

ONE STEP AHEAD
A 21st Century Strategy to Defeat Organised Crime
HOME OFFICE CONSULTATION

RESPONSE
OF
TRANSPARENCY INTERNATIONAL (UK)

July 2004

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- 1.1 Transparency International (TI) has been at the forefront of the anti-corruption movement since it was formed in 1993. TI is a not-for-profit, independent, non-governmental organisation, dedicated to increasing accountability of government and the private sector and to curbing both international and national corruption. It seeks to work in a non-confrontational way with governments, companies, development agencies, NGOs and international organisations to build coalitions to combat corruption.
- 1.2 TI's international secretariat is based in Berlin and there are more than 90 national chapters around the world (www.transparency.org). TI(UK) is the national chapter for the UK and was among the first to be formed, also in 1993. (www.transparency.org.uk)

TI(UK)'s Response

- 2.1 TI(UK) is grateful for the opportunity to comment on the Home Office paper (the HO Paper). TI(UK)'s principal concerns are to ensure that the institutions, mechanisms and practical arrangements for the investigation and prosecution of foreign bribery and corruption are equal to the enormity of the task. TI(UK)'s concerns apply also to Scotland, but where the present situation or the Home Office proposals distinguish between the two countries, then for the limited purpose of this submission, TI(UK) will confine its remarks to England and Wales.
- 2.2 The HO Paper directs particular attention to certain key questions (pages 57 and 58) which are of great importance. However, whilst this response will include some comments about the criminal justice system and these may refer to *reforming criminal trials*, this paper will not focus on the specified key questions. Rather it will look at the fundamentals of equipping the UK to tackle foreign bribery and a range of other important financial and economic crimes. "Organised crime" for the purpose of the HO Paper seems to embrace drug and people trafficking, excise fraud, VAT fraud and fraud against the private sector (including counterfeiting).
- 2.3 In January 2004, TI(UK) responded in writing to the Home Office Consultation on *Policing: Building Safer Communities Together* (the Policing Paper). In that response (Attachment 1 – the Policing Response) TI(UK)'s aim was to draw attention to the UK's international obligations in the anti-corruption field and express its concern that the proposals for community engagement and local accountability of policing would pull in exactly the

reverse direction to that required for tackling crimes with an international dimension. The current consultation on “Organised Crime” is directly involved with crime that is frequently “international” and rightly proposes a broadly “national” solution as opposed to one based on local police forces.

Dealing with “Organised Crime” and other crime

- 3.1 There is much in the HO Paper that TI(UK) welcomes and supports in the context of tackling organised crime. The recognition of the need for a national agency (SOCA), clarifying accountabilities, strengthening skills, improving use of intelligence, bringing closer the prosecuting and investigating functions, enhancing investigation powers and techniques and developing new measures of success based on “harm reduction” are just some of the more important.
- 3.2 It is however important that “success” in the area of what the Home Office perceives to constitute “organised crime” should not be at the expense of equally harmful financial and economic crime (including international corruption) which seems largely to fall outside these proposals and for which no new or additional measures are suggested. TI(UK) is concerned to ensure that there is at least equal clarity in allocating the investigation and prosecution of international corruption to a well-empowered and resourced institution. Anything less would leave the UK non-compliant with its **international obligations** (see paras 4.1 through 4.3 of the Policing Response).

International Corruption Struggles for Attention

- 4.1 Much of the analysis of what is needed to tackle “organised crime” effectively applies equally to foreign bribery, money laundering and other serious financial and economic crime. According to the PricewaterhouseCoopers Economic Crime Survey of the UK for 2003, the UK reported a higher incidence of economic crime than the rest of continental Europe, North and South America and Asia. As was pointed out in the Policing Response (see para 6.2), according to World Bank figures, the cost of corruption globally represents 5% of the world economy. The writings and speeches of those in government regularly underline the severe consequences to the poor and vulnerable and to whole economies of the damage and instability that result from international corruption. Yet it remains sidelined and struggling for commensurate attention.
- 4.2 At page 20 of the HO Paper, the Home Office reaffirms its commitment “*to combating corruption internationally. Bribery overseas can be a factor which supports corrupt governments, with widespread destabilising consequences. We are duty-bound toensure that UK citizens do not contribute to corruption at home or abroad etc*” The point seems to have been raised but is not pursued. Foreign bribery is not swept up as part of organised crime and nothing is offered for improving its investigation and prosecution.

- 4.3 Handling of allegations of foreign bribery under Part 12 of the Anti-terrorism, Crime and Security Act 2001 depends on the Memorandum of Understanding (MOU) described in paras 5.2 through 5.4 of the Policing Response to sort out overlapping responsibilities (MOU now dated 1.3.04), with the reality that unless a case is taken by the SFO, it will simply not be investigated (see para 5.7 of the Policing Response). It will not benefit from specifically allocated budgets. It is not “core policing”. It does not feature in any statistical or other returns. There is no incentive to investigate. Not only do the local forces generally not have the requisite skills base, but cases are likely to be expensive in resource time and cost. It is not a serious arrestable offence and therefore coercive investigation powers are not available. Special investigative powers are available if the SFO decides to take the case and not if it is consigned to a local force.
- 4.4 These features conspire to minimise the chances of even fairly clear cases coming forward for prosecution, even though by a measurement based on “harm”, it would rank highly (see devastating consequences of foreign bribery as described above and in the Policing response). There are sometimes many more true “victims” than the more obvious ones encountered in “organised crime” and the sums involved and misappropriated can be enormous. Yet foreign corruption barely gets a mention in general descriptions of economic crime.

Interface between Fraud and Corruption

- 5.1 Serious and complex fraud has its own agency (the SFO) that will presumably remain independent of SOCA. It has express statutory authority to investigate and prosecute fraud and cartels under the Enterprise Act 2002 but has no express authority to deal with cases of serious and complex corruption, although it has occasionally done so presumably when there has been a sufficient element of fraud. No single agency is charged with responsibility for foreign bribery /corruption; nor for a range of other financial or economic crimes, although the FSA has certain powers within the regulated sector and the DTI has certain policing powers in regard to companies.
- 5.2 There can be no prosecution of corruption without the consent of the Law Officers. No such consent is required for fraud cases. Both offences are likely to be equally pre-meditated. Both should result in criminal investigation and prosecution. Foreign bribery cases should be prosecuted as such – one or two successful cases would deliver a powerful message and act as a deterrent. The Auld Report recommended that judges should sit without juries in complex fraud trials, but there was no suggestion that a complex foreign bribery trial might be treated similarly.

- 5.3 It seems to have been only since foreign bribery was criminalised for UK citizens and companies with effect from 14 February 2002 that it has begun to be taken more seriously, helped by the process that calls for “peer” evaluation of the UK’s compliance under the OECD Anti-bribery Convention 1997 and the Council of Europe Criminal Law Convention ratified by the UK in December 2003.

Role of the Serious Fraud Office

- 6.1 It is evident that the Home Office is not at present proposing to create a single new agency to tackle a wider range of economic crime than “organised crime”, as TI(UK) proposed in the Policing Response (see paras 5.6 through 5.8). It is therefore necessary to look critically at other solutions, such as the SFO, which combines the role of investigation and prosecution, a model that is rejected for SOCA (pages 32 and 33 of the HO Paper). Skills of the type and level required for foreign bribery are already present in the SFO and it carries its own Mutual Legal Assistance Unit, which makes it likely to be a much more effective body in obtaining information and evidence from other countries and in responding to requests from other countries.
- 6.2 The biggest problem that seems to beset the SFO is its limited case handling capacity (top slice only – around 70 cases at any one time), doubtless exacerbated by falling police support (from more than 4 officers per case in 1997 to around 1 per case in 2002). There is some prospect that this situation will be alleviated from 2004/2005 with additional police resources made available through the City of London Police (who have agreed to be a lead force for London and the South East) and additional funding from the Home Office. This arrangement depends on an agreement with the City Corporation and does not have the strength of statutory backing. This is a pragmatic ad hoc solution that cuts across local accountabilities. Even the two London police authorities are locally accountable.
- 6.3 It cannot be satisfactory to rely on such arrangements. Accepting that there is a strong case for a body that combines investigation and prosecution functions, that body should be as self-sufficient as possible with power to direct its fully seconded or allocated police resource, without regard to local accountabilities.
- 6.4 There are a number of references in the HO Paper to fraud against business and it is not clear what role the SOCA would undertake in regard to such fraud? Would it in any way displace cases that might at present be referred to the SFO, or would SOCA only deal with some cases that do not meet SFO criteria? If so, would the remainder still be referred to local forces, few of which now have dedicated fraud squads?
- 6.5 Interestingly, the Annual Report of the SFO published on 19 July 2004, has the following paragraph on Overseas Corruption:

“The Anti-Terrorism Crime and Security Act 2001 makes the bribery and corruption of overseas officials by UK nationals or companies a criminal offence. It is important to ensure that any allegations of overseas corruption are reported and investigated, and prosecuted where the evidence justifies it. We liaise with the Metropolitan Police and City of London Police, as well as the CPS, since such cases will often come within our criteria for acceptance, involving as they do complex commercial transactions and the need to obtain evidence overseas. They require the multi-disciplinary approach which is central to our way of working.”

From this it may perhaps be inferred that the SFO is to become the preferred investigator/prosecutor for cases of foreign bribery. This has much to commend it, particularly if the SFO is to have specialists assigned to foreign corruption cases and that its resources and limited case load will not lead to shedding of surplus cases to under-qualified local forces, which as pointed out in para 4.3 above, will lead to cases not being prosecuted, which will do nothing for the reduction of fraud and bribery.

- 6.6 However, this arrangement should be enacted so that the SFO is given a clear mandate to take on cases of serious and complex corruption. It is absurd that the SFO has express authority to deal with cases of fraud and cartels and yet has to find a sufficient element of fraud in a bribery case before it can assume jurisdiction to deal with a bribery case. This will become even more important if the Government proceeds with its proposals in the Fraud Law Reform Consultation of May 2004 and substitutes a statutory general fraud offence for the present eight statutory deception offences in the Theft Acts and the common law offence of conspiracy to defraud. “Fraud” would then clearly mean the statutory general fraud offence and there would be less scope for relaxed statutory interpretation. There may even be a case for changing the name of the SFO to reflect its wider powers. There will be ample opportunity to legislate in the Serious Organised Crime Bill expected in the 2004/2005 Session of Parliament. It could equally well be included in a Criminal Justice Bill or perhaps in a Bill that would in due course enact the Government’s proposals for Fraud and Corruption law reform?

Consequences of Creating the SOCA

- 7.1 There is clearly a strong case for creating an agency such as the SOCA to tackle organised crime. Three issues arise immediately. If the SOCA is formally to bring together the NCS, and the NCIS, what are the consequences for the SFO and local forces, is there a sufficient pool of excellence from which to draw the skilled personnel required for the SOCA, the SFO and the local forces and will there remain a category of financial and economic crime for which neither the SOCA nor the SFO is seen as the responsible investigator/prosecutor?

7.2 It is clear from the Annual Report of the SFO that it currently uses the services of the NCS and the NCIS. Once absorbed in the SOCA, will the covert policing and criminal intelligence resource now proposed to be part of the SOCA, with its focus upon a narrow range of “organised crime”, be equally available to the SFO and local forces, or will something else need to be created to replace these services? Assuming that the SFO is to continue as a separate office, how will the former NCS and NCIS services be secured to the SFO? Whatever arrangement is put in place should be assured of some measure of permanence by at least some form of secondary legislation under a statutory power whereby the Home Secretary may make satisfactory arrangements or schemes for these matters. The SFO and local forces should be no less effective after the creation of the SOCA than they were before its creation and hopefully become even more effective.

7.3 Pages 31 and 32 of the HO Paper correctly analyse the many specialist and technical skills required by any law enforcement agency that will be tackling cross-border financial or economic crime, particularly if the agency is going to be proactive in generating investigations. Many of these skills are transferable between law enforcement bodies and professional and commercial organisations. If skilled people are employed in sufficient numbers for the SOCA, will that prejudice equivalent recruitment of similarly qualified people by the SFO and by those local forces that are “leading” on these crimes, particularly the Metropolitan and City of London forces, or will they all be competing in a relatively small skills pool?

7.4 It seems that organised crime will be taken care of with the SOCA-assumed bodies (NCIS/NCS) and directly recruited skilled staff. Serious and complex fraud, corruption and cartels will be looked after by the SFO and its skilled staff supplemented by ad hoc arrangements with the City of London police. To which bodies will other serious and complex financial and economic crimes (international securities offences, money laundering unrelated to organised crime etc) be assigned and how will they access the same range of skills? Are the accounting, procedural, language and related skills to be concentrated in a single force or agency that can deal confidently with such crimes, or are there to be two or three such bodies?

Alternative Structures and Requirements for Prosecution of Foreign Bribery

8.1 An alternative proposal to that suggested in the HO Paper, would be to leave the NCIS and the NCS as technically independent bodies able to supply their services to the national SOCA and SFO and such other forces or bodies as are called upon to operate on a national basis. This would be more flexible and be more likely to ensure that the SOCA does not become a strong operator at the cost of weakening the SFO and local forces. It would thus ensure that international corruption can be accorded equivalent priority to organised crime and fraud.

- 8.2 Whatever solution finally emerges for the SOCA, the foreign bribery offence should be investigated and prosecuted by a single national body, expressly empowered by statute (as is the case with the SFO for serious fraud and cartels), with special investigative powers (as enjoyed by the SFO), fully resourced and financed specifically for this task and any arrangements for sharing services currently afforded by the NCIS and the NCS or police forces, secured at least in secondary legislation – it should not be compelled to rely on informal ad hoc arrangements that can be unwound as easily as they are put in place. Only in this way will budgets and resources be clearly allocated and the prosecution of the foreign bribery offence be proactively pursued. Careful attention also needs to be given to coordination with the complementary and supportive roles that should be played by the FSA, the DTI companies investigation sections, the Inland Revenue and others.

Mutual Legal Assistance (MLA) and the Criminal Justice System

- 9.1 Pages 19 and 20 of the HO Paper seek views upon further improving MLA beyond those procedures simplified under the Crime (International Cooperation) Act 2003 (the 2003 Act). Page 39 seems to accept that the criminal justice process in England and Wales is extremely expensive “*reflecting both the high quality of the evidence required to secure conviction, the fairness and transparency of the process and the cost of preparing for trial*”. Pages 42 and 43 look at the circumstances in which individuals may be compelled to give evidence and the sort of cases for which powers of compulsion may be used and page 44 *et seq* look at ways in which criminal trials should be reformed. TI(UK) does not propose to make detailed comments on these important issues which have a wider impact than their application to the investigation and prosecution of international corruption. Reform of rules of evidence and trial procedures that facilitate prosecutions without unduly detracting from essential human rights and perhaps lower costs should definitely be considered.
- 9.2 The SOCA would benefit from having its own MLA unit along the lines of that of the SFO. For cross-border crimes and in the absence of a power to compel witnesses to attend trials in the UK, there should be careful consideration of relaxing rules of evidence to the extent necessary to get essential facts before the Court. This could lead to evidence by television links (already begun to be provided for in the 2003 Act) and even affidavit written testimony untested by examination by advocacy. The judge would always retain discretion as to admissibility and where the result falls short of best evidence, would give directions as to the weight to be attached to it. The normal rules of evidence in criminal proceedings in our courts rightly set high standards, but if the result is to guarantee that cross-border crimes are just too difficult to bring to trial, then the criminal justice system is failing to protect society in the global environment in which criminals now operate. Judges and the Courts must be prepared to make radical changes to our systems to achieve successful yet fair prosecutions and should recognise that the

traditional adversarial advocacy model does not need to apply in cases where that must frustrate the development of criminal justice.

- 9.3 The whole range of serious financial and economic crimes discussed in this paper would benefit from the availability of SFO style powers to compel witnesses to produce documents and answer questions. They should certainly be available to the investigation of foreign bribery cases which will often encounter major difficulties in obtaining evidence, much of which will need to be obtained from overseas. It seems logical that the powers should be available according to the offence rather than the agency to which the offence is normally assigned, although one agency may need a different set of safeguards from another. “*All cases of serious crime*” might be too general, but “*all cases of serious financial and economic crime*” would come closer to a generic description. This should be defined expressly to include organised crime of the type to be assigned by statute to the SOCA, and cartel and serious and complex fraud and corruption offences of the type to be assigned by statute to the SFO. It may then be necessary to list other offences and perhaps take a power to add to or remove offences from the list by statutory instrument. In applying special investigatory powers to SOCA, it is recognised that prosecuting lawyer (rather than investigator) discretion would afford some safeguards against misuse.

Tax Powers

- 10.1 Page 38 of the HO Paper refers to the key role that the Inland Revenue can play against organised crime as indeed it can against other serious financial and economic crime. It is particularly well placed to assist in the detection of foreign bribery. In the review being conducted by the NCS and the Inland Revenue as to the use of the gateway in section 19 of the Anti-terrorism, Crime and Security Act 2001 (the A-T Act), the Inland Revenue should be encouraged to make much more use of the power. TI(UK) takes the view that subject to reasonable safeguards, the Inland Revenue’s discretion should become mandatory or at least there should be a presumption that disclosure will be made to the enforcement authorities.

Legislation

- 11.1 The legislation that will be necessary to create the SOCA offers an opportunity to make progress on a number of related criminal law matters. TI(UK) recommends that the short and long titles of the Bill should be drawn widely so as to avoid “scope” problems. There follow some suggestions:

whatever may be required to enable the UK to ratify the UN Convention against Corruption and the UN Transnational Organised Crime Convention;

power for the Home Secretary by appropriate secondary legislation to provide for and make changes to the allocation of offences to designated agencies or

police forces or to establish schemes for cooperation giving lead or strategic status to police forces;

power to the Home Secretary to designate offences that merit the special SFO style investigative powers;

amendment to section 19 of the A-T Act to make the gateway more effective;

amendments to Part 12 of the A-T Act to place beyond doubt the UK's compliance with the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions;

amendment if required to the Export and Investment Guarantees Act 1991 to enable the Secretary of State through the Export Credits Guarantee Department to operate a scheme of debarment as a sanction against companies found to have engaged in corrupt or fraudulent activity;

amendment to the Criminal Justice Act 1987 expressly to authorise the SFO to investigate and prosecute cases of serious and complex corruption.

Conclusion

TI(UK) would welcome a discussion of the points raised in this paper and would be very willing to offer whatever further information or assistance might be found helpful.