THE UK BRIBERY ACT 2010 AND ACCOMPANYING GUIDANCE: BELATED IMPLEMENTATION OF THE OECD ANTI-BRIBERY CONVENTION

Abstract On 1 July 2011 the UK Bribery Act 2010 and accompanying guidance finally came into force, marking the end of years of controversy about how and when the United Kingdom would implement the OECD Anti-Bribery Convention. The United Kingdom's very delayed implementation of the Convention provoked an increasingly threatening response from the OECD Working Group on Bribery, and highlighted this body's lack of binding enforcement procedures. By contrast, the OECD's reliance on non-binding guidelines has proved successful in that the UK Guidance draws heavily upon the OECD's guidance on how corporations should prevent the bribery of foreign public officials.

I. INTRODUCTION

The UK Bribery Act 2010 and its accompanying guidance highlight the role that soft law and soft enforcement play in the domestic implementation of the 1997 OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions ('OECD Anti-Bribery Convention' or 'OECD Convention').[1] The term 'soft law' may refer to the form that an instrument takes, such as a non-binding guideline or recommendation, or to the content of an instrument or provision which is vague or hortatory.[2] The term 'soft enforcement' may describe the character of an instrument's dispute-resolution mechanism, such as a non-binding compliance procedure. Scholars generally focus on the ways in which instruments with a 'soft' form or content interact with 'hard law' at the horizontal or international level, as in the way that declarations or recommendations harden into a multilateral treaty.[3] This paper, however, examines the vertical effects of both soft law and soft enforcement—namely, the way that norms at the international level have influenced developments in the domestic sphere.

[1] Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, adopted by the negotiating conference on 21 November 1997, entered into force on 15 February 1999.

[2] Alan Boyle, 'Some Reflections on the Relationship of Treaties and Soft Law' (1999) 48 ICLQ 901–2.

[3] See, eg Christine Chinkin, 'The Challenge of Soft Law: Development and Change in International Law' (1989) 38 ICLQ 850; Boyle (n 2); Prosper Weil, 'Towards Relative Normativity in International Law?' (1983) 77 AJIL 413.

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The OECD Anti-Bribery Convention itself is a 'hard' or binding multilateral treaty that obligates States Parties to criminalize the bribery of foreign public officials by natural and legal persons.[4] Yet, non-binding guidelines and a soft enforcement mechanism play significant roles in the way that the Convention's norms penetrate the domestic legal systems of its States Parties. Since the Convention came into force in 1999, for example, the OECD has produced a number of non-binding instruments for both States Parties and companies on how to comply with the Convention.[5] In addition, enforcement of the Convention is soft, as the OECD Working Group on Bribery in International Business Transactions ('Working Group') only makes recommendations on implementation and enforcement of the Convention and it does not have the capacity to sanction States Parties for non-compliance.[6] The Working Group operates on the basis of peer review, which depends on consensus and peer pressure among the States Parties.[7]

The strengths and weaknesses of the soft guidelines and enforcement mechanism associated with the Convention are demonstrated by the history of the implementation of the OECD Convention in the United Kingdom, which has been remarkably delayed and controversial. Although the United Kingdom signed the OECD Convention on 17 December 1997, the Bribery Act 2010 and its accompanying guidance did not come into force until 1 July 2011.[8] Meanwhile, in 2006 the Serious Fraud Office terminated its investigation of alleged bribery of Saudi officials by BAE Systems following the Saudi Government's threat to withdraw security cooperation with the United Kingdom should the investigation continue.[9] The termination of this investigation into the 'Al Yamamah' arms deal drew attention to the general lack of enforcement of existing anti-bribery laws in the United Kingdom, as well as the absence of safeguards to ensure that

[4] Art 1.

[5] Working Party on Export Credits and Credit Guarantees, 'OECD Council Recommendation on Bribery and Officially Supported Export Credits' TD/ECG(2006)24 (18 December 2006); 'Recommendation of the Council on Tax Measures for Further Combating Bribery of Foreign Public Officials in International Business Transactions' C(2009)64 (25 May 2009); 'Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions' (26 November 2009); OECD Council, *Good Practice Guidance on Internal Controls, Ethics, and Compliance* (18 February 2010).

[6] Nicola Bonucci, 'Article 12: Monitoring and Follow-up' in Mark Pieth, Lucinda Low and Peter Cullen (eds), *The OECD Convention on Bribery: A Commentary* (CUP 2007).

[7] See generally, Fabrizio Pagani, General Secretariat, Directorate for Legal Affairs, 'Peer Review: A Tool for Co-operation and Change: An Analysis of an OECD Working Method' SG/LEG(2002)1 (11 September 2002).

[8] Steps taken to implement and enforce the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, United Kingdom (24 September 2010); Ministry of Justice, The Bribery Act 2010, Guidance about procedures which relevant commercial organizations can put into place to prevent persons associated with them from bribing (section 9 of the Bribery Act 2010), Forward [hereinafter UK Guidance].

[9] *R (on the application of Corner House Research and others) v Director of the Serious Fraud Office* [2008] UKHL 60, 30 July 2008, para 11 [hereinafter House of Lords *Corner House* Judgment]. In April 2007, Corner House Research and the Campaign Against Arms Trade brought an application for judicial review of the SFO Director's decision to end its investigation of alleged bribery by BAE. The Queen's Bench Divisional Court held that the SFO Director's decision was unlawful, but the House of Lords reversed this ruling on appeal. *The Queen on the application of (1) Corner House Research (2) Campaign Against Arms Trade v The Director of the Serious Fraud Office (Defendant) and BAE Systems Plc (Interested Party)*, Claim No CO/1567/2007, High Court of Justice, Queen's Bench Division, Administrative Court, 18 April 2007.

such investigations and prosecutions remain free of considerations prohibited under the Convention.[10] The termination also caused two public interest groups, Corner House Research and the Campaign Against Arms Trade, to bring an application for judicial review of the SFO Director's decision to end its investigation of BAE, but a detailed discussion of this case remains beyond the scope of this paper. Following this episode, the Working Group became increasingly critical of the United Kingdom's failure to carry out its obligations under the Convention.[11]

The UK government's belated enactment of both implementing legislation and associated guidance reveals weaknesses in the Working Group's non-binding enforcement mechanism, which precludes it from sanctioning non-complying States Parties that have failed to implement the Convention in a timely manner. Part II sketches the Working Group's response to the United Kingdom's delayed implementation of the OECD Convention, which evolved over the course of 12 years from patient to hostile. In the end, the Working Group adopted overtly threatening language that would be appropriate for a treaty body that actually has the capacity to sanction non-complying States Parties, thus inadvertently highlighting the limits of the Working Group's soft-enforcement mechanisms. Yet, one positive development has gone unnoticed: the OECD's Good Practice Guidance on Internal Controls, Ethics, and Compliance ('OECD Guidance') appears to have helped shape the domestic guidance that the UK Government finally issued on how companies should prevent the bribery of foreign public officials.[12] Part III of this article explains how the OECD guidance, despite its non-binding form, successfully penetrated the domestic legal system of the United Kingdom, where it actually retained its non-binding form. The UK guidance does not technically oblige companies to implement its principles, but the incentives for doing so are considerable.

II. THE WORKING GROUP'S RESPONSE TO DELAYS IN IMPLEMENTATION OF THE UK BRIBERY ACT

The Working Group's response to delays in the implementation of the UK Bribery Act highlights the limitations of its working methods. Among the States Parties to the OECD Convention, the United Kingdom arguably has one of the worst records of implementation. The United Kingdom is, for example, one of only five countries that the Working Group has subjected to a Phase 2bis review, which is reserved for States Parties that have inadequately implemented the Convention.[13] The UK's record has been marred not only by the high-profile 'Al Yamamah' episode, but also by its failure to modernize its anti-bribery laws in a timely manner. Although the United Kingdom

[10] See generally, David Leigh and Rob Evans, 'Nobbling the Police' *The Guardian* <http://www.guardian.co.uk/baefiles/page/0,,2098531,00.html>; David Lorello, Rose Parlane and Andy Irwin, 'UK High Court Al-Yamamah Decision Signals Debate on Role of Prosecutorial Discretion in Anticorruption Investigations' (June 2008) 5 International Government Contractor 6.

[11] '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' (16 October 2008) [hereinafter UK Phase 2bis Report]; Directorate for Financial and Enterprise Affairs, 'OECD Group demands rapid UK action to enact adequate anti-bribery laws' (16 October 2008).

[12] OECD Council, 'Good Practice Guidance on Internal Controls, Ethics, and Compliance'.

[13] 'Revised Guidelines for Phase 2 Reviews' 19. The other four countries are Japan (June 2006), Luxembourg (March 2008), Ireland (December 2008) and Turkey (June 2009).

deposited its instrument of ratification in December 1998, bribery reform languished on the legislative agenda in the United Kingdom for approximately a decade until 2008, when the Bribery Act 2010 finally began to take shape.[14] Yet, due to delays in the publication of guidance required under the Act, it did not come into force until July 2011—over 12 years after ratification of the Convention. Although the Working Group generally epitomizes 'soft' enforcement, its responses to the United Kingdom have taken on an increasingly 'hard' character.

Before examining how the attitude of the Working Group towards the United Kingdom shifted from diplomatic to threatening and impatient, the role and procedures of the Working Group merit some attention. Article 12 of the OECD Convention provides that States Parties, acting within the framework of the Working Group, shall cooperate in carrying out systematic follow-up to monitor and promote the Convention's full implementation.[15] Thus, while the Working Group is an OECD body, it also acts as a Conference of the Parties, like those that have been established by many other multilateral treaties in the fields of human rights and environmental law.[16] Article 12 and the accompanying commentary set forth the Working Group's terms of reference, which include a process for the regular exchange of information, systems of self- and mutual evaluation, the provision of regular information to the public, and the examination of bribery-related issues.[17] While these terms of reference are entirely lacking in detail, the drafters do at least appear to have envisioned that the Working Group would act as a mechanism for assessment by peer States, not as a dispute settlement body or as an independent court.[18]

The monitoring mechanisms under Article 12 did not take any sort of definite shape until after the negotiation of the Convention, and these mechanisms have continued to evolve, as the Working Group regularly reviews and modifies the details of its fairly elaborate procedures.[19] The Working Group has developed a peer review monitoring system that involves three different phases.[20] Phase 1 involves an evaluation of the adequacy of the legislation of the States Parties that implements the Convention.[21] Phase 2 concerns an assessment of whether States Parties are applying such legislation effectively, and Phase 3 focuses on the enforcement of the Convention. At each of these phases the Working Group produces publicly available reports that typically make detailed recommendations regarding implementation and enforcement.

[14] See 'United Kingdom: Phase 2: 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' (17 March 2005) paras 23–35 [hereinafter UK Phase 2 Report].

[15] Paragraph 34 of the commentary indicates that Article 12 incorporates Article VIII of the 1997 Revised Recommendation of the Council on Combating Bribery in International Business Transactions, which sets forth the terms of reference for the Working Group.

[16] Bonucci (n 6) 449.

[17] Commentary para 34; Article VIII of the 1997 Revised Recommendation of the Council of Combating Bribery in International Business Transactions.

[18] Mark Pieth, 'Introduction' in Mark Pieth, Lucinda Low and Peter Cullen (eds), *The OECD Convention on Bribery: A Commentary* (CUP 2007) 30.

[19] See, eg OECD, 'Anti-Bribery Convention: Phase 2 Monitoring Information Resources, Revised Guidelines for Phase 2 Reviews' DAF/INV/BR/WD(2005)12/REV3 (27 February 2006).

[20] Bonucci (n 6) 449.

[21] 'Country Monitoring of the OECD Anti-Bribery Convention' <http://www.oecd.org/document/12/0,3746,en_2649_37447_35692940_1_1_1_37447,00.html>.

A. Patience during Phase 1 and Phase 1bis

During its Phase 1 review, the Working Group 'urged' the United Kingdom to move forward with the enactment of modern legislation, but it also demonstrated an understanding that this process could require a substantial amount of time. Even though the UK government at this stage viewed its nearly century-old statutory laws and the relevant common law as providing it with 'generally effective measures' for combating acts of corruption, the government had accepted, at least in principle, that it should restate its anti-corruption laws in a modern statute.[22] In its 1999 Phase 1 Report on the United Kingdom, the Working Group diplomatically indicated that it was 'not in a position to determine' that the Prevention of Corruption Act 1906 and the common law of the United Kingdom were in compliance with the Convention's standards.[23] The Working Group accordingly 'urged' the United Kingdom to enact appropriate legislation as a matter of priority.[24] The Working Group further noted that it would review the situation by the end of 2000, although it acknowledged that the UK government had stressed that it was very unlikely to enact legislation by that time.[25]

The terrorist attacks of 11 September 2001 had an impact upon legislative priorities in the United Kingdom, resulting in the inclusion of provisions on bribery and corruption in Part 12 of the Anti-Terrorism, Crime and Security Act 2001. The inclusion of these provisions arguably may be attributed less to the UK's international obligations under the OECD Convention, and more to a perceived link, however tenuous, between corruption and the creation of conditions that allow for and foster terrorism.[26] Sections 108 and 109 of the Act essentially extended the application of the Prevention of Corruption Acts 1889 to 1916 so as to cover foreign bribery.[27] The 2001 Act did not, however, implement Article 5 of the Convention—an omission which later allowed the House of Lords to decline to rule on this provision in the *Corner House Research* case involving the 'Al Yamamah' investigation, on account of its unincorporated status in the laws of England and Wales.[28] The House of Lords instead ruled that, as a matter of domestic law, the SFO Director had not exceeded his discretion in deciding that the public interest in pursuing the investigation was outweighed by the public interest in protecting the lives of British citizens.[29] Although Parliament intended Part 12 of the Act to be a temporary measure that would be replaced by comprehensive corruption legislation, it remained in force for almost ten years, until the Bribery Act 2010 took force in July 2011.[30]

The Working Group's support for this legislative development was seemingly premised on the temporary status of Part 12 of the 2001 Act. In its March 2003 Phase 1bis Report, the Working Group congratulated the United Kingdom on the significant steps that it had taken, by virtue of the 2001 Act, to address the concerns that the

[22] 'United Kingdom: Review of Implementation of the Convention and 1997 Recommendation' (December 1999) 1. [23] ibid 24. [24] ibid. [25] ibid.

[26] Law Commission, *Reforming Bribery* (Law Com No 313, 19 November 2008) para 4.7; Hansard (HL), 27 November 2001, vol 629, col 152–3, by Lord Rooker; col 204–5, by Baroness Whitaker; col 265–6 by Lord Neil of Bladen; col 288 by Lord Goldsmith.

[27] Law Commission (n 26) para 4.10.

[28] House of Lords *Corner House* Judgment, paras 43–4.

[29] ibid 38–42. [30] Law Commission (n 26) para 4.8.

Working Group had expressed in its Phase 1 review.[31] The Working Group, however, noted that UK authorities had confirmed that the Act would be repealed and replaced as a part of a wider reform of corruption laws. In addition, the Working Group recommended that the UK 'proceed at the earliest opportunity to enact a comprehensive anti-corruption statute' that would address certain essential elements of the offence of foreign bribery as well as the Convention's application to Scotland, the UK Crown Dependencies and Overseas Territories.[32]

Initially, the UK government appeared to be making progress towards meeting the Working Group's expectations. The UK government produced a Draft Corruption Bill in March 2003, the same month that the Working Group published its Phase 1bis Report. This Draft Corruption Bill was long in coming, as it was preceded by and based upon a June 2000 UK White Paper on corruption laws, which was in turn based on a March 1998 Law Commission Report.[33] A Joint Committee of Parliament then undertook pre-legislative scrutiny of the Draft Corruption Bill, which failed to win broad support, in particular because it retained the agent/principal construct as the basis for the offence.[34] Under the agent/principal concept, an exception to the offence of foreign bribery would exist where the bribed official acted with the informed consent of the principal.[35] Reform efforts became derailed when the UK Government rejected the Committee's main recommendations on the definition of corruption, and then decided to undertake a consultation exercise. This resulted in a 2005 Report, on the basis of which the government concluded that there was no clear consensus on the shape that a reform should take.[36] At this point, the government referred the issue back to the Law Commission for further review.

B. Increasing Disappointment during Phase 2 and Phase 2bis

Despite the setbacks following the Draft Corruption Bill of 2003, The Working Group maintained a relatively patient tone in its March 2005 Phase 2 Report.[37] The Working Group began by noting that the UK authorities had 'made substantial efforts to prepare draft legislation and engage in wide consultations', even though the UK government had not implemented the recommended legislative changes.[38] The Working Group went on to recommend that 'the United Kingdom enact, at the earliest possible date, comprehensive legislation whose scope clearly includes the bribery of a foreign public official'.[39] The Working Group also noted that it was surprising that no company or individual had been indicted or tried for the offence of bribing a foreign public official since the United Kingdom had ratified the Convention, given the size of the UK economy, its level of exports and outwards foreign direct investment, and

[31] 'United Kingdom: Review of Implementation of the Convention and 1997 Recommendation: Phase 1bis Report' (March 2003) 16. [32] ibid 17–18.

[33] See generally, Explanatory Notes to UK Bribery Act 2010, paras 6–10; Home Office, 'Raising Standards and Upholding Integrity: The Prevention of Corruption' (June 2000); Law Commission Report *Legislating the Criminal Code: Corruption* (No 248 March 1998).

[34] Joint Committee on the Draft Corruption Bill Session 2002–03 Report and Evidence HL 157, HC 705. [35] UK Phase 2 Report, para 183.

[36] Government Reply to the Report from the Joint Committee on the Draft Corruption Bill Session 2002–03 HL 157, HC 705, Cm 6068; Bribery: Reform of the Prevention of Corruption Acts and SFO powers in cases of bribery of foreign officials (2005).

[37] UK Phase 2 Report. [38] ibid para 15. [39] ibid para 248.

'its involvement in international business transactions in sectors and countries that are at high risk for corruption'.[40]

The suspension of the Al Yamamah investigation in December 2006 appears to have prompted a general shift in the Working Group's approach towards the United Kingdom. At its March 2007 meeting, the Working Group decided to conduct a Phase 2bis review of the United Kingdom, which would focus, in part, on the UK government's failure to enact a new foreign bribery law.[41] At a Working Group press conference that focused on this decision, Mark Pieth, the Chairman of the OECD Working Group, made some revealing remarks about enforcement of the OECD Convention.[42] The Chairman explained that there are two methods by which the Working Group could pressure non-complying countries such as the United Kingdom. The first 'technical' method involved conducting a Phase 2bis review. The second method involved diplomacy, namely 'sending teams of high-ranking diplomats to speak to ministers'. The Chairman further explained that the Working Group had chosen not to employ the latter solution in this specific case. At several points during the course of the press conference, the Chairman distinguished the Working Group from a court of law and emphasized the effectiveness of peer pressure in bringing about increased compliance with the Convention by States Parties. When pressed, the Chairman acknowledged that he did not know what the enforcement mechanisms would be if the Working Group came to the conclusion that a State Party was in breach of the Convention.

In its October 2008 Phase 2bis Report, the Working Group abandoned its use of mild language and began to point towards alternative enforcement mechanisms, beyond the technical and the diplomatic. The lead examiners expressed their extreme disappointment and grave concern at the UK government's continuing lack of implementation of the Working Group's recommendations, as set forth in its 1999 Phase 1 and 2002 Phase 1bis Reports. They noted that the UK government had not even presented a bill to Parliament to address these long-standing deficiencies. The lead examiners therefore 'strongly recommend that the UK enact effective and modern foreign bribery legislation as a matter of high priority and make all possible efforts to ensure that the process is as speedy and effective as possible'.[43] Notably, the Working Group also stressed that 'failing to enact effective and comprehensive legislation undermines the credibility of the UK legal framework and potentially triggers the need for increased due diligence over UK companies by their commercial partners or Multilateral Development Banks'.[44]

C. Threats of Sanctions

The UK government continued to make very slow progress even following this relatively scathing criticism.[45] Further review by the Law Commission resulted in a

[40] ibid paras 16, 249.

[41] 'OECD to conduct a further examination of UK efforts against bribery' (14 March 2007) <http://www.oecd.org/document/12/0,3746,en_33873108_33873870_38251148_1_1_1_1,00.html>.

[42] OECD Press Conference (14 March 2007) <http://www.pieth.ch/nc/media/video_clips/show/oecd-press-conference/>.

[43] UK Phase 2bis Report 12.

[44] ibid 71.

[45] See, by contrast, 'Japan: Phase 2bis: Report on the Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 1997

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2007 consultation paper and then a 2008 report, which formed the template for the draft bribery bill that the government presented to Parliament in March 2009.[46] The UK Bribery Act finally received Royal Assent on 8 April 2010, and it was originally due to come into effect in October 2010, following the release of guidance in July 2010.[47] The implementation of the UK Bribery Act 2010 was, however, delayed twice by a total of nine months. Lobbying by business groups played a significant role in these delays. The Confederation of British Industry (CBI), for example, expressed concerns about the competitiveness of UK companies and pressed for more time for companies to prepare for the legislative changes.[48] In July 2010 the Ministry of Justice announced that it would publish the guidance in early 2011, in advance of the Act coming into force in April 2011.[49] The Ministry of Justice indicated that the publication of the guidance would be followed by a three-month notice period before the Bribery Act's implementation.[50] The UK government accordingly held a consultation exercise in the autumn 2010 on draft guidance regarding the prevention of bribery by commercial organizations.[51] On 31 January 2011, however, the Ministry of Justice announced a further postponement of the publication of the guidance, which was ultimately published on 30 March 2011. The Bribery Act 2010 finally came into force on 1 July 2011.

The OECD responded to the January 2011 delay with blatant threats that represent a marked departure from the organization's usual reliance on peer pressure. In a relatively mild press release, the Chairman responded to the delay by expressing 'disappointment that despite public commitments', the UK would be further delaying the implementation of the UK Bribery Act.[52] It appears, however, that the Chairman may have used harsher language in interviews with various newspapers. The Chairman reportedly

Recommendation on Combating Bribery in International Business Transactions' (15 June 2006) para 62 (the Working Group considered Japan's failure to act on some of the Phase 2 Recommendations to be 'regrettable'); 'Luxembourg: 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' (20 March 2008) paras 81–3 (the Working Group was 'particularly concerned' and 'seriously concerned'); 'Ireland: 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' (11 December 2008) 21, 24 (the Working Group was 'deeply concerned'); 'Turkey: 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' (18 June 2009) 14–15 (the lead examiners were 'concerned').

[46] Law Commission, *Reforming Bribery* (Consultation Paper No 185, October 2007); Law Commission (n 26).

[47] Kelly Hagedorn, 'The Bribery Bill's Wash Up', FCPA Blog (15 April 2010) <http://www.fcpablog.com/blog/2010/4/15/the-bribery-bills-wash-up.html>.

[48] Simon Bowers, 'Serious Fraud Office vows to pursue corrupt foreign companies' *The Guardian* (25 March 2011).

[49] Consultation on guidance about commercial organizations preventing bribery (section 9 of the Bribery Act 2010), Consultation Paper CP11/10, para 2; Ministry of Justice, Bribery Act Implementation (20 July 2010) <http://www.justice.gov.uk/news/newsrelease200710a.htm>.

[50] Ministry of Justice (n 8).

[51] Ministry of Justice, Bribery Act 2010 <http://www.justice.gov.uk/publications/bribery-act.htm>.

[52] OECD Press Release, UK: Chair of OECD Working Group on Bribery concerned over delay of new Bribery Act, 1 February 2011.

noted that in October 2008 (upon publishing its Phase 2bis Report), the OECD had 'already threatened to blacklist British companies if they remained under-regulated'.[53] In light of the January 2011 delay, the Chairman renewed this warning regarding a 'blacklist' that would increase the cost of doing business with UK companies.[54] A Financial Times article states that '[t]he OECD's money-laundering task force has taken similar action in the past against Russia, Israel, and Nigeria.'[55] In addition, a Wall Street Journal article appears to attribute to the Chairman the notion that '[t]he ultimate sanction would be to place U.K. companies on a global blacklist, which would require companies doing business with them to set aside a portion of the contract value against the possibility they could be held responsible if the U.K. firm engaged in bribery'.[56] This article further quotes the Chairman as saying that '[i]t would cost everybody 5% of the contract value to do business with a U.K. company . . . . We can trigger this if we really get fed up. . . . But we would much prefer Britain as a partner.' The Chairman also reportedly warned that if the UK government continues to delay implementation of the Bribery Act, UK companies 'could face a concerted series of actions in other jurisdictions similar to that undertaken by the U.S. Department of Justice against BAE'.[57] The Chairman was referring to a US$400 million criminal fine that the US District Court for the District of Columbia imposed on BAE in March 2010, partly with respect to the sale of arms to Saudi Arabia.[58]

To the extent that these statements by the Chairman of the Working Group reflect the views of the Group as a whole, a point addressed further below, they illustrate the progress made by the Working Group in identifying possible enforcement mechanisms in the case of non-compliance by States Parties. In the process of doing so, the Working Group made it more difficult to characterize its working methods as entirely 'soft'. Although the information that may be gleaned from the Chairman's press statements is unfortunately not entirely illuminating, it appears that the Working Group conceived of three possible sanctions for non-compliance. A close examination of these sanctions mechanisms, however, reveals that they would be undertaken not by the OECD itself, but by other actors. Thus, it appears that the Working Group essentially attempted to give its country report recommendations a more binding character by associating itself with hard enforcement mechanisms that are actually external to the OECD.

First, in its October 2008 Phase 2bis Report, the Working Group indicated that continued non-compliance could result in 'increased due diligence over UK companies by their commercial partners or Multilateral Development Banks'. While the precise meaning of such due diligence is unclear, the Chairman could have been referring to the World Bank's ability to debar companies that have engaged in a corrupt practice in connection with a World Bank Project, such that they may no longer be awarded Bank-financed contracts for a period of time, or indefinitely.[59] In addition, the other

[53] David Leigh, 'British firms face bribery blacklist, warns corruption watchdog' (31 January 2011) *The Guardian*.

[54] Paul Hannon, '2nd Update: OECD: Delay in UK Bribery Law "Very Disappointing"' (1 February 2011) *The Wall Street Journal*.

[55] James Boxell and Elizabeth Rigby, 'Exports warning as bribery law is delayed' (31 January 2011) *Financial Times*.

[56] See (n 54).

[57] ibid.

[58] *United States v BAE Systems plc*, Plea Agreement, 1 March 2010.

[59] The World Bank, Sanctions Committee, *Report Concerning the Debarment Process of the World Bank* <http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/PROCUREMENT/0,,contentMDK:50002288~pagePK:84271~piPK:84287~theSitePK:84266,00.html>.

multilateral development banks (the African Development Bank Group, the Asian Development Bank, the European Bank for Reconstruction and Development, and the Inter-American Development Bank Group) agreed to enforce the debarment decisions of the World Bank (and vice versa), thereby amplifying the power of this sanction mechanism.[60]

Second, the Working Group pointed to the role that other jurisdictions can play in enforcing the Convention when foreign bribery falls within the scope of legislation in other States Parties, such as the FCPA. Although the Working Group cannot itself bring about such enforcement actions, its open encouragement of prosecutions in other jurisdictions is significant. By stressing the fact that other States Parties were losing patience with the delays in the United Kingdom, the Working Group suggested that enforcement actions in other jurisdictions were a distinct possibility.

Finally, the Working Group threatened to blacklist UK companies. The legal basis for this sanction is particularly unclear, as the OECD does not appear to have any capacity to blacklist countries or corporations. Moreover, the World Bank's debarment mechanism applies to corporations that have actually committed an act of corruption, not to those that are simply under-regulated. The Chairman seems to have been referring to the Financial Action Task Force ('FATF'), which has the competence to list 'high-risk and non-cooperative jurisdictions' with unsatisfactory anti-money laundering legislation (Russia, Israel and Nigeria were all listed in the past).[61] Yet, FATF's competence in this regard does not include 'blacklisting' corporations themselves. Moreover, FATF's mandate extends only to the laundering of the proceeds of crime and the financing of terrorism, not to bribery or corruption more generally.[62] Various newspapers (or less likely, the Chairman himself) appear to have conflated the FATF and the OECD, which constitute separate entities, even though they have overlapping member countries, somewhat overlapping mandates, and the FATF Secretariat is housed at the OECD in Paris.[63]

Although the Chairman's warnings about these possible sanctions may be characterized as empty threats, his mere discussion of them is significant because it represents a break from the OECD's persistent emphasis on enforcement via peer review rather than sanctions.[64] The threats are arguably empty because of their somewhat uncertain or poorly defined legal basis, and because the OECD does not actually have control over these sanctions mechanisms. The nature of and basis for heightened 'due diligence' and 'blacklisting' are particularly unclear, although, as indicated, they most likely refer to the World Bank's debarment procedures and FATF's list of high-risk and non-cooperative jurisdictions. The imprecision in the Chairman's remarks may simply indicate that some meaning was lost in the process of being reported by various newspapers. This, however, raises the question of why the

[60] Agreement for Mutual Enforcement of Debarment Decisions, 9 April 2010.

[61] FATF, *High-Risk and Non-Cooperative Jurisdictions*, <http://www.fatf-gafi.org/pages/0,3417,en_32250379_32236992_1_1_1_1_1,00.html>; FATF, *About the Non-Cooperative Countries and Territories (NCCT) Initiative* <http://www.fatf-gafi.org/document/51/0,3746,en_32250379_32236992_33916403_1_1_1_1,00.html>; FATF, *Non-Cooperative Countries and Territories: Timeline* <http://www.fatf-gafi.org/document/54/0,3746,en_32250379_32236992_33919542_1_1_1_1,00.html>.

[62] FATF, *General FAQ* <http://www.fatf-gafi.org/document/26/0,3746,en_32250379_32236836_34312026_1_1_1_1,00.html>.

[63] ibid.

[64] See generally, Pagani (n 7).

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Chairman made these threats via interviews with reporters rather than during a Working Group press conference or in a country report. The Chairman's press statements could perhaps represent off-the-cuff remarks or his own personal opinions rather than carefully considered options upon which the Working Group has deliberated. These threats may also be considered empty because the Working Group does not have control over these sanctions mechanisms, which would instead be triggered by procedures at the World Bank, FATF, and in the domestic legal systems of States Parties to the OECD Convention. The Chairman's statements, at least as reported, suggest that the Working Group is effectively relying upon the sanctions mechanisms of other institutions without acknowledging them as such.

Although these threats are not as powerful as the newspaper articles would suggest, they did correspond with their intended effect, in that the United Kingdom did finally publish guidance under the Bribery Act. It is, however, not possible to assess whether the relationship between the two is causal or simply correlative. Moreover, the real significance of these threats perhaps lies not in the effect, if any, that they had on the UK's actions—although the coming into force of the Bribery Act undoubtedly represents a positive development. Instead, the threats point towards the limitations of treaty monitoring that is premised upon peer review and that includes no recourse to sanctions. This represents a noteworthy moment for an organization that, in general, embraces soft forms of treaty monitoring.

III. GUIDANCE IN THE UNITED KINGDOM UNDER THE UK BRIBERY ACT 2010

Sections 6 and 7 of the Bribery Act address 'commercial bribery'. Section 6 makes it an offence to bribe a foreign public official in order to obtain or retain business or an advantage in the conduct of business. Thus, a commercial organization will be guilty of an offence under this section if a person associated with it bribes a foreign public official with the requisite intention of obtaining or retaining business for the commercial organization, or obtaining or retaining an advantage in the conduct of business for the commercial organization.[65] Section 7(2), however, makes it a defence for a commercial organization to prove that it had in place 'adequate procedures' that were designed to prevent persons associated with it from bribing foreign public officials.[66] Section 9 of the Bribery Act required the Secretary of State to issue guidance about procedures that commercial organizations can put into place to prevent persons associated with them from bribing.[67] After a series of controversial delays, which will be discussed below, Kenneth Clarke, the Secretary of State for Justice finally published this Guidance on 30 March 2011.[68] Commentators have heavily criticized the UK Guidance for narrowing the scope of the Bribery Act, such as by indicating that it will not apply to non-UK companies listed on the London Stock Exchange.[69] These criticisms, however, lie beyond the scope of this paper, which instead examines the relationship between guidance at the level of the OECD and in the domestic sphere of the United Kingdom.

[65] Section 7(1). [66] Section 7(2). [67] Section 9(1).
[68] UK Guidance, 20–31.
[69] Transparency International UK, *Government Guidance 'deplorable' and will weaken Bribery Act* (30 March 2011) <http://www.transparency.org.uk/all-news-releases/167-government-guidance-deplorable-and-will-weaken-bribery-act>.

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The Guidance explains that section 7 provides a full defence because the Act's objective 'is not to bring the full force of the criminal law to bear upon well run commercial organizations that experience an isolated incident of bribery on their behalf'.[70] Section 7 therefore encourages commercial organizations to put procedures in place to prevent bribery, while also recognizing that such bribery prevention regimes will not be 100 per cent effective.[71] The Guidance accordingly sets forth six principles that should inform the procedures that commercial organizations may put into place to prevent bribery by persons associated with them, and it is complemented by a number of case studies that examine how these principles would apply to hypothetical scenarios likely to be encountered by commercial organizations.[72]

The core of the UK Guidance consists of these six principles and accompanying commentary on the procedures and policies that their application should produce. Briefly, Principle 1 provides that a commercial organization's procedures should be proportionate to the risk of bribery and to the nature, scale and complexity of its activities.[73] The commentary to this principle includes a detailed list of the topics that bribery prevention procedures might cover (eg gifts and facilitation payments), depending on the risks at stake.[74] Principle 2 provides for the commitment of top-level management to preventing bribery and fostering a culture in which bribery is unacceptable, and the commentary specifically enumerates the elements that such top-level engagement should involve.[75] Principle 3 provides that risk assessments should involve periodic, informed and documented assessments of the nature and extent of a commercial organization's exposure to external and internal risks of bribery.[76] The commentary further lists specific risk-assessment procedures as well as commonly encountered risks.[77] Principle 4 provides for a proportionate, risk-based approach to applying due diligence procedures to persons, such as intermediaries, who perform services for or on behalf of the organization.[78] Principle 5 provides for communication, including training, to ensure that bribery prevention policies and procedures are understood throughout the organization.[79] Finally, Principle 6 provides for the monitoring and review of procedures to prevent bribery.[80]

The UK Guidance not only appears to draw inspiration from, but also elaborates significantly upon the OECD Guidance, which seems to have acted as a sort of template for the development of norms on the prevention of bribery in both the United Kingdom and the United States. The OECD Guidance, which was adopted by the OECD Council in February 2010, represents the Working Group's non-binding recommendations to companies on how to prevent and detect bribery. Although the UK Guidance does not lift entire passages from the OECD Guidance, in contrast with the deferred and non-prosecution agreements in the United States discussed further below, the content of the principles is very much in keeping with this soft OECD instrument. While the six principles in the UK Guidance do not neatly correspond with the twelve good practices set forth by the OECD Guidance, they do capture most of what the OECD Guidance recommends. The six principles, for example, reflect the OECD Guidance's general call for the development of risk-based compliance programmes that address companies' individual circumstances, such as their country and industrial sector of operation. Principle 3 of the UK Guidance usefully expands upon what risk assessments might

[70] UK Guidance, para 11. [71] ibid. [72] ibid 32–43. [73] ibid 21–2.
[74] ibid para 1.7. [75] ibid para 2.4. [76] ibid 25–6. [77] ibid paras 3.3, 3.5.
[78] ibid 27–8. [79] ibid 29–30. [80] ibid 31.

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entail by identifying five broad categories of external risks, including country of operation and industry sector, as well as high-risk transactions, business opportunities, and partnerships.[81]

In general, the level of detail in the commentary that accompanies the six principles goes well beyond that provided by the OECD Guidance. By fleshing out the meaning of the OECD Guidance, the six principles have given these relatively abstract concepts greater meaning. This level of detail gives the UK Guidance a 'hard law' quality—these principles resemble binding administrative regulations even though they are not supposed to be prescriptive, standard setting, or to impose direct obligations on businesses.[82] In addition, although section 7 of the Bribery Act does not compel compliance with the UK Guidance, the existence of a defence of 'adequate procedures' creates a very strong incentive for doing so, thereby blurring the line between soft and hard law at the domestic level.

It may also be argued that the Bribery Act's mere inclusion of section 9, which requires the publication of guidance, constitutes a further example of the hardening of international soft law in the domestic sphere. The publication of the UK Guidance under section 9 brings the United Kingdom into compliance with another soft law OECD instrument: the Good Practice Guidance on Implementing Specific Articles of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions ('OECD Guidance on Implementation').[83] This OECD Guidance on Implementation indicates that States Parties should provide 'specific written guidance' to the public on their laws implementing the OECD Convention.[84] In its December 2010 Phase 1ter Report on the United Kingdom, the Working Group found that the 'new corporate offence of failure to prevent bribery', as set forth in section 7, follows the approach recommended in this Guidance on Implementation.[85] The Working Group did not elaborate upon how exactly section 7 follows the recommended approach, but presumably it complies because section 9 of the Act requires the issuance of written guidance on how companies can fall under section 7's adequate procedures defence by implementing compliance programmes to prevent the bribery of foreign public officials. Sections 7 and 9 of the Act and the Guidance that followed therefore represent another example of the progression of soft law at the OECD level to hard law in the UK domestic sphere.

In light of recent developments in the United States, the integration of the OECD Good Practice Guidance into domestic legal systems could represent an emerging trend. The OECD Guidance is playing a similar role in the United States, where little judicial, legislative or administrative guidance exists on how companies should comply with the 1977 Foreign Corrupt Practices Act ('FCPA').[86] In November 2010, the Department of

[81] ibid para 3.5.

[82] Ministry of Justice, Consultation on guidance about commercial organisations preventing bribery (section 9 of the Bribery Act 2010), Consultation Paper CP11/10, para 4.

[83] Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions, Annex I.

[84] Ibid.

[85] 'United Kingdom: Phase 1ter: Report on the Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 2009 Revised Recommendation on Combating Bribery in International Business Transactions' (16 December 2010) para 80.

[86] Amy Westbrook, *Enthusiastic Enforcement, Informal Legislation: The Unruly Expansion of the Foreign Corrupt Practices Act* (2011) 45 Georgia L Rev 489.

Justice began incorporating language, nearly verbatim, from the OECD Guidance into the deferred and non-prosecution agreements that it reaches with companies that are alleged to have violated the FCPA.[87] According to these agreements, the Department of Justice will dismiss or will not bring charges against a company after a period of time so long as the company fulfils a number of conditions, including the reform of its compliance programme. The language included in these agreements constitutes the only existing governmental guidance for companies in the United States on how to institute a compliance programme that would prevent the bribery of foreign public officials. The stipulations set forth in these agreements are not technically binding, although the incentives for companies to develop compliance programmes are very high, as the failure to do so may result in the reinstitution of criminal proceedings or the filing of charges. Thus, as with the UK Guidance, these agreements in the United States blur the boundary between soft and hard law in a manner that strengthens the normative value of non-binding OECD guidance.

IV. CONCLUSION

For the most part, the OECD appears to make effective use of soft law and soft enforcement. Despite its non-binding status, the OECD Good Practice Guidance has influenced developments in the domestic sphere in the United Kingdom as well as the United States, where it seems to have served as a useful template for the development of regulatory-like guidance. In addition, the OECD Working Group has developed a relatively sophisticated peer review monitoring mechanism through which it has, in general, successfully shepherded States Parties towards compliance with the Convention. The history of the implementation of the OECD Anti-Bribery Convention in the United Kingdom, however, demonstrates that the Working Group lacks the capacity to cope effectively with more extreme situations involving failure to comply with the Convention. The Working Group's threatening response towards the United Kingdom's failure to implement the Convention in a timely manner also highlights the international community's fractured approach towards bribery and other forms of corruption. The OECD, the World Bank, and FATF, among other institutions, all have distinct but overlapping roles to play in international anti-corruption efforts. By

[87] Non-Prosecution Agreement between the United States Department of Justice and Nobel Corporation, 4 November 2010, Attachment B; *US v Panalpina World Transport (Holding) Ltd.*, 10-CR-769, Deferred Prosecution Agreement, U.S. District Court for the Southern District of Texas, Houston Division, 4 November 2010, Attachment C; *US v Pride International, Inc.*, 10-CR-766, Deferred Prosecution Agreement, U.S. District Court for the Southern District of Texas, Houston Division, 4 November 2010, Attachment C; *US v Shell Nigeria Exploration and Production Company Ltd.*, 10-CR-767, Deferred Prosecution Agreement, U.S. District Court for the Southern District of Texas, Houston Division, 4 November 2010, Attachment C; *US v Tidewater Marine International Inc.*, 10-CR-770, Deferred Prosecution Agreement, U.S. District Court for the Southern District of Texas, Houston Division, 4 November 2010, Attachment C; *US v. Transocean*, 10-CR-768, Deferred Prosecution Agreement, U.S. District Court for the Southern District of Texas, Houston Division, 4 November 2010, Attachment C; Non-prosecution agreement between the United States Department of Justice, Criminal Division, Fraud Section, the U.S. Attorney's Office for the Northern District of California, and RAE Systems Inc., 10 December 2010, Attachment B; *US v. Maxwell Technologies, Inc.*, 11-CR-329, Deferred Prosecution Agreement, United States District Court for the Southern District of California, 31 January 2011, Attachment C.

seemingly invoking the sanctions mechanisms of the World Bank and FATF, the OECD Working Group hinted at the potential for these mechanisms to work in tandem, as if under the same umbrella. At least for the time being, this potential will remain unexplored now that the Bribery Act has finally come into effect—hopefully marking the beginning of more robust anti-bribery investigations and prosecutions in the United Kingdom.

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