**BOND Anti-Corruption Group Submission to the OECD Working Group on Bribery Review team, Phase 4 review of the UK, October 2016.**

1. **Legal Framework**

The Bribery Act

The Bribery Act is a widely respected piece of legislation which has helped put the UK at the forefront of global anti-corruption enforcement efforts. The UK government has expressed its commitment to the Act on various occasions, including at the UK’s Anti-Corruption Summit. It also cited the value of the Bribery Act in its 2013 National Action Plan on Business and Human Rights as a key instrument through which it has sought to promote good corporate behaviour and respect for human rights, and in its 2013-2015 Open Government Partnership National Action Plan.

There have however continued to be some parts of the private sector which have argued that UK business is disadvantaged by the Bribery Act and this argument has at times had advocates from within certain parts of government. In July 2015, the National Security Council and the Export Implementation Framework ordered an informal consultation with business groups as to whether the Bribery Act was considered ‘a problem’ and whether it could be made ‘simpler’ and ‘less costly’ to follow. The message that the government received from large parts of the business community was that there was no perceived problem with the Bribery Act.

It is possible that with Brexit, concerns may be raised again and gain traction as to whether the Bribery Act disadvantages UK business. The UK government needs to send a strong signal that the Bribery Act is not up for negotiation in a post-Brexit world and that the UK intends to meet its international commitments with regard to having the right legal instruments to fight corruption. With other countries putting in place new anti-corruption legislation, such as France, Germany and Ireland, any move to weaken the Bribery Act would also undermine the emerging global process of levelling up anti-corruption standards. A weakened Bribery Act in fact would put the UK behind emerging global standards for anti-corruption, effectively giving UK companies a competitive advantage compared to companies in those countries that have enhanced their legislation.

The single most important issue that has emerged both from the 2015 informal consultation with business and from a survey published by the government in July 2015 is the need for awareness raising among SMEs. In the 2015 survey, a third of SMEs had not heard of the Bribery Act. And of those that had heard of it, 74% were not aware of the Ministry of Justice guidance to help corporations understand the procedures they need in place to prevent persons associated with them committing an offence.[[1]](#footnote-1) As SMEs are already at a disadvantage under the Bribery Act because they have less resources to deploy than large multinationals to pay for external lawyers and accountants to scrutinise and verify their compliance procedures, it is crucial that the UK government devotes more time, energy and resources on awareness raising with SMEs.

The Bribery Act and the corporate liability framework in the UK

The introduction of the Section 7 ‘*failure to prevent*’ offence has been invaluable as a tool to both incentivise improvements in corporate governance and for prosecutors to hold companies to account within a criminal law framework. The proposed extension of Section 7 to other economic crime, on which the UK government has announced that it will consult, will help prosecutors fight broader financial crime, including crimes that are intricately linked to corruption such as money-laundering, false accounting and fraud. This extension is essential for a level playing field among corruption-related offences and to ensure that economic crime by companies is tackled effectively.

In addition to an extension of Section 7, it would be desirable for a broader review of how the identification doctrine impacts on the UK’s ability to hold companies to account to be undertaken. This is for the following reasons:

1. SMEs remain disadvantaged by the Bribery Act.

The substantive offences of the Bribery Act, in particular Sections 1 and 6, are subject to the identification doctrine. With these offences, a prosecutor must prove that there is a ‘*controlling mind*’ at a senior board level – a test that was recently described by the SFO’s counsel, Alun Milford, as “*unfair in its application, unhelpful in its impact and … unprincipled in scope*.”[[2]](#footnote-2)

A key point of unfairness is that it is far easier to prove the controlling mind when prosecuting SMEs than with larger, decentralised or global companies. In practice therefore SMEs are open to being prosecuted more easily under both Sections 1 and 6 of the Act as well as Section 7 whereas large companies are more likely to be prosecuted solely under Section 7 of the Act. Given that convictions under Section 7 only incur discretionary exclusion from public procurement, while convictions under Sections 1 and 6 incur mandatory exclusion (subject to the self-cleaning clauses of the Public Contract Regulations), SMEs are therefore more likely to face exclusion from public procurement for bribery and other economic crimes than large companies as they are more likely to face Sections 1 and 6 convictions. Given that this is an important sanction, it is essential that the government addresses this issue both through looking at the wider issues of the identification doctrine in the long term, and through addressing more clearly how Section 7 can lead to discretionary debarment (see section 7).

The Law Commission project initiated over a decade ago on codification of the UK criminal law as it relates to corporations has never been completed. It would be helpful for the Law Commission to look as a priority at the identification doctrine as it applies to substantive corporate offences to ensure that a level playing field can be developed between SMEs and large companies when it comes to the Bribery Act. It would also be helpful for a review of whether different parts of the UK’s corporate law which have a bearing on the fight against corruption are fit for purpose.[[3]](#footnote-3)

1. There is a lack of individual accountability

While it is perhaps too early to tell about how Section 7 case law will develop, it is noticeable that of the three Section 7 enforcement actions taken so far (two by Deferred Prosecution Agreement and the other by guilty plea[[4]](#footnote-4)) only one has resulted in individuals being charged within the UK for Sections 1 or 6 offences that the organisation concerned failed to prevent. In the case where individuals have been charged, the organisation received a DPA for both a Section 7 offence and a Section 1 offence. The lack of individual charges being laid in the other two cases which involved solely Section 7 offences poses the question of whether in practice companies will be able effectively to trade off a guilty plea to a Section 7 offence for non-prosecution of its employees.

One of the substantial benefits of Section 7 is that it enables companies to be held to account for broad systemic failures that occur across an organisation and which may not be attributable to one or two individuals. That conduct by the organisation is held sufficiently serious to attract criminal liability. However, it is also crucial for public confidence and for deterrence that the individuals at a senior level, and ultimately the board of directors who are responsible for the organisation’s failure and hence its criminal culpability are themselves held to account for such failures. Current legislation provides no grounds upon which directors can be held publically to account, regardless of how seriously they may have failed in their duties.

In the UK, serious consideration should be given to holding directors to account for corporate convictions for a Section 7 offence by making them liable to disqualification. This would require an amendment to the Company Directors Disqualification Act 1986, which already provides for Director’s disqualification for breaches of competition law. If Directors proven to have behaved in such a way that led to the company’s failure to prevent an offence were disqualified this could create a strong incentive on board members to ensure that companies are fully compliant with the Bribery Act.

1. **Enforcement setup**

The Serious Fraud Office has taken on an increasingly large workload in relation to foreign bribery with some high profile investigations against large UK companies ongoing. A number of issues arise from the current enforcement set up in the UK:

1. Ongoing uncertainty over the future of the SFO

Continuous question marks over the SFO’s future are potentially detrimental to its morale and ability to recruit and maintain high quality talent, although good leadership in the past few years has helped to cushion the impact of uncertainty on morale and the ability to attract and maintain talent. Continual questioning over the existence of the SFO however undermines the fight against corruption and potentially the efforts of the SFO to encourage self-reporting. Companies may think twice about reporting wrongdoing to a body that may not exist in a few years’ time.

The SFO has specific powers and expertise that are crucial to the fight against corruption, has corruption as one of a few top priorities and uses the Roskill model, with prosecutors leading investigations which is vital for complex financial crime. It has now built up considerable expertise among its staff for fighting corruption and built up international networks that are crucial for such work.

It is vital that the UK government draws a line under the continual uncertainty over the UK’s anti-corruption enforcement set up and a final decision be taken. The enforcement review that the Cabinet Office undertook during 2015 has never been made public despite suggestions that it would be and it is not clear what the outcome or policy recommendations of that review are. There were suggestions earlier in 2016 that the NCA would be given a power of direction over the SFO as a result of that review[[5]](#footnote-5) which raised concerns about potential political interference in SFO investigations.

1. Resources for the SFO are still inadequate and its funding model problematic

SFO core funding has gone from £52 million in 2008 to £33 million in 2016. The SFO is able to ask for ‘blockbuster funding’ from the Treasury, and between 2014 and 2016 it asked for a total of £47 million this way. The HM Crown Prosecution Services Inspectorate found in May 2016 that the blockbuster funding model was preventing the SFO from building expertise and capacity as it encouraged the SFO to rely on temporary staff.[[6]](#footnote-6)

The blockbuster funding model has also been criticised for giving the impression that HM Treasury could in effect make a political decision as to whether to deny funding for a particular case, thus interfering in the exercise of the SFO’s discretion. An increased permanent budget for the SFO (in the region of around £75 million annually) would send a clear signal from the UK government as to its intention to drive out corporate irresponsibility and hold companies to account for financial crime.

1. Case attribution continues to be an issue and the International Corruption Unit at the National Crime Agency has yet to find its feet.

The creation of a single International Corruption Unit at the NCA was a key output of the UK’s December 2014 Anti-Corruption Action Plan. It was designed to ease coordination issues between agencies. The transition has not however been an entirely a smooth one. The City of London Police Overseas Anti-Corruption Unit (OACU) decided not to move to the unit, resulting in loss of expertise in relation to fighting bribery. OACU was tasked to finish off the investigations it had on its books already, while funding for the unit from the Department for International Development (DFID) was to be slowly transferred to the ICU. While members of the Metropolitan Police Proceeds of Crime Unit did move to the ICU, it is not clear, 18 months on how many of them remain.

The ICU has had to build up new expertise through recruitment. Recruitment of suitable staff is an issue for the ICU. It is not clear what impact this has had on casework. So far, there appear to have been no arrests made or charges laid by the ICU in relation specifically to foreign bribery.[[7]](#footnote-7)

Additionally, as the ICU is primarily funded by DFID it may only focus on DFID priority countries. There has been lack of clarity over whether the Home Office has put up matching funds for the ICU to cover investigators that cover non DFID priority countries. There is a danger that lack of clarity over the use of aid money may undermine the credibility of a funding model that has for all intents and purposes been successful in getting dedicated resource for fighting corruption in the UK.

Coordination between the ICU and law enforcement agencies in other jurisdictions has in some cases been problematic. In the OPL 245 case involving the restraint of money suspected to be destined for use in the payment of bribes in relation to a Nigerian deal, which is currently under investigation by the ICU, administrative errors and other issues led to substantial delay in providing Italian prosecutors with crucial information. The case raises important questions around coordination between the ICU, the Crown Prosecution Service, UK Central Authority and the impact this has on being able to deliver prompt assistance to foreign law enforcement agencies.

Meanwhile, it is not clear that issues around coordination, intelligence sharing and case attribution (a main justification for the creation of the ICU) have been fully resolved between the SFO and the ICU. This is particularly so with foreign bribery cases. Now that the SFO has removed its £1 million threshold for taking on cases and has shown an appetite for taking on smaller cases in developing countries such as Smith and Ouzman, it is not clear what the exact remit of the ICU on foreign bribery is.

In terms of case attribution and coordination there is a strong case to be made for making the SFO the main and only international anti-corruption enforcement agency with the NCA taking a lead on domestic bribery and corruption. The SFO would clearly need to be funded properly to do so and also ensure that its remit is officially broadened to include all bribery and corruption and not just the ‘very top-most level’. It would also still need to have a clear agreement with police forces that it relies on for making arrests, or be given powers of arrest directly. Having one main agency would have the advantages of building a centre of excellence for fighting overseas corruption and of providing a one stop shop for whistleblowers and others with crucial information.

Alternatively, clearer case attribution guidelines need to be drawn up so that it is clear which agency is responsible for which cases.

1. **Key barriers to enforcement**

There is no doubt that the SFO’s recalibration towards a more prosecutorial approach has been slow to produce results. The number of enforcement actions taken has fallen. This is not surprising given that it takes much longer to prove corruption or bribery to a criminal standard than to a civil standard. As a result, the period from August 2012 to 2016 cannot be easily compared to 2008-2012 when civil settlements were the norm. Arguably, the quality of enforcement actions has significantly improved. A significant number of investigations have been going on for over four years and results on such investigations should be expected in the next two years. Whether the SFO can sustain successful prosecutions in large and complex foreign bribery cases such as Rolls Royce, Airbus, GSK and GPT will be a key test of its recalibrated approach.

Despite a lack of prosecutions, the SFO has won some important satellite judgements in the course of investigations including at the Court of Appeal that are setting the legal parameters for investigating and prosecuting corruption. These include:

* a long overdue judgement in January 2016 that the Prevention of Corruption Act does apply to payments made to foreign officials prior to 2002, when the Anti-Terrorism Crime and Security Act ‘clarified’ UK law in this regard;[[8]](#footnote-8)
* a December 2013 Court of Appeal judgement, that a prosecutor does not need to prove that an employer had no knowledge of the payment to an employee – essentially undermining a key argument used by former Attorney General, Lord Goldsmith, as to why an SFO investigation into alleged bribes by BAE Systems in Saudi Arabia was doomed to fail[[9]](#footnote-9) - ensuring that a Principal’s knowledge of bribes taken by an agent does not legitimise bribe payments;
* an important Court of Appeal ruling in July 2016 about whether diary entries of a former executive who could not be extradited to give evidence can be admitted as evidence in court against a company;
* a ruling in relation to its investigation into GSK that the SFO’s policy not to allow individuals being interviewed under its Section 2 powers to be represented by lawyers that are also representing a corporate suspect was legitimate;[[10]](#footnote-10)
* a high court ruling upholding how the SFO handles material that is potentially subject to legal professional privilege;[[11]](#footnote-11) and
* a settlement with Barclays prior to a court hearing whereby Barclays handed over material that it had previously claimed was subject to legal professional privilege.

However, the SFO faces some considerable barriers:

1. Lack of economic crime courts and underfunding of the court system

It takes the SFO on average around 18 months to get a court slot. While Southwark court is the main economic crime court, it also covers many other prosecutions, placing a heavy load on the court system there. Having a ring-fenced economic crime court, with judges who are specialised in economic crime would significantly help the prosecution of overseas corruption and financial crime in general.

1. Lack of tools for ensuring that courts can impose a review of compliance procedures as part of sentencing

Under a Deferred Prosecution Agreement, a court can approve an agreement between the prosecutor and a company that the company will take remedial measures such as implementing or modifying its compliance programme. Such agreements can also require that a company has an independent monitor to review its compliance programme. However, for companies that chose not to cooperate and self-report, there are few tools available to the court or prosecutors to require such companies to take remedial measures. Prosecutors may apply for a Serious Crime Prevention Order but this is a very heavy-handed approach, requiring a separate civil process and the prosecutor to present evidence of the risk of re-offending. In practice such orders are unlikely to be used routinely. It would be better for ‘remedial orders’ or corporate probation orders that can be imposed at the time of sentencing to be introduced for economic crime. The UK Corporate Manslaughter Act 2007 has just such a process with remedial orders and publicity orders (where a court can require a company to publicise its conviction and the terms of a remedial order) available to the court as a sentencing option. Under the current system in the UK, a company that self-reports and cooperates faces greater scrutiny of its corporate governance standards than a company that chooses not to do so. This creates a potentially perverse incentive not to self-report.[[12]](#footnote-12)

1. **Deferred Prosecution Agreements**

Since the introduction of Deferred Prosecution Agreements in February 2014, there have been two such agreements. The SFO has made clear on numerous occasions that the criteria for being offered such agreement are strict and require a self-report of information that the prosecutor would not otherwise have been aware of, and cooperation from the company. The SFO has also made clear that it will use DPAs as part of a broader prosecution strategy in which companies that do not cooperate or self-report will be prosecuted.

*First Deferred Prosecution Agreement: Standard Bank.*

The first agreement with Standard Bank in December 2015 set some good standards particularly with regard to transparency. The Statement of Facts was comprehensive and identified people involved in the alleged wrongdoing either by name or by position. The Standard Bank DPA also set a precedent for compensation being paid to the victim country. However, the DPA also raised some significant concerns in particular:

1. Reliance on a company investigation

The Standard Bank DPA made clear that the SFO had not request any documentation or evidence from the Government of Tanzania and that the SFO has relied for large part on the company investigation for its information. It further emerged in April 2016 from a Global Investigations Review report[[13]](#footnote-13) that the SFO had only received oral summaries for key first witness accounts from Standard Bank rather than the full transcripts; that it had not re-interviewed several of those key witnesses; and that Standard Bank had deliberately kept all reference to witness interviews out of the internal investigation it handed the SFO. This has led some legal experts to question whether the SFO ‘*pressure-tested*’ the company’s internal investigation beyond asking some of its staff.[[14]](#footnote-14)

1. Lack of a consistent definition of cooperation

Sweett group, which pleaded guilty in December 2015 to a Section 7 offence, was criticised for lack of cooperation on the basis of failing to provide first witness accounts to the SFO. At the Sweett hearing, it was noted that Sweett had reported to the SFO seven days before an article appeared in the Wall Street Journal in June 2013, but that as this was regarded as a report in anticipation of the newspaper article, it was not regarded as a self-report. Despite this and despite various actions that Sweett took during the course of the investigation, including electing at one stage to self-investigate, and taking a position for six months that the payments were in fact legal under the laws of the United Arab Emirates, in July 2015, the SFO offered Sweett the possibility of entering into negotiations for a DPA.[[15]](#footnote-15)

Some of the criminal defence sector have suggested that whether the SFO offers negotiations for a DPA may depend on which prosecutor is assigned to the case.[[16]](#footnote-16) The SFO needs to ensure public confidence that its standards on self-reporting and cooperation are applied consistently.

1. Lack of individual accountability

Despite the fact that key staff based in the UK office of Standard Bank approved the use of the agent who was alleged to have paid the bribes, drew up the agency agreement, and concealed the use of the agent from compliance staff, no UK individuals were held to account for the failure to prevent bribery in the Standard case. Charges have been laid against individuals in Standard’s Tanzanian sister company by the Tanzanian authorities. It is noticeable that one of these individuals is suing Standard Bank in Tanzania for damages, including misrepresenting facts in order to obtain the DPA.

*Second DPA: anonymous*

In its second DPA in July 2016, the SFO launched proceedings against individuals concerned before seeking court approval for the DPA. As a result, all details in the DPA with regard to the name of the company and the wrongdoing have been anonymised and no Statement of Facts released, in order not to prejudice the proceedings against the individuals. Some commentators have stated that if the SFO proceeds with this policy, the anonymity would be a “*significant boon*” for companies ensuring that they do not have their named dragged through the public eye twice, once in the DPA and another when the individuals are prosecuted.[[17]](#footnote-17) The issue of delayed transparency in DPAs and the impact this has on deterrence and public confidence in the DPA process is clearly a trend that needs to be watched.

Perhaps most significantly, the second DPA introduced, essentially by the back door, a new policy of providing a 50% discount to companies that self-report and cooperate. Following extensive public consultation prior to DPA’s being introduced, the government decided in 2013 that DPAs should provide a one-third discount so that getting a DPA would not be seen as a ‘soft’ option. This was enshrined in the Crime and Courts Act which introduced the legislative basis for DPAs, where it states that the fine imposed on a DPA shall be equivalent to a guilty plea at the earliest opportunity. Additionally, the Sentencing Guidelines Council introduced new guidelines on sentencing corporate offenders for economic crimes including money laundering, fraud and bribery (again following public consultation). These guidelines were “*created as part of a package to support the introduction of Deferred Prosecution Agreements*.”[[18]](#footnote-18) While not guidelines for DPAs as such, they were designed specifically to be ‘*of assistance as a point of reference*’ for fines levied in DPAs.

The introduction through a DPA of a new policy of significantly greater reduction in penalty for companies that self-report is therefore a major change. That policy cannot be judicially reviewed because the decision of a high court judge cannot be judicially reviewed. This raises real questions about accountability in policy making.

There is no doubt that the SFO has been under pressure from the criminal defence sector to provide greater incentives for companies to self-report. The criminal defence sector has argued that having the same financial penalty for a company that does not self-report and cooperate but pleads guilty and one that self-reports and cooperates undermines any incentive for self-reporting (particularly given the more onerous remedial requirements under a DPA).[[19]](#footnote-19) Additionally, the introduction of a one-year pilot programme by the DOJ in April 2016 to reduce penalties by 50% for self-reporting companies in FCPA cases will have increased that pressure.[[20]](#footnote-20) However, the DOJ has announced the programme both as a pilot and as a government policy. That means it is both reversible and open to challenge and public debate. The UK policy has been introduced without consultation and without public debate. Introducing de facto changes to the Crime and Courts Act through DPAs in this way will undermine public confidence in the DPA regime.

Furthermore, it is not clear whether the lure of a 50% discount will incentivise greater self-reporting in the absence of a significant increase in detection and prosecution of companies that do not self-report. As the SFO will not release statistics on the number of self-reports it receives from companies (see below),[[21]](#footnote-21) it is not possible to establish whether the new discount levels allowed for in the second DPA has or will lead to an upswing in corporate self-reporting. It is worth noting that the DOJ significantly increased capacity, doubling its FCPA prosecutors, at the same time as introducing its policy.

Finally, while the SFO was at pains to lay out in the second DPA how it had conducted an investigation independent from the company including interviews under Section 2 powers, it is noticeable that once again the company was allowed to provide oral summaries rather than full versions of first witness accounts. As one defence lawyer has put it, this policy enables companies to “*retain a greater degree of control over the information that they provide the SFO.*”[[22]](#footnote-22) Put another way, it potentially reduces the amount of information a company must provide the SFO, and allows the company to manage information in such a way that it could reduce its exposure in relation to wrongdoing.

*Scotland*

The DPA regime was not introduced in Scotland but only applies to England and Wales.[[23]](#footnote-23) Scotland continues to rely on civil settlements with companies that self-report. Scotland has disposed of four bribery cases (including in the past year, Braid and Brand-Rex) through civil recovery orders since the introduction of a self-reporting policy in 2011 by the Crown Office and Procurator Fiscal Service (COPFS) in Scotland.

The guidance issued by COPFS in 2011 is similar to that issued by the then Director of the SFO in 2009 which the current Director of the SFO distanced himself from shortly after his appointment. The use of civil settlements for foreign bribery cases was criticized by the OECD in its Phase 3 report into the UK. Lord Justice Thomas in his 2010 *Innospec* ruling also stated that it will rarely be appropriate for corruption of foreign government officials to be dealt with by way of civil sanctions.

The Scottish guidance introduced in 2011 was for five years and is currently under review. COPFS see it as a success so it is unlikely to change. The Scottish approach however lacks transparency and fails to achieve real deterrence. Little information is made available about the nature of the alleged offending. Meanwhile, the sole penalty imposed through these settlements is loss of gross profit compared to a penalty imposed under DPAs in England and Wales that includes a multiple of assessed harm in addition to disgorgement.

Given that Scotland has a strong oil industry and this industry is very high risk for corruption, it is a matter of concern that Scotland continues to rely on civil recovery orders to deal with these offences. Major differences in approach between Scotland and England/Wales also mean that the accident of whether a company is incorporated in Scotland or England and Wales results in substantially different penalty levels.

1. **Weaknesses in the SFO’s strategy**

Lack of transparency

The SFO provides on its website a list of companies against which it has opened investigations. Its policy it only to state publically investigations which companies have already announced to the market. On its list of SFO cases published on its site there are 11 cases that relate to bribery and corruption. The SFO has refused to give further detail publically about how many investigations it is undertaking. In 2014, for instance, the SFO refused to provide information in response to a Freedom of Information Request about how many self-reports it had received and how many investigations it had underway. This decision was upheld by the Information Commissioner in April 2016, who accepted the SFO’s grounds that to state how many investigations it had underway might lead to less self-reports being made if the corporate world knew that it was conducting only a few investigations. This lack of transparency about basic enforcement statistics is not only undesirable in itself but makes it hard to assess the effectiveness of the SFO’s approach.

Additionally, there are issues around transparency of documents mentioned in open court. In the UK, it is very hard to get information about cases unless one is either present in court or one can afford transcripts of cases which are prohibitively expensive for the public. The SFO could significantly aid the transparency in such cases by providing on a routine basis its prosecution opening note (which usually sums up the evidence and the charges being made) and the sentencing remarks of Judges. Neither of these are routinely made public at the moment.

Failure to use civil recovery where criminal prosecutions have failed

The SFO appears to be failing to use civil recovery against companies where a prosecution has failed. Because civil recovery operates lower standards of evidence, the use of civil recovery processes where a prosecution fails would send a strong message that companies will still pay a penalty for wrongdoing.

Inadequate assessment of the full harm and full benefit to a company

In both the Smith and Ouzman case and the Standard Bank DPA, issues emerged as to whether the SFO had conducted a full assessment of the whole range of harm caused and benefit received. For instance, in Smith and Ouzman, the SFO could have counted as a benefit to the company a further contract won under suspicious circumstances with the same authority that it was found guilty of having bribed to win earlier contracts. This would have resulted in a substantial uplift in the full fine level. Likewise, with the Standard Bank DPA, the SFO did not appear to pay attention either to additional benefits and business gained by Standard as a result of the bribes allegedly paid, nor the full damage to Tanzania as a result of entering into an uncompetitive contract won without tender.

Given increasing evidence that fine levels for foreign bribery are currently insufficient for real deterrence, and given the importance of ensuring that the full harm of corruption is represented in court hearings to give voice to the victims of corruption, it would be hoped that prosecutors should seek to establish as broad and full a picture of both benefit and harm as possible.

1. **Article 5** – **economic and political considerations**

Brexit has heightened risks that Article 5 considerations might be taken into account particularly by government ministers in assessing whether a particular investigation or prosecution might undermine the UK economy at a time when protecting the economy is the absolute priority for ministers. In addition, Brexit has increased the risk that UK companies may use the threat of relocation and potential loss of UK jobs that would result from a prosecution as a bargaining chip in negotiations with prosecutors over charges. Given that the SFO has on its books some very large UK companies that are significant partners in the government’s industrial strategy, this is a real concern.

It is worth noting that the SFO is investigating a significant number of cases that involve activity that occurred prior to the Bribery Act. If these come to the stage of laying charges, the SFO will require Attorney General’s consent to proceed with a prosecution. One of these cases in particular, GPT, involves a government to government contract in Saudi Arabia which raises similar issues to the BAE/Al Yamamah case, including potential complicity and authorisation by UK government officials. The potential for the Attorney General to use the consent procedure to introduce political or economic considerations is a grave concern.

In the OECD Working Group on Bribery’s Phase 2 report on the UK’s implementation of the OECD Anti-Bribery Convention, noted that the consultation of government ministers on individual cases as conducted under a Shawcross exercise, “*may generally not be appropriate in foreign bribery cases.*” This exercise was reformulated in the 2009 Protocol between the Attorney General and the Prosecuting Departments as ‘*seeking ministerial representations in a public interest consultation exercise*’ – a process only to be conducted the Protocol states in “*a few very exceptional cases*”.

In late 2014, it emerged from a Freedom of Information request that one such an exceptional case had taken place since 2012. However the Attorney General’s office has refused to answer further questions as to whether this exercise was conducted in relation to a foreign bribery case on the grounds that to do so would prejudice the prosecution of offenders or the administration of justice.[[24]](#footnote-24) Given the risk that such exercises could result in prohibited Article 5 considerations being made in ministerial representations on an investigation or prosecution, the lack of transparency with which the exercise has been used in this case is perturbing.

It is worth noting that the Attorney General still has the right to appoint and terminate the appointment of the Director of the SFO – a fact that in its Phase 2 review of the UK, the OECD Working Group on Bribery expressed concern about. The concern still remains that were a Director to refuse to end an investigation or prosecution on the instruction of the Attorney General, that his or her appointment could be terminated.

1. **Exclusion from public procurement**

The UK continues to be in a similar position to where it was when the OECD reviewed it for Phase 3 with regards to exclusion from public procurement. In particular, several of the OECD recommendations made at Phase 3 including for a national register of excluded companies and for guidance to contracting authorities on the circumstances in which convictions under Section 7 should incur discretionary exclusion, remain unimplemented. Limited guidance was published on 9th September 2016 by the Crown Commercial Service which covered exclusion.[[25]](#footnote-25)

In a model Selection Questionnaire provided by the CCS in its September 2016 guidance, under the grounds for exclusion, a contractor must declare whether they have received a conviction for corruption. Arguably, a conviction for a Section 7 offence under the Bribery Act is not a conviction ‘for’ corruption. Despite the fact that the government has stated that a conviction under Section 7 would incur discretionary exclusion, the model Selection Questionnaire does not include a question as to whether the contractor has received a conviction under Section 7. Under this model Selection Questionnaire, a contractor could potentially not declare a Section 7 conviction as there is no obvious request for them to do so. Since Section 7 of the Bribery Act is not mentioned anywhere in the official government guidance on grounds for Mandatory and Discretionary Exclusion, this makes it even more likely that a contractor could conclude that they did not need to declare it.[[26]](#footnote-26)

While grave professional misconduct needs to be declared, there is no clear definition of what that misconduct consists of or whether it would include a conviction for Section 7. A conviction under Section 1, 2 or 6 of the Bribery Act by an ‘associated person’ who has powers of representation, decision-making or control on behalf of the person would need to be declared. If however the associated person who committed the offence has left the company, the company would therefore not need to declare it. Likewise if the offence were committed by a subsidiary, since subsidiaries are not associated persons, the company would not need to declare the conviction.

Meanwhile, there is little evidence that the exclusion provisions of the Public Contracts Regulations are being used in practice on a regular or meaningful basis. This lack of implementation is becoming starker as more convictions, including under Section 7, occur. For instance, Sweett group which pleaded guilty to a Section 7 offence on 18th December 2015 has had 24 contract awards with UK local authorities since its conviction.[[27]](#footnote-27) It is not clear whether they were required to declare their conviction to those authorities, or prove what action they had taken with regard to self-cleaning.

Additionally, there is no comprehensive collection of data about how procurement authorities are implementing the exclusion provisions. For the sake of introducing clarity, transparency and consistency into the exclusion regime, the Crown Commercial Service should collect meaningful data on how many exclusions are made by contracting authorities, when they accept that a company has self-cleaned, and when they have used discretionary exclusion for Section 7 offences. This data should be stored centrally and made available to all contracting authorities. Lack of comprehensive data collection means that situations are more likely to arise where one authority excludes a company while another does not.

Ultimately, the UK could and should adopt a policy, which would significantly enhance its anti-corruption policies, of requiring companies to declare whether they are under investigation by a law enforcement authority when bidding for public contracts. This would enable contracting authorities to have a fuller picture of the integrity and responsibility of the contractor when assessing their suitability for a public contract.

1. **UKEF (UK Export Finance)**

UK Export Finance has been in the spotlight various times in the last year for support it has given to companies implicated in corruption. On 1st April 2016, Airbus announced that it had informed UK authorities of “*its findings concerning certain inaccuracies relating to applications for export credit financing*.”[[28]](#footnote-28) On the 4th April, UKEF stated that it had referred the findings to the SFO and had temporarily frozen all Airbus applications pending a review.[[29]](#footnote-29) It is noticeable that these inaccuracies were picked up by Airbus and not by UKEF. This raises serious questions about how robust UKEF’s due diligence procedures are.

UKEF has given support in several other cases where corruption allegations have been made or where companies are under investigation.

*Petrobras/Rolls Royce*

In 2005/06, UKEF supplied Rolls Royce with export credit support worth £31.9 million for the supply of engines to Petrobras Netherlands for use in Brazil.[[30]](#footnote-30) Rolls Royce was one of four companies to receive export credit support in 2005/6 for sales to Petrobras. In February 2015, a Petrobras executive named Rolls Royce in a plea agreement with Brazilian authorities as one of the companies he received bribes from.[[31]](#footnote-31) In August 2015, documents seen by the Guardian newspaper showed that a Brazilian businessman, Julio Faerman, who has been at the centre of allegations of multinational companies paying bribes to Petrobras officials, claimed to act as the agent for Rolls Royce when the company sold power engines to Petrobras for offshore oil platforms.[[32]](#footnote-32) Faerman has now been charged in Brazil for paying bribes on behalf of a Dutch company, SBM Offshore, and has admitted receiving $45 million into Swiss bank accounts from SBM for criminal activity.[[33]](#footnote-33)

This case raises serious questions about whether Rolls Royce disclosed Faerman as agent to UKEF and whether UKEF’s due diligence on Faerman was adequate. But UKEF’s exposure to the Petrobras scandal is far greater.

Three years before the Petrobras scandal broke, in 2011, UKEF guaranteed a $1 billion loan facility to Petrobras, to finance supply of goods and services to Petrobras’ offshore drilling and exploration services.[[34]](#footnote-34) By 2012, Petrobras had nominated $500 million worth of contracts for UK companies under this facility.

In November 2014, just two months after a major corruption scandal surrounding Petrobras broke in Brazil, UKEF announced that it was giving a further £330 million line of credit to Petrobras to buy goods from UK companies.[[35]](#footnote-35) In July 2015, UKEF announced that it would provide SBM with £34 million in support.[[36]](#footnote-36) SBM Offshore was at the time under investigation in the Netherlands and Brazil, and went on to reach a settlement with Dutch authorities in November 2015 which showed that it had paid commissions of $139.1 million to sales agents in Brazil between 2007 and 2011.[[37]](#footnote-37) In both instances, UKEF stated that it had reviewed the anti-corruption policies now in place at Petrobras and SBM and found that they were sufficient to renew support.

Given the enormous impact that the Petrobras scandal has had in Brazil and the strong likelihood that further allegations involving UK companies using UKEF facilities to enter into contracts with Petrobras will emerge, UKEF should order an independent review of its handling of export credit facilities in relation to Petrobras and of whether its anti-corruption and due diligence procedures were fit for purpose.

*Smith and Ouzman*

In January 2013, UKEF provided anonymous support worth £12.2 million for a company to export ballot papers to Kenya. An increasing percentage of UKEF support is now no longer disclosed for reasons of ‘commercial confidentiality’. This raises serious questions about transparency. However, UKEF has confirmed under the Freedom of Information Act that its 2013 support to Kenya was for Smith and Ouzman, the company convicted in December 2014 of paying bribes on contracts to provide electoral products to Kenya. At the time that the UKEF support was given, Smith and Ouzman were under investigation by the SFO for corruption, and had been since October 2010. UKEF states that it had no knowledge of the investigation. This raises questions about whether it asks sufficient information in its application forms to ascertain whether companies are under investigation at the time of applying for support.

Additionally, the 2013 contract to provide ballot papers to Kenya for its general election for which UKEF provided support was controversial in Kenya. In January 2013, the same month UKEF gave support, a court case was launched in Kenya by competitors alleging that procurement rules had been breached.[[38]](#footnote-38) The contract had been given on a single-source basis to Smith and Ouzman. UKEF appears to have given support to the company before this court case was resolved.

UKEF has also said that the company was provided details in this case about the agent and commission payments made in relation to the contract. It is not clear whether UKEF has passed this information to the SFO who have received further allegations of corruption in relation to the 2013 contract for which UKEF support was given.

*Recent developments*

In March 2015, UKEF undertook a public consultation on changes to its anti-bribery and corruption procedures in which it proposed that a new UKEF facility, the general working capital facility, would not require routine information by applicants about agents and consortium partners. UKEF also proposed not to consult in future on any changes to its anti-corruption policies. Following the public consultation, UKEF upheld this position but said it would require companies applying for the general working capital facility to make a declaration that it has no reason to believe that a group company, agent or consortium partner has been convicted of or admitted to corruption or has engaged in corruption in relation to the exporter’s current and prospective export contracts. It also said it would consult on changes to anti-corruption policies where appropriate.

The general working capital facility allows companies to access lending from banks to export with UKEF guaranteeing those loans. However, the loans will cover specific contracts and UKEF, by deciding not to ask for details on agents and partners on specific contracts under this facility, has opened up a significant loophole for exporters to use their facilities without being subject to proper due diligence. This raises questions as to whether UKEF’s new facility is more vulnerable to being tainted by bribery.

1. **Ministry of Defence**

The Ministry of Defence in the UK has considerable overseas corruption risks inherent to its business. This includes the number of government to government contracts it concludes and the fact that around 50% of the MOD’s procurement is for single source contracts. In 2014/15, the MOD spent £8.3 billion on single-source contracts – making it one of the highest single source procurers in Europe. Additionally, the defence sector is known as a sector that is at particularly high risk of corruption.

The fact that another corruption allegation involving a government to government contract between the UK and Saudi Arabia has arisen and is under investigation by the SFO raises particular questions about whether the MOD has learned all the lessons that should have been learned from the BAE/Al Yamamah. After that scandal, the UK failed to undertake any kind of independent review into potential failings at the MOD.

Once the SFO investigation on the GPT has concluded, it is essential that the UK government set up an independent and transparent ethics review committee to examine the way in which the MOD handles overseas corruption risks, particularly with regards to government to government contracts. This review should also look at how the MOD handles conflicts of interest that arise in particular from lobbying, the revolving door between the department and the defence industry, and the use of single source contracting. It should also look at whether its reporting and whistleblowing procedures accord with best practice.

**10. Financial Conduct Authority**

The same concerns about the independence and effectiveness of the SFO also currently exist for the FCA, following the replacement of its former Chief Executive after the former Chancellor expressed no confidence in him and allegations of Treasury interference in the manner of the sacking and appointment process. The concerns that the new appointment might be more industry friendly are now heightened in the light of Brexit and sensitivities about Banks and financial institutions relocating.

The role of the financial regulator is absolutely key in combating crime of financial crime. Financial sanctions, which only hit investors and employees, are crucial but by themselves may not be sufficiently deterrent. The FCA should have the power to refer and recommend to the SFO or the NCA that Banks and other financial institutions should face criminal prosecution for a new offence of deliberately failing to prevent money laundering.

1. **Whistleblowing**

There has not been a lot of movement on the OECD recommendations for whistleblowing from the last review.

1. *Reform of PIDA*

To recap, the last review identified that the Public Interest Disclosure Act (PIDA), which protects whistleblowers when they face retaliation such as being dismissed or forced out of their job, had insufficient coverage for foreign bribery cases. PIDA does not provide protection for an expatriate worker of a UK Company unless there is a “strong connection with Great Britain and British employment law”.[[39]](#footnote-39) The review highlighted the case of Mr Foxely who worked in Saudi Arabia but for a UK-incorporated company and worked regularly with UK officials but had a Saudi of Arabia contract of employment. When he raised concerns about bribery and corruption between his employer and Saudi officials he was dismissed, but due to the Saudi contract of employment the Employment Tribunal ruled there was an insufficient link to the UK. As the review highlighted this ruling undermines the public policy goals of PIDA which was to detect crime and protect those raising the wrongdoing. The UK Government have so far resisted calls for reform of the law in this area.

1. *Poor Knowledge of legal rights*

The review highlighted poor awareness of PIDA among citizens of the UK; with research at the time of the review finding that 77% of whistleblowers were unaware legal protection existed.[[40]](#footnote-40) Poor awareness of rights can provide a barrier to whistle-blowers raising their concerns if they feel there is no protection should they face retaliation for coming forward. Research has shown that fear of reprisals is a barrier that would prevent a worker coming forward with concerns. This area has improved but there is still a lot of work to do. In 2015, 67% of respondents to a survey of UK workers were either unaware or believed there was no whistleblowing protection in the UK.[[41]](#footnote-41) There has been no government activity in increasing awareness of PIDA since the OECD review. Our recommendation is that the Government should launch a campaign, with the trade unions, to raise awareness of whistleblowing rights.

1. *Effective Company Arrangements for Whistleblowing*

The review also recognised that low awareness of the law was an issue for organisations as well as individuals and so steps should be taken to increase awareness among companies as well as citizens. This is a sensible suggestion, given that it is now commonly accepted that whistleblowing is an integral part of the fight against corruption, and that all organisations should have effective whistleblowing arrangements.

The key issue now is whether organisations should be encouraged or required to have effective whistleblowing arrangements. The Government have sided towards encouraging organisations and have published voluntary guidance.[[42]](#footnote-42) Financial regulators increasingly expect the organisations they supervise to have effective whistleblowing policies. For example, the Financial Conduct Authority (FCA) and the Prudential Regulation Authority (PRA) that require, and the Financial Reporting Council (FRC) recommends, that the companies they regulate to have whistleblowing arrangements - including senior designated individuals, policies and training.[[43]](#footnote-43)

There will always be a danger that whistleblowing policies can be seen as a tick-box exercise rather than a mechanism that can be used by staff to alert the organisation to wrongdoing or malpractice. To counteract this more can be done to highlight best practice which contains effective audit mechanisms that can test the policy’s effectiveness on the ground.

The Government through a public consultation should produce a Whistleblowing Code of Practice and this should be underpinned by statute. The code would not require organisations to have arrangements in place but the code could be used by regulators, law enforcement bodies and the courts when deciding issues around whistleblowing.

1. <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/440661/insight-into-awareness-and-impact-of-the-bribery-act-2010.pdf> [↑](#footnote-ref-1)
2. <https://www.sfo.gov.uk/2016/09/06/control-liability-good-idea-work-practice/> [↑](#footnote-ref-2)
3. For instance, in November 2015 the SFO was forced to drop a case looking at fraud in relation Gyrus, the UK subsidiary of Olympus, following a Court of Appeal ruling that Section 501 of the Companies Act, which makes it an offence to mislead an auditor, does not apply to companies, but only individual officers of a company. <http://www.lexology.com/library/detail.aspx?g=cabfe80b-ce29-48f9-89bc-4f3f4fe9e2a0> [↑](#footnote-ref-3)
4. At the Sweett hearing in December 2015, the SFO stated that it expected to charge an individual within three months. However, that has not happened. [↑](#footnote-ref-4)
5. <http://www.ft.com/cms/s/0/daa673be-d0da-11e5-831d-09f7778e7377.html#axzz4M1WQ6xxr> [↑](#footnote-ref-5)
6. <https://www.justiceinspectorates.gov.uk/hmcpsi/inspections/sfo-governance-arrangements/> [↑](#footnote-ref-6)
7. Arrests made by the ICU in October 2015 appear to have been in relation to potential theft of state resources by former Nigerian oil minister, Alison-Madueke Diezani, though little public information has been released. <http://www.nationalcrimeagency.gov.uk/news/718-international-corruption-unit-arrests>; <http://www.independent.co.uk/news/world/africa/reformer-of-nigerian-oil-industry-diezani-alison-madueke-arrested-on-bribery-charges-a6685146.html> [↑](#footnote-ref-7)
8. <http://www.bailii.org/ew/cases/EWCA/Crim/2016/2.html> [↑](#footnote-ref-8)
9. *R v J, B, V and S* [2013] EWCA Crim 2287, <http://www.bailii.org/ew/cases/EWCA/Crim/2013/2287.html> [↑](#footnote-ref-9)
10. <http://www.bailii.org/ew/cases/EWHC/Admin/2015/865.html> [↑](#footnote-ref-10)
11. <http://www.bailii.org/ew/cases/EWHC/Admin/2016/102.html> [↑](#footnote-ref-11)
12. These arguments have also been made by the criminal defence sector. See <http://thebriberyact.com/2016/06/27/exclusive-u-turn-on-dpas-sfo-director-points-to-concerns-over-lack-of-incentives-for-dpas-while-sir-brian-leveson-says-dpa-companies-entitled-to-bigger-discounts/> [↑](#footnote-ref-12)
13. (<http://globalinvestigationsreview.com/article/1035486/standard-bank-dpa-interview-transcripts-not-required> [↑](#footnote-ref-13)
14. Michael Bowes QC and Judy Krieg, International Bar Association Anti-Corruption Digest, June 2016 [↑](#footnote-ref-14)
15. <http://www.cw-uk.org/2016/02/16/sfo-plays-hardball-sweett-case-sets-new-standards-for-cooperation-in-corruption-cases/> [↑](#footnote-ref-15)
16. <http://globalinvestigationsreview.com/article/1017389/gir-live-london-uk-dpa-unattractive> [↑](#footnote-ref-16)
17. <http://economia.icaew.com/finance/july-2016/the-uks-second-dpa-a-hopeful-judgment> [↑](#footnote-ref-17)
18. <https://www.sentencingcouncil.org.uk/wp-content/uploads/Fraud_Response_to_Consultation_web1.pdf> [↑](#footnote-ref-18)
19. <http://thebriberyact.com/2016/06/27/exclusive-u-turn-on-dpas-sfo-director-points-to-concerns-over-lack-of-incentives-for-dpas-while-sir-brian-leveson-says-dpa-companies-entitled-to-bigger-discounts/> [↑](#footnote-ref-19)
20. <https://www.justice.gov/opa/blog/criminal-division-launches-new-fcpa-pilot-program> [↑](#footnote-ref-20)
21. In a September 2016 speech, Ben Morgan, Joint Head of Bribery and Corruption at the SFO, stated that the SFO was receiving more self-reports than at any time in the previous four years and mentioned that in the prior week to his speech there had been three “*significant matters*”. Morgan stated however that the vast majority of their case load is from self-generated work resulting from increased intelligence capacity at the SFO (<https://www.sfo.gov.uk/2016/09/15/ben-morgan-global-investigations-review-live/> ) [↑](#footnote-ref-21)
22. <http://globalinvestigationsreview.com/article/1035486/standard-bank-dpa-interview-transcripts-not-required> [↑](#footnote-ref-22)
23. This was in part because of Scottish judges had concerns that DPAs would blur the distinction between judges and prosecutors. [↑](#footnote-ref-23)
24. <https://ico.org.uk/media/action-weve-taken/decision-notices/2016/1623980/fs50577464.pdf> [↑](#footnote-ref-24)
25. <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/558531/PPN_8_16_StandardSQ_Template_v3.pdf> [↑](#footnote-ref-25)
26. <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/551130/List_of_Mandatory_and_Discretionary_Exclusions.pdf> [↑](#footnote-ref-26)
27. Ted Electronic Tenders Daily Database. [↑](#footnote-ref-27)
28. <http://www.airbusgroup.com/int/en/news-media/press-releases/Airbus-Group/Financial_Communication/2016/04/20160401_airbus_group_UKEF.html> [↑](#footnote-ref-28)
29. <http://uk.reuters.com/article/uk-airbus-probe-uk-idUKKCN0X11IB> [↑](#footnote-ref-29)
30. [http://webarchive.nationalarchives.gov.uk/20100918112119/http://www.ecgd.gov.uk/assets/bispartners/ecgd/files/publications/ann-reps/ecgd-annual-review-2005-06.pdf](http://webarchive.nationalarchives.gov.uk/20100918112119/http%3A//www.ecgd.gov.uk/assets/bispartners/ecgd/files/publications/ann-reps/ecgd-annual-review-2005-06.pdf) [↑](#footnote-ref-30)
31. <https://www.theguardian.com/business/2015/feb/16/rolls-royce-corruption-claims-spread-to-brazil> [↑](#footnote-ref-31)
32. <https://www.theguardian.com/business/2015/aug/30/rolls-royce-cooperate-brazil-investigation-petrobras-bribery> [↑](#footnote-ref-32)
33. <http://agenciabrasil.ebc.com.br/en/economia/noticia/2016-09/former-agent-dutch-company-return-45-million-embezzled-petrobras>. The money was returned to Petrobras in September 2016. [↑](#footnote-ref-33)
34. <http://www.publications.parliament.uk/pa/cm201213/cmselect/cmbis/writev/82/m07.pdf> [↑](#footnote-ref-34)
35. <https://www.theguardian.com/environment/2015/nov/24/uk-to-give-petrobras-330m-despite-the-company-facing-corruption-charges> [↑](#footnote-ref-35)
36. <https://www.theguardian.com/world/2015/jul/30/uk-to-back-sbm-offshore-despite-bribery-investigations> [↑](#footnote-ref-36)
37. <http://www.offshoreenergytoday.com/sbm-offshore-pays-240m-to-settle-bribery-case/> [↑](#footnote-ref-37)
38. <http://www.standardmedia.co.ke/article/2000074590/iebc-grapples-with-court-case-over-tender-to-supply-ballot-papers> [↑](#footnote-ref-38)
39. Serco Limited v. Lawson, [2006] UKHL 3 at paras. 35-40. [↑](#footnote-ref-39)
40. P.g. 55, PHASE 3 REPORT ON IMPLEMENTING THE OECD ANTI-BRIBERY CONVENTION IN THE UNITED KINGDOM March 2012 [↑](#footnote-ref-40)
41. P.g. 31 of the *Whistleblowing: Time for Change,* Public Concern at Work, 2016. [↑](#footnote-ref-41)
42. <https://www.gov.uk/government/publications/whistleblowing-guidance-and-code-of-practice-for-employers> [↑](#footnote-ref-42)
43. [↑](#footnote-ref-43)