, as well as the training that such staff may require to carry out their functions, should be provided”.

Article 30 (Prosecution, adjudication and sanctions)⁶⁷

“Each Party shall make the commission of an offence established in accordance with this Convention liable to sanctions that take into account the gravity of that offence”.

Article 34 (Consequences of corruption)

“With due regard to the rights of third parties acquired in good faith, each State party shall take measures, in accordance with the fundamental principles of its domestic law, to address the consequences of corruption. In this context, State Parties may consider corruption a relevant factor in legal proceedings to annul or rescind a contract, withdraw a concession or other similar instrument or take any other remedial action”.

Article 36 (Specialised Authorities)

“Each State Party shall, in accordance with the fundamental principles of its legal system, ensure the existence of a body or bodies or persons specialized in combating corruption through law enforcement. Such body or bodies or persons shall be granted the necessary independence, in accordance with the fundamental principles of the legal system of the State party, to be able to carry out their functions effectively and without any undue influence. Such persons or staff of such body or bodies should have the appropriate training and resources to carry out their tasks”.⁶⁸

Article 37 (Cooperation with law enforcement agencies)

“1. Each State Party shall take appropriate measures to encourage persons who participate or who have participated in the commission of an offence in accordance with this Convention to supply information useful to competent authorities for investigative and evidentiary purposes and to provide factual, specific help to competent authorities that may contribute to depriving offenders of the proceeds of crime and to recovering such proceeds.

2. Each State Party shall consider providing for the possibility, in appropriate cases, of mitigating punishment of an accused person who provides substantial cooperation in the investigation or prosecution of an offence established in accordance with this Convention.”

⁶⁷ Articles 31 (Freezing, Seizure and confiscation), 32 (Protection of witnesses, experts and victims), 33 (Protection of reporting persons), 34 (Consequence of acts of corruption), 35 (Compensation for damage) and 37 (Cooperation with law enforcement authorities) of the UN Convention also relate to enforcement issues.

⁶⁸ In the revised draft of the Convention from January 2003, the wording was stronger: “Each State Party *shall* ensure that the staff of such entities has adequate training and financial resources to carry out their tasks” (article 39) (emphasis added).

3. European Union Criminal Law Convention on Corruption

Article 20 (Specialised authorities)

“Each Party shall adopt such measures as may be necessary to ensure that persons or entities are specialised in the fight against corruption. They shall have the necessary independence in accordance with the fundamental principles of the legal system of the Party, in order for them to be able to carry out their functions effectively and free from any undue pressure. The Party shall ensure that the staff of such entities has adequate training and financial resources for their tasks.”

Article 23 (Measures to facilitate the gathering of evidence and the confiscation of proceeds)

“Each Party shall adopt such legislative and other measures as may be necessary, including those permitting the use of special investigative techniques, in accordance with national law, to enable it to facilitate the gathering of evidence”

Annex 3

Serious Fraud Office's Acceptance Criteria and Section 2 Powers

Acceptance Criteria⁶⁹

“The key criterion for deciding whether the SFO should accept a case is that the suspected fraud is such that the direction of the investigation should be in the hands of those responsible for the prosecution.

In determining whether the criterion is met the factors taken into account include:

- Cases where the monies at risk or lost are at least £1 million. (This is simply an objective and recognisable signpost of seriousness and likely public concern, rather than the main indicator of suitability;)
- Cases likely to give rise to national publicity and widespread public concern. These include frauds on government departments, public bodies, the governments of other countries and commercial cases of public interest.
- Cases requiring highly specialist knowledge of, for example, stock exchange practices or regulated markets.
- Cases in which there is a significant international dimension.
- Cases where legal, accountancy and investigative skills need to be brought together.
- Cases which appear to be complex and in which the use of Section 2 powers may be appropriate.”

Criminal Justice Act 1987, Section 2 Powers

Under Section 2 of the Criminal Justice Act 1987:

2 (2) “the Director [of the Serious Fraud Office] may by notice in writing require the person whose affairs are to be investigated or any other person whom he has reason to believe has relevant information to answer questions or furnish other information;”

2 (3) “the Director [of the Serious Fraud Office] may by notice in writing require the person under investigation or any other person to produce at such place as may be specified, in the Notice and either forthwith or at such time as may be so specified any specified documents which appear to the Director to relate to any matter relevant to the investigation or any documents of a specified description which appear to him to so relate and

- a) if any such documents are produced the Director may take copies or extracts from them; require the person producing them to provide an explanation of any of them;
- b) if any such documents are not produced the Director may require the person who was required to produce them to state to the best of his knowledge and belief where they are.”

⁶⁹ The Law Officers' Departments, “Departmental Report”, April 2004, para 17.

Section 2 powers can only be used once a decision to commence an investigation has been taken and cannot be used during the vetting process.

Annex 4

Enforcement arrangements in other OECD countries and OECD Phase 2 review recommendations on these arrangements

The following information is drawn from the OECD Phase 2 reviews of a selected group of OECD countries.⁷⁰ The purpose of Phase 2 reviews, which are peer reviews carried out by two other member states of the OECD and the OECD Secretariat, is “to study the structures put in place to enforce the laws and rules implementing the Convention and to assess their application in practice.” According to the OECD, Phase 2 should also “broaden the focus of monitoring to encompass more fully the non-criminal law aspects of the 1997 Revised Recommendation” as well as serving “an educational function as participants discuss problems and different approaches.”⁷¹

Canada⁷²

- The federal police agency, the Royal Canadian Mounted Police (RCMP), normally investigates cases that have an international dimension or a ‘national interest’ aspect. Municipal police forces, however, also have jurisdiction to investigate allegations of bribery of a foreign public official where the alleged offences took place within their province’s territory. The different police agencies are not required to inform or notify each other of investigations, although at the time of the on-site visit in February 2003, the Canadian authorities informed the OECD that it was putting in place systems to facilitate information exchange. Prosecution in Canada is the responsibility primarily of the Federal Prosecution Service of the Department of Justice.
- The OECD report on Canada recommended that a coordinating role be given to one of the principal agencies for the purpose of collecting information from both police and prosecution authorities, and to enable the maintenance of specialised knowledge on overseas bribery cases. The OECD suggested that the federal government take on a special coordinating role with regard to these offences, as it has done with regard to “certain other offences with unique enforcement challenges”.

⁷⁰ See footnote 16 for description of the review process. The OECD has also published Phase 2 reviews of Bulgaria, Finland, Iceland and Luxembourg. This Annex focuses on the information from Phase 2 reviews of other major exporting OECD countries.

⁷¹ http://www.oecd.org/document/27/0,2340,en_2649_37447_2022939_1_1_1_37447,00.html.

⁷² OECD Working Group on Bribery, “Canada: Phase 2”, March 2004.

France⁷³

- At the time of the OECD's on-site visit in June 2003, responsibility for prosecuting overseas corruption offences was held by the Public Prosecutor's Office and the Paris Prosecutor, who had been given jurisdiction at a national level for dealing with these offences.
- Given that the Public Prosecutor's office acted under the authority of the Minister of Justice, the OECD review noted that this arrangement "could potentially result in pressure being brought to bear on the Paris Prosecutor's Office to ensure the shelving of certain cases in order to protect the economic interests of France," in contravention of Article 5 of the OECD Convention.
- The Public Prosecutor initiates criminal proceedings and entrusts the case to an investigating magistrate. It is the criminal police that conduct investigations. Two departments within the Sub-directorate of Economic and Financial Affairs of the Central Judicial Police Directorate are responsible for helping the Public Prosecutor's office: the National Division for Financial Investigations and the Central Office for Fighting Major financial Crime (OCRGDF). The specialised investigators seconded to the Economic and Financial Divisions of each Regional Judicial Police Service (of which there are 19 in all), and the 30 research sections that specialise in economic and financial crime in the Gendarmerie, could also be called on for assistance in investigating. The most complex cases tend to be investigated by the Sub-Directorate of Economic and Financial Affairs of the Criminal Police in the Paris Police Prefecture, and particularly by the 70 or so officers of its Brigade Financière.
- At the time of the on-site visit by the OECD in June 2003, the French authorities reported that, at the end of 2003, an inter-ministerial investigation group known as Central Brigade for Combating Corruption was to be established. This was to comprise 20 or so officials, including police, gendarmerie, customs officers, officials from tax, competition and consumer affairs authorities, and the fraud squad, operating within the National Division for Financial Investigations. It would investigate all forms of bribery, both domestic and foreign.

Germany⁷⁴

- Investigation and prosecution of bribery offences is conducted by the governments of Germany's 16 Länder. Policing in each Land is the responsibility of the Land Minister of Interior, and prosecution the responsibility of the Land Minister of Justice. The Berlin and Hesse Länder have specialised corruption and economic crime units.
- There is a Federal Senior Police Training Academy responsible for training police officials at both Land and federal level, and a federal body, Deutsche Richterakademie, responsible for training judges and prosecutors. There are federal police units for some offences, such as cartel and anti-trust offences.

⁷³ OECD Working Group on Bribery, "France: Phase 2", January 2004.

⁷⁴ OECD Working Group on Bribery, "Germany: Phase 2", June 2003.

- The OECD review of Germany noted that there had been no training of police in investigating foreign bribery offences, and expressed concern that resources for investigating and prosecuting corruption were not “adequately allocated” in some of the Länder.

Norway⁷⁵

- Since 1994, Økokrim (the National Authority of Investigation and Prosecution of Economic and Environmental Crime) has had an anti-corruption team with national responsibility for dealing with corruption. Økokrim comprises both police and prosecution authorities. Its director holds the rank of both chief constable and chief public prosecutor.
- All local police districts in Norway (27 altogether, reduced from 54 under a recent re-organisation) have an economic crime section. Local police forces do not automatically refer cases to Økokrim, and have themselves been involved in investigating and prosecuting corruption cases. The decision as to whether it is Økokrim or the local police force that investigates usually depends upon the complexity of the case, the economic value, the resources required and the level of international work, among other factors.
- OECD reviewers expressed concern that the allocation of resources within the local police forces might “appear as a possible hindrance in the efficient investigation and prosecution of bribery offences”.
- Økokrim has disseminated information on anti-corruption legislation particularly to companies involved in public procurements abroad, those working in sensitive sectors such as energy or transport, and those working in sensitive geographical areas.

USA⁷⁶

- Responsibility for enforcement is divided between the Department of Justice, which deals mainly with criminal enforcement of provisions under the Foreign Corrupt Practices Act (FCPA), and the Securities and Exchange Commission (SEC), which deals with civil enforcement particularly of the record-keeping and accounting provisions of the FCPA. Investigations into criminal offences are carried out by the Federal Bureau of Investigation (FBI), supervised by the Fraud Section of the Department of Justice Criminal Division. Investigations by the SEC are carried out by attorneys in the Division of Enforcement at the SEC.
- Since 1994, criminal enforcement of the FCPA has been centralised under the overall control of the Criminal Division Fraud Section in the Department of Justice. This section has an FCPA co-ordinator, and a “cadre of highly trained FCPA prosecutors”. FCPA cases are given priority when allocating staff. At the time of the OECD’s on-site visit in March 2002, 11 of the 60 attorneys were working on FCPA cases, many of them at the same time as working on other non-related cases.

⁷⁵ OECD Working Group on Bribery, “Norway: Phase 2”, April 2004.

⁷⁶ OECD Working Group on Bribery, “United States: Phase 2”, October 2002.

- The US was criticised by the OECD review, however, for having “no clear, documented, formal processes between agencies to underpin the vital exchange of information and reporting of suspected violations” and for “a corresponding absence of statistics.”