



**HOUSE OF COMMONS INTERNATIONAL DEVELOPMENT COMMITTEE  
INQUIRY ON CROSS-DEPARTMENTAL WORKING ON DEVELOPMENT AND TRADE**

**SUBMISSION BY TRANSPARENCY INTERNATIONAL (UK)  
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Transparency International (UK) (TI(UK)) welcomes this Inquiry by the House of Commons International Development Committee (IDC). As the UK National Chapter of the global non-governmental coalition against corruption, we are primarily concerned with combating corruption both within the UK and in the UK's international economic relations with the rest of the world, particularly developing countries. We pursue these objectives by working through partnerships with government, the private sector and civil society. This submission therefore covers three areas the IDC is focusing on, where the Government's anti-corruption policies have an impact on trade and development.

By way of introductory comment, we endorse the observation of a recent relevant and international analysis by the International Peace Academy, assessing "whole of government" approaches to fragile states.<sup>1</sup> While noting that the UK is at the forefront of conceiving and adopting integrated policy responses to weak and failing states, the study observes that its "performance in designing and implementing coherent and integrated strategies towards fragile states continues to fall short of its aspirations." Combating corruption is a key component of any strategy to strengthen weak governance, and the criticism of the Government's incoherence and poor implementation is all too apt in relation to tackling corruption.

## **OECD AND CORRUPTION**

### **OECD Guidelines for Multinational Enterprises**

The OECD Guidelines for Multinational Enterprises (Guidelines) were adopted in revised form in 2000. The UK, together with other adhering countries, undertook to set up a "National Contact Point" (NCP) with responsibility for actively promoting and developing the Guidelines and for handling complaints about companies failing to meet them. The activities of companies in the Congo (DRC) caused widespread concern. The All Party Parliamentary Group on the Great Lakes Region published a report in February 2005 critical of the UK NCP in failing to address complaints either promptly or adequately. A Joint Working Group chaired by Lord Mance, and composed of representatives from prominent companies and NGOs, proposed substantial reform, and the Government accepted these proposals almost entirely.

There was criticism that the NCP had been set up as a low level appointment within DTI. The new arrangement shared responsibility between three Departments: DTI (0.6 FTE); FCO (0.2 FTE) and DFID (0.2 FTE), leaving the secretariat within DTI. The NCP's performance was to be guided by a Steering Board composed of "senior staff from relevant ministries" and members from outside government. It was expected that the Steering Board would be appointed by December 2006.

The Steering Board was eventually appointed in April 2007, and has met twice, most recently on 19 September 2007. There are four 'externals': nominated respectively by the CBI, TUC, Civil Society and the AAPG (Jeremy Carver, a Trustee/Director of TI(UK)). No less than twelve Government departments and agencies are represented: DTI/DBERR, ECGD, DEFRA, Scottish Executive, Ministry of Justice, UKTI, DFID, FCO, DTI-CSR, Work & Pensions, DTI-Legal and Attorney General's Office. It is said that current rules require that, on such bodies, external members must be out-numbered in a ratio of not less than 4:1. Whatever the rule, this over-large membership is bound to be unwieldy and inefficient.

It is too early to comment on the performance of either the reformed NCP or its Steering Board; but the involvement of so many officials drawn from a wide range of departments, many of which are unlikely to have direct dealings with the Guidelines or their observance globally provides a disappointing indicator that they will make a difference in strengthening the Guidelines wherever they operate, but particularly in parts of the world suffering from

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<sup>1</sup> Stewart Patrick & Kaysie Brown, 'Greater than the Sum of its Parts?' (IPA, New York, 2007).

entrenched corruption. The Guidelines go beyond addressing corrupt business, dealing with transparency, labour relations, the environment, consumer interests, science and technology, competition and taxation. This is a broad agenda, of great potential benefit to countries in urgent need of economic development. The emphasis of the NCP's work has been international, and this is likely to continue. It must be doubted whether any of the Departments other than DTI/DBERR, DFID and FCO have any real contribution to make to the NCP or Steering Board. The still-undefined merger of responsibilities between DBERR and DFID suggests the possibility of an even smaller concerned core. The smaller the core, the easier to manage and implement it, and the easier to finance it from public funds.

The primary focus of the NCP will almost certainly continue to be international. Trade and investment today are truly international; and abuses such as those dealt with in the Guidelines occur most often in situations of ignorance, exploitation and lack of understanding between commercial and social aims and expectations. It is not foreseeable that some binding treaty will be concluded to prohibit abuses. But if a voluntary code is to do the job, it will have to function coherently, with effective mechanisms operating in all the major exporting and investing countries. Having initially failed to make proper arrangements for the UK NCP, the Government has the opportunity to make a real contribution to strengthening the Guidelines. The dispersal of responsibility for review of the NCP between twelve departments of government gives grounds for pessimism in this respect.

### **OECD Anti-Bribery Convention and UK Action Plan for Combating International Corruption**

Serious concerns have been expressed about the UK by the OECD Working Group on Bribery in International Business Transactions (Working Group). A coordinated approach across departments is essential if a meaningful and convincing response is to be made. This goes to the heart of the UK's national and international interests, including trade and financial markets.

There is a perception that the UK is not serious about fully implementing and enforcing the OECD Convention foreign bribery offence. The Phase 1 and Phase 2 evaluations of the UK have both led to second follow-up evaluations. The Phase 2 bis evaluation visit is due in March 2008. Notice has been given that it will look particularly at the following issues:

- Progress in enacting a new foreign bribery offence;
- Broadening the liability of legal persons for foreign bribery;
- Systemic problems that may explain the lack of foreign bribery cases brought to prosecution.

These issues all have strong 'legal' content. Primary departmental responsibility for them would involve MOJ, DBERR and the Law Officers. However, national strategic and international development interests mean that the outcome of the Phase 2 bis Review of the UK is of vital concern to the FCO and DFID. In anticipation of the OECD Review, that concern should prevail. Law-making is not an end in itself and should serve the broader interests of the UK represented in this area by the FCO and DFID. The FCO leads on the UK's implementation of and compliance with international anti-corruption conventions. DFID has to promote good governance to facilitate sustainable development. The UK's reputation and the combat of international corruption are too important for their progress to be frustrated by the law-making process.

With only three or four months in which to prepare for the crucial OECD Phase 2 bis evaluation visit, this is a bad time to be seen as diminishing the importance of coordination across departments in the work against international corruption. There has been significant progress in implementing the first Action Plan (2006/2007) for Combating International

Corruption published in March 2006. That progress was achieved because it was driven at the highest policy level by the Coordinating Committee's being chaired by Hilary Benn, then Secretary of State for International Development who had special responsibility for coordinating action across departments ('Ministerial Champion'). It is understood that this role now falls to the Secretary of State (DBERR), but nowhere is this set down (see the announcement of ministerial responsibilities within DBERR of 10 July 2007). It is assumed that the Cabinet Coordinating Committee will continue, but that Committee only became truly effective when chaired by the former Secretary of State (DFID).

The written ministerial statement (Minister for Trade, Investment and Foreign Affairs) of 20 March 2007 announcing publication of HMG's report to the OECD Working Group underlined the importance of the UK Action Plan and the changes made to UK coordination in combating international corruption under the Secretary of State (DFID). To accord any lesser status to the Plan and the Coordinating Committee so soon could lead to the perception that these measures were essentially short-term to get through Phase 2. Phase 2 bis has unexpectedly made the need for demonstrable coordination with ministerial lead even more important.

The UK Action Plan needs to move forward. A 2007/2008 version needs to be published urgently and it should give high prominence to all three issues that are on the agenda for the Phase 2 bis review.

Phase 2 bis illustrates well how 'lead' departments need to take account of interests wider than their separate departmental responsibilities. The only way in which the UK will begin to redress the damaging perception that it is not serious about tackling foreign bribery is to make demonstrable and convincing progress in dealing with the issues.

### ***Enacting a new foreign bribery offence***

The Working Group has been promised comprehensive new legislation since Phase 1. The further reference to the Law Commission (LC) after 10 years from the first reference will have done nothing to increase credibility in the context of OECD concerns. The difficulty of defining bribery has been greatly exaggerated in order to excuse long periods of inaction within the Home Office (HO). Other countries have found it possible to define bribery within their laws. No 'consensus' could have been expected from the last HO consultation – the reason given for the further reference to the LC. There was nothing in the procedure followed in the consultation that was calculated to achieve a consensus. What has been lacking is the will to be seized of the issues and to make a decision.

At the time of the reference to the LC (5 March 2007), a Phase 2 bis review of the UK had not been expected. The earliest that a report and draft Bill can be expected is November 2008 and even then there is no assurance that parliamentary time will be found to enact the new law. A measure that clearly complies with the OECD Convention is urgent. To tell the lead examiners on their visit that nothing more can be expected until 2009 is unthinkable. It would diminish the UK's reputation further and undermine the UK's standing in 'making governance work for the poor' – the title of DFID's most recent White Paper.

There are legislative options to meet the concerns of the Working Group that could be started immediately. So long as the principal components of the offence of foreign bribery can be clearly understood from the text by those who need to refer to the legislation, the government could improve the UK's standing by acting promptly to enact new legislation and by changing the terms of reference of the LC as necessary.

### ***Broadening the liability of legal persons for foreign bribery***

The record of the UK in dealing with this issue is a good example of the lack of cross-departmental coordination. Article 2 of the Convention requires the UK "to take such

measures as may be necessary, in accordance with its legal principles, to establish the liability of legal persons for the bribery of a foreign public official (FPO)". The UK response, presumably in reliance on the HO or the Law Officers, has been to take a theoretical stance, i.e. to claim (correctly) that corporations can be made liable for criminal offences. Unfortunately, 'legal principles' in the UK (the need to show 'directing mind') make it impossible in practice to prosecute large, especially global, companies for bribery. These are the very companies that need to be targeted in investigating bribery of FPOs. Quite apart from the injustice that may result from prosecuting only natural persons for offences that confer direct economic benefit on companies that win business, this exploitation of a technical loophole does nothing to persuade the Working Group that the UK is serious about enforcing the Convention.

HMG's position, that it would not be justifiable to alter the basic principles of corporate liability solely in relation to bribery, is understood. However the reality is that almost nothing is being done to resolve the practical difficulty. The question is a small part of the LC's work on codification of the criminal law. A perfect opportunity to address this issue was lost with the recent Companies Bill. Had there been sufficient cross-departmental coordination, the then DTI could have been encouraged to look urgently at some provision that could have met the Working Group's legitimate concerns.

With the issue being raised higher in the agenda (e.g. by its inclusion in the UK Action Plan) the LC team dealing with corruption could be asked to look urgently at whether some intermediate solution could be proposed to make prosecution of companies for foreign bribery effective, pending more general codification? HMG could declare its acceptance of the justice and reason behind the proposal and then promote this strongly. Progressive companies could be expected to support the legislation if sensible defences are built in. The timing is difficult, but energetic cross-departmental action driven at ministerial level would demonstrate a will to be fully compliant with the OECD Convention.

### ***Systemic problems in prosecuting***

Logically, this needs to look more widely than at foreign bribery alone – perhaps economic and financial crime including foreign bribery? With appropriate cross-departmental coordination to take account of the powerful policy need to satisfy the OECD Review, HMG could commit (through the Law Officers) to a thorough examination of all those problems that delay or deter investigation and prosecution of these crimes – including judicial process (disclosure, evidence rules, jury trials etc), mutual legal assistance and judicial cooperation. It can be damaging to the interests of the City and financial markets for criminal activities to be conducted and proceeds to be transferred freely across borders with little expectation of investigation and prosecution. Nothing that impedes enforcement should go unchallenged.

This is potentially a major piece of research. If the lead examiners can be convinced that the issue is being thoroughly examined, the scope of the work could be defined within a few weeks and an interim report could be available by end-January 2008. This would only be achievable with strengthened cross-departmental coordination.

### **NATURAL RESOURCES**

The Extractive Industries Transparency Initiative (EITI), which now includes about 20 countries and 25 companies who have committed to the EITI's criteria and principles for revenue transparency, is a good example of effective cross-departmental working. During the period 2002-2006, when the UK Government took the lead to strengthen international support for EITI, DFID led this work within the Government, drawing on inputs from other departments, especially the FCO. EITI is a multi-stakeholder enterprise - involving governments, companies and civil society. Since different parts of the UK Government have various interactions with these constituencies, it was important to have effective co-ordination within Government to support EITI.

The UK's and DFID's responsibilities for EITI have been reduced following the establishment of an international Board to govern EITI as well as a secretariat in Oslo to facilitate the Initiative's implementation. However, EITI needs the UK Government's continued support to build on its initial successes. This will require further cross-departmental collaboration between DFID, the FCO and DBERR.

## **DEVELOPMENT ASPECTS OF DEFENCE EXPORTS**

When trade is infected by corruption, development is negatively impacted. This is particularly true when the product being traded is a defence export item, as the corruption of the export process can fuel human suffering, terrorism, and insecurity, all of which undermine development.

TI(UK) hopes that the ministerial changes will allow for the adoption of a more rigorous and detailed anti-corruption methodology in Criterion 8 of the EU Code of Conduct for arms exports. It is noteworthy that not a single UK arms export licence has been refused on grounds of Criterion 8. Indeed the Quadripartite Committee's strategic export controls review (2007) stated: "We recommend that DFID considers including an assessment in the Criterion 8 methodology applied by Government to test whether the contract behind an application for an export licence is free from bribery and corruption".

TI (UK) believes this recommendation should be implemented and would be happy to help DFID to develop such a methodology.