UK ANTI-BRIBERY EFFORTS DRAW QUALIFIED PRAISE FROM OECD

5 April 2012

To Our Clients and Friends:

The Bribery Act and increased prosecution of foreign bribery have earned the UK qualified approval from the main international body monitoring countries' anti-corruption laws. But UK prosecutors have been criticised for what is portrayed as an emerging practice of settling foreign bribery cases behind closed doors.

The UK is a party to the Organisation for Economic Co-operation and Development OECD Convention on Combating Bribery of Foreign Public Officials in International Business (the "Convention"). This Convention, agreed to in 1997, obliges all 38 signatories to pass and enforce criminal laws forbidding the bribery of foreign officials. Implementation of the Convention is monitored by the OECD Working Group on Bribery (the "Working Group").

Though the UK was one of the first countries to ratify the Convention in 1998, it has in the past faced harsh criticism from the Working Group. For example, the Working Group's phase 2bis report of October 2008 expressed "particular concern" about "the UK's continued failure to address deficiencies" in its foreign bribery laws, and "strong[] regret" about the UK's failure to amend some laws.[1]

This criticism played a part in leading to the passage of the Bribery Act in 2010 and its entry into force last year. This effort by the UK has now borne fruit, with the Working Group's latest report painting a much more positive picture of the UK's anti-bribery efforts. In the report, completed last month, the Working Group stated:

> "The Working Group commends the UK for the significant increase in foreign bribery enforcement actions since Phases 2 and 2bis. The UK is encouraged to continue providing adequate resources and support to the [Serious Fraud Office ("SFO")] and other relevant law enforcement agencies so that they may continue improving their

[1] *OECD, United Kingdom: Phase 2bis Report on the application of the convention on combating bribery of foreign public officials in international business transactions and the 1997 recommendation on combating bribery in international business transactions, October 2008 at 4, http://www.oecd.org/dataoecd/23/20/41515077.pdf.*

> record of enforcement. The Working Group also commends the UK for publishing the Guidance to Commercial Organisations which led to the entry into force of the Bribery Act after the Phase 1ter evaluation."[2]

It also congratulated the UK government for its "substantial efforts to raise awareness of the Bribery Act", which has led to a heightened awareness of foreign bribery issues in the UK. This is clearly correct: in the past few years, foreign bribery has been a regular topic in the press and other media, and law firms and other professional organisations frequently provide their clients with updates on the topic.

SFO Director Richard Alderman responded positively:

> "I welcome this report and its recognition that significant efforts have been made in the UK to combat foreign bribery. I am pleased to note the OECD's supportive calls for the SFO and other agencies to be suitably resourced to make even better inroads, through enforcement actions, into the cynical and sapping corrupt practices that too frequently blight global business."[3]

But the Working Group considers that there is still room for improvement. In particular:

> "The Working Group is concerned that, to settle foreign bribery-related cases, UK authorities are increasingly relying on civil recovery orders which require less judicial oversight and are less transparent than criminal plea agreements. The low level of information on settlements made publicly available by UK authorities often does not permit a proper assessment of whether the sanctions imposed are effective, proportionate and dissuasive. This also misses an opportunity for the UK to provide guidance and raise public awareness on foreign bribery-related issues. It is equally concerning that the SFO has in some cases entered into confidentiality agreements with defendants that prevent the disclosure of key information after cases are settled.[4]

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2 OECD, Phase 3 Report on implementing the OECD Anti-bribery Convention in the United Kingdom, March 2012 at 5, http://www.oecd.org/dataoecd/52/19/50026751.pdf [hereinafter "Phase 3 Report"].

3 SFO welcomes OECD recognition of the UK's actions against foreign bribery, http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2012/sfo-welcomes-oecd-recognition-of-the-uk's-actions-against-foreign-bribery.aspx.

4 Phase 3 Report, 5.

Debevoise's recent client update regarding the SFO's civil settlement with Macmillan Publishers5 highlighted this problem. While pointing out the advantages of civil recovery orders to the SFO and companies, we also stated:

> "The final point to be made about this case is one that is less welcome: the lack of transparency. As noted above, the Consent Order providing the terms of the settlement is confidential, and thus even many of its most basic terms are unavailable to the public. The value of the contracts won by Macmillan and its manner of winning them have not been released, so it cannot be known on what basis the £11 million forfeiture was calculated, or what was wrong with the public tender processes and Macmillan's own processes. … It is hoped that in the future the SFO and cooperating companies will release more detailed information about matters settled by way of civil recovery."

The Working Group recognised that confidentiality agreements "undoubtedly" encourage companies to resolve investigations, but they also minimised the settlements' deterrent impact: "not only must justice be done; it must also be seen to be done."[6] It said UK authorities should avoid confidentiality agreements and ensure that key facts, court documents and settlement agreements are publicly disclosed. At the same time, however, the Working Group expressed its support for the use of plea agreements, including Deferred Prosecution Agreements ("DPAs"). It recommended that the UK continue its efforts to establish a solid legal framework for DPAs.[7] The Ministry of Justice is currently drafting a white paper on DPAs."[8]

Alderman said he understood the Working Group's concerns regarding transparency, as open settlements would lead to greater public confidence. But he noted that confidentiality had "often been the key that unlocks resistance."[9]

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5 FCPA Update August 2011, http://www.debevoise.com/newseventspubs/publications/detail.aspx?id=9d56da80-1da1-4e29-bc27-4288643df3cc.

6 Id., 23-24.

7 Id., 20.

8 SFO Release.

9 SFO Welcomes.

The Working Group also made some further specific criticisms:

- It considered that the government's stance on what is allowable **corporate hospitality**, as set out both in the Ministry of Justice's Guidance for Commercial Organisations of March 2011 (the "Guidance")[10] and in other public statements, is too lenient.[11] In particular, the Working Group took issue with the examples the Guidance used to illustrate what was acceptable. For example, the Guidance stated that it would be appropriate to take a foreign public official and his or her partner out to fine dining and a baseball game; the Working Group and invited experts "unanimously agreed that this example presented an unadvisable, high-risk activity under almost all circumstances." The Guidance's reference to industry norms was also criticised because "customary industry standards developed over time may permit a high level of entertainment and gifts that are improperly used to influence official decision-making." More generally, the Working group considered that the Guidance did not take account of the higher risks attendant on entertainment provided to public officials, and asked the government to provide further clarification.

- It was concerned that the UK had not extended the Convention to the **overseas territories** of Gibraltar, Montserrat, the British Virgin Islands and the Turks & Caicos Islands, especially since some of them "are considered offshore financial centres which can be used to facilitate foreign bribery".[12]

- The Working Group was concerned that the treatment of **facilitation payments** by UK authorities was uneven.[13] It welcomed SFO statements that companies should work towards zero tolerance of facilitation payments over time, but noted that there were no criteria for judging if a company was doing so and stated that the SFO should develop such criteria. It

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10 See http://www.debevoise.com/newseventspubs/publications/detail.aspx?id=c95ed31b-99e7-4d01-b6f6-dd3c1e53ffcd for our previous client update on the Guidance.

11 Phase 3 Report, 11-12.

12 Id., 49.

13 Id., 10-11.

also recommended that the SFO coordinate its approach to facilitation payments with the CPS and Scottish prosecutors, which the SFO agreed to do.

- The Working Group was concerned about the SFO's practice of **advising companies confidentially** on specific transactions and procedures. It said the practice it blurred the line between the SFO's advisory and enforcement roles. More worryingly, the practice lacked transparency. The Working Group said that any requests for advice, and the advice itself, should be in writing and made public. If a company self-reported, any agreement not to prosecute on that basis should also be in writing and made public where appropriate.[14]

Overall, the Report shows that progress has been made by the UK. Its tone is markedly more supportive than that of previous reports of the Working Group. However, the report's concerns, and its five pages of recommendations, indicate the Working Group's view that the UK may still have some way to go in order to achieve full compliance with the Convention.

It remains to be seen whether the UK government will implement all the recommendations—some previous recommendations of the Working Group dating back to 2005 and 2008 have never been implemented. But organisations should be aware of statements and activities of the SFO and Ministry of Justice, to see in particular whether the Working Group's recommendations on hospitality or transparency are followed. We will continue both to monitor and to work with the authorities on these and other topics, and to keep you informed of important developments.

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14 Id., 33-35.

For more on the Bribery Act and anti-corruption, including all our previous client updates, please see our website at www.debevoise.com/thebriberyact.

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