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The U.K. Bribery Act: Business Integrity and Whistleblowers

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This article's main focus is the extent to which the U.K. Bribery Act 2010 and the Guidance Document prepared by the Secretary of State, addressing the procedures that commercial organizations can put into place to prevent bribery, include whistleblower protection. The article also examines provisions for whistleblower protection in the four anti-corruption conventions that the U.K. has ratified in order to provide the context for a discussion of whistleblower protection in the Bribery Act and in the Guidance Document.

There are plenty of reports of corruption in the business sector in newspapers all over the world. Not all of them relate to emerging economies such as India[1] and Russia.[2] They include developed nations as well. For instance, a recent Canadian report exposed the level of corruption in the construction sector.[3] This is not unique to this business sector. The defense sector is notorious for its share of corrupt dealings.[4] One need only mention corruption in this sector and immediately people are reminded of the alleged bribes paid by BAE to Saudi public officials and the sudden dropping by the U.K. Serious Fraud Office ("SFO") of the investigation on grounds of national security. The reason for this about

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turn was that Saudi Arabia threatened to withhold vital intelligence reports on possible terrorist activity which were of primary importance to U.K. national security.[5] Since then BAE has been the subject of investigations for alleged corruption in Tanzania, for instance, which resulted in an agreement with the SFO that BAE would plead guilty to the offense of failing to keep accounting records.[6]

Equally, a relatively recent newcomer, the technology sector is also touched by the "cancer of corruption."[7] In September 2011, a technology services company Accenture agreed to "pay US $63.7 million to the US Department of Justice to resolve whistleblower allegations that it participated in a large-scale kickbacks scheme involving U.S. government contracts."[8] It would not be an exaggeration to state that even a quick trawl through newspapers and journals in the English language reveals there are at least one or two reports of corruption on a daily basis with businesses as suppliers of bribes to the public sector. This does not include donations for political campaigns since such payments are not regarded as corrupt payment in the laws of many jurisdictions. The high prevalence of business corruption-related material in newspapers endorses the findings of a World Bank ("WB") survey measuring bribery from the private sector to the public sector worldwide conducted in 2000. This survey estimates it at US $1 trillion per annum.[9] According to Daniel Kaufmann "the main point is that [bribery] is not a relatively small phenomenon of a few billion dollars — far from it." [10]

The international community has responded to the role of the business sector in corrupt activities by adopting conventions such as the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, 1997 ("OECD Anti-Bribery Convention"), the Council of Europe Civil Law Convention on Corruption 1999 ("COE Civil Convention"), the Council of Europe Criminal Law Convention 1999 ("COE Criminal Convention"), and the United Nations Convention against Corruption, 2003 ("UNCAC").[11] The scope of these conventions inevitably vary[12] but all of them require the contracting states to criminalize bribery from the supply side, although the OECD Anti-Bribery Convention is restricted solely to bribery of foreign public officials in the context of international business transactions. The success of any convention

lies in its being ratified, implemented and enforced. The issue of enforcement is a major problem — the reason being the secretive nature of corrupt activities. It is extremely unlikely that a business giving (supplying) a bribe and a person receiving a bribe are going to engage in this in the open for all to see or make mistakes in their account books for an auditor, be it internal or external, to spot immediately. In many cases of bribery by businesses, intermediaries such as employees and commission agents are likely to be used for the purposes of communicating the willingness to supply and receive a bribe. In these circumstances, the relevant state authorities require information that can initiate investigation and result in subsequent prosecution. There are a variety of sophisticated investigative techniques available ranging from the overt to the covert, from scrutiny of bank accounts to surveillance.[13] But these types of proactive activities may at times be challenged on grounds of breach of human rights, right to privacy and right against self-incrimination. It is often the case that police authorities in many jurisdictions cultivate informers but there is always the possibility that such information obtained, for a consideration, may be unreliable. Similarly, information from outsiders such as business competitors may be suspect on grounds of the competitor's motivation for starting an investigation. This is where whistleblowers play a unique role. They are able to provide information of better quality since they are exposing malpractices from within their institutions.

The focus of this article is to examine whether and to what extent the recently enacted Bribery Act 2010 and the Guidance Document tackle the issue of procedures within an organization and the protection of whistleblowers. Prior to examining the legislative developments in respect of bribery, however, it must be noted that there is still some uncertainty surrounding the definition of "whistleblowing." Thus, the issue of definition is considered briefly hereinafter.[14] After the definition of "whistleblowing" is explored, this article will examine the approaches to whistleblower protection in the OECD Anti-Bribery Convention, the UNCAC and the COE Conventions. The final section of this article examines the recent developments in respect of combating bribery and improving business integrity in the U.K.

DEFINING "WHISTLEBLOWING"

There is no commonly accepted definition of whistleblowing and an examination of the ample literature suggests that it is seen by some as an aspect of free speech in the public interest without any reference being made to the employee-employer relationship. Others see it as taking place within an employment context where the employee owes a duty of confidentiality to the employer and brings the matter to the attention of authorities in breach of that duty in the public interest. It is not intended here to analyze all the definitions in the existing literature on this subject matter. Instead, the definitions provided by Peter Jubb and Miceli and Near are chosen from the academic literature to indicate the divergence in approaches to defining whistleblowing. According to Jubb, whistleblowing is

> a deliberate non-obligatory act of disclosure which gets onto [*sic*] public by a person who has or had privileged access to data or information of an organization about non-trivial illegality or wrongdoing whether actual, suspected or anticipated which implicates and is under the control of that organization, to an external entity having power to rectify the wrong doing.[15]

For Miceli and Near, it is "the disclosure by organization members (former or current) of illegal, immoral, or illegitimate practices under the control of their employers, to persons or organizations that may be able to effect action."[16] It is immediately apparent that in comparison to the Miceli and Near definition the Jubb definition is wider in scope and includes people who do not fall within the class of employees but may include those who have had some connection with the organization, however tenuous. As Jubb states:

> categorizing whistleblowers as employees precludes those who give service under arrangements other than employment contracts. Volunteers, unpaid trainees, sub-contractors and consultants may also qualify as might persons engaged by service contracts, those holding executive position and fee earning directors.[17]

In contrast to Jubb, Miceli and Near also focus on the immorality of employer practices which suggests they may be alluding to an ethical motive on the part of the whistleblower within their definition.

The divergence between definitions is not peculiar to academic literature and is also to be found in definitions offered by civil society organizations. The definition of whistleblowing as "the disclosure of information about a perceived wrongdoing in an organisation, or the risk thereof, to individuals or entities believed to be able to effect action"[18] offered by Transparency International ("TI") is much wider than that offered by Guy Dehn, former Director of the British NGO Public Concern at Work and author of a key report for the European Commission. For him whistleblowing is:

> [a]lerting the authorities to information which reasonably suggests there is serious malpractice, where that information is not otherwise known or readily apparent and where the person who discloses the information owes a duty (such as an employee's) to keep the information secret, provided that wherever practicable he or she has raised the matter within the organisation first.[19]

The TI definition's focus is on exposing the wrongdoing and does not restrict the information to being revealed in the context of an employer-employee relationship, whereas Dehn's definition highlights the breach of the duty of confidentiality by an employee (presumably in the public interest) but who has also taken steps to voice concerns initially within the organization where possible. Regardless of the differences it can be said with some certainty that, at a minimum, whistleblowing is understood to be an exposure of malpractices within an organization by its employees. Since employees are perceived as owing first and foremost loyalty to their institution, in speaking out about malpractices, whistleblowers may face reprisals not only from their employers but fellow employees.[20]

WHISTLEBLOWER PROTECTION IN THE UNCAC, COE CRIMINAL LAW AND CIVIL LAW CONVENTIONS AND THE OECD ANTI-BRIBERY CONVENTION

This section considers the provisions for whistleblower protection in the four above mentioned conventions, to which the U.K. is a contracting party.[21]

UNCAC

The UNCAC has had a noticeable impact on the international scene and has been ratified, according to information currently available, by 154 states.[22] The Convention aims to combat corruption not only through the criminalization of certain types of behavior ranging from bribery of national officials, foreign public officials, officials of public international organizations, bribery in the private sector, embezzlement and trading in influence to illicit enrichment and the laundering and concealing the proceeds of corruption but also through prevention mechanisms. Greater transparency is seen as the tool to prevent corruption and as part of this drive institutions are expected to establish codes of conduct. While voluntary adoption of codes of conduct are seen as an important part of combating corruption, the expectation that institutions follow their codes is strengthened by giving protection to whistleblowers. The UNCAC in its Article 33 provides that:

> Each State Party shall consider incorporating into its domestic legal system appropriate measures to provide protection against any unjustified treatment for any person who reports in good faith and on reasonable grounds to the competent authorities any facts concerning offences established in accordance with this Convention.

There are a number of striking features in this provision. First, the provision requires contracting states to consider adopting legislation that will provide protection to those who report. The language of this provision is not mandatory so there is no obligation to put legislation protecting such

informants in place. This is in contrast to some of the other provisions which are of a mandatory character. For instance, Article 16 on the bribery of foreign public officials and officials of public international organizations states:

> Each State Party shall adopt such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally, the promise, offering or giving to a foreign public official or an official of a public international organization, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties, in order to obtain or retain business or other undue advantage in relation to the conduct of international business,

obligates state parties to put regulation in place. This means that many states are unlikely to adopt laws that protect whistleblowers and it is no surprise that not many of the states that have ratified the Convention have such legislation in place. This is the case even amongst developed countries. For instance, according to a study by the Council of Europe many of their member states are yet to have whistleblower legislation in place.[23] Of the developing and emerging economies South Africa and Ghana have legislation on whistleblower protection. India is in the process of considering a bill and it ratified the UNCAC recently after much pressure from the civil society.

The other feature that stands out in this provision is the absence of the word "whistleblower." It only refers to "persons reporting in good faith" and this class can be fairly extensive. It does not only refer to a whistleblower reporting from within an organization about the malpractices within the institution in which the whistleblower is located but also to those informants who are external to an institution. The omission of the word "whistleblower" is indeed odd given that there is reference to it in the Travaux Préparatoires to UNCAC. Article 43 of the Negotiation Texts is titled "Protection of whistle-blowers, witnesses and victims." Also, according to the Travaux Préparatoires, during the first reading of the draft

text, at the second session of the Ad Hoc Committee, there was a proposal from India to include a definition of whistleblowers and "to include in that category those individuals who provide information that leads to the prevention of an act of corruption and to provide effective protection for those persons from potential retaliation or intimidation."[24] However during the course of the negotiations the term "whistle-blower" was dropped and the following text (Article 43 *bis*) was arrived at:

> Each State Party shall consider incorporating into its domestic legal system appropriate measures to provide protection against any unjustified treatment for any person who reports in good faith and with reasonable grounds to the competent authorities any incident concerning offences covered by this Convention.

This was the text finally adopted by UNCAC in Article 33[25] and is sufficiently broad to include whistleblowers who are employees within an institution as well as those listed by Jubb. It must also be noted that the suggestion by India for a definition was not taken any further.

The protection of whistleblowers also appears in the Negotiation Texts of Article 13 relating to civil society and there was also a proposal for rewarding whistleblowers by the Republic of Korea as follows:

> If 'whistle-blowing' has resulted in the direct recovery or increase of revenues belonging to public agencies or in savings on their part, the 'whistle-blower' may request the competent authorities to pay him or her a reward and the requested authorities shall pay him or her an appropriate reward.

There is no reference to whistleblowers in the adopted Article 13 and the suggestion from Korea was not progressed. It must, however, be noted that the Korean suggestion for paying a reward to the whistleblower is not uncommon. For instance, the U.S. in 1863 enacted the False Claims Act ("FCA"),[26] the aim of which was to encourage informers to come forward with information about fraud against the government in return for a share of the damages recovered. The FCA empowers citizens to bring suit on be-

half of the government for fraud against the government. This Act has been extremely successful and it was heralded in 2005 by the Assistant Attorney General of the U.S. Department of Justice as giving "ordinary citizens the courage and protection to blow the whistle on government fraud."[27]

It is not very clear as to why the term "whistle-blower" was dropped when there seemed to be some support for the use of the term. A possible reason is the failure to find a definition of "whistle-blower" that would be commonly accepted or a reluctance by some states to accept the term owing to different culture-driven understandings of it. A recent report from the Council of Europe entitled "The Protection of 'Whistle-Blowers,'" which examined the laws of 26 European nations, is revealing when it states:

> The problem in appropriately defining the term whistle-blower leads to a wider problem in most countries under analysis to the extent that, when asked about their national legislation in the field of protection of whistle-blowers, many countries refer to their witness protection laws (Bulgaria, Estonia, Italy, Poland, Turkey, etc.), which cover some aspects of the protection of whistle-blowers, but which may not take the place of a broader law covering the protection of all different aspects of whistle-blowing. Witness protection laws can and indeed should extend to whistle-blowers, if and when they appear before a court to testify as witnesses. But the notion of whistle-blower should not be confused with or limited to that of a witness. A whistle-blower will not necessarily wish to, or need to appear in a court of law, considering that whistle-blowing measures are designed to deter malpractice in the first place or to remedy it at an early stage.
>
> What also transpires from these 26 replies is that the question of whistle-blowing is closely intertwined with the countries' legal cultures in general. Political and administrative norms in most European countries do not value whistle-blowing. In Poland or in France, for example, whistle-blowing can be quite easily considered as a denunciation, which is strongly condemned in both cultures. In some countries, the cultural argument is put forward as a justification for not enacting specific legislation to protect whistle-blowers, it often being considered

> that the few provisions scattered among various other pieces of legislation are enough to ensure any protection needed.[28]

In this context it is also easy to understand why Article 32 of UNCAC contains a separate provision on the protection of witnesses, experts and victims. This indicates that Article 33 is referring to a type of informant who is not a witness, expert or a victim and that this type of informant also needs to be specifically protected.

Another feature that stands out in Article 33 is the requirement that the informant reports in good faith and with reasonable grounds. Why include the phrase "good faith?" It is generally understood that the whistleblower, despite being perceived by the institution and fellow employees as a deviant actor, is not acting out of self-interest but for the greater good or in the public interest. It is possible that the whistleblower may have acted in a self-interested manner, for instance, to exact revenge and so the emphasis on good faith is to discourage reports of a vexatious nature.[29] The emphasis on "reasonable grounds" is to ensure that the report has some rational backing and not merely done on the basis of pure conjecture.

The UN recently published its review document on the implementation of UNCAC and in respect of Article 33 found that "there was considerable variation among the States parties with regard to [its] implementation" and that "[s]everal States parties had not established comprehensive measures to implement the article, though legislation was pending in some cases."[30] So it seems the situation is not that different from that reported by the Council of Europe. Also a number of states seemed to think that they need not have specific legislation to protect whistleblowers though they had legislation protecting witnesses.[31]

COE Conventions

Article 9 of the COE Civil Law Convention addresses the protection of employees and states that:

> [e]ach Party shall provide in its internal law for appropriate protection against any unjustified sanction for employees who have reasonable

> grounds to suspect corruption and who report in good faith their suspicion to responsible persons or authorities.

Like the UNCAC, the COE Civil Law Convention also refrains from using the term "whistleblower." However, unlike Article 33 of UNCAC Article 9 refers solely to employees and leaves those who do not fall within this class outside its ambit. By restricting Article 9 to employees the approach taken by this Convention towards protecting whistleblowers reflects the more restrictive approach taken towards defining whistleblower in the academic literature. There is also a provision in Article 22 of the COE Criminal Convention protecting informants entitled "Protection of collaborators of justice and witnesses," which states:

> Each Party shall adopt such measures as may be necessary to provide effective and appropriate protection for:
>
> a. those who report the criminal offences established in accordance with Articles 2 to 14 or otherwise co-operate with the investigating or prosecuting authorities;
>
> b. witnesses who give testimony concerning these offences.

Even though this Article is not directed at employees of an institution who report wrongdoing internally it is possible that Article 22 will affect employees who act as informants and/or act as witnesses.

In a sense the distinction drawn between informants who are likely to be regarded as whistleblowers in common parlance and those who are not, in both the UNCAC and the COE Conventions, are reflective of (1) the indeterminacy indicated in arriving at a uniform definition of whistleblower in both academic and non-academic literature, and (2) the negative connotations associated with the term "whistleblower" in many cultures.

OECD Anti-Bribery Convention

The OECD Anti-Bribery Convention is not comprehensive in its scope and does not contain any provision recommending that member states enact legislation protecting whistleblowers. Despite the lack of whistle-

blower protection in the Convention, in its Phase 2 Reports the OECD Working Group on Bribery[32] addresses the protection of whistleblowers in its recommendations.[33]

The theme on protection of whistleblowers also appears in other OECD documents. For instance, Recommendation V of a recent publication on business integrity and anti-bribery legislation in African countries, entitled "Strengthening Business Integrity and Accountability," states:

> Another important cornerstone in the fight against bribery of public officials in business transactions is through legislation aimed at increasing business integrity, transparency and accountability. Businesses can also set guidelines for improving their integrity and put in place mechanisms within their organisations for reporting bribery and training staff on detecting bribery, following good accounting practices and undertaking best practices when engaging in public procurement bids. A number of countries have adopted business codes of conduct but these best practices still need to be widely publicised and adopted across the twenty countries. Countries are therefore recommended to strengthen these initiatives by addressing the following:
>
> 1. Adoption of whistleblower legislation that protects employees who report suspicions of bribery or other unlawful activities in good faith and on reasonable grounds to competent authorities from discriminatory or disciplinary actions ….[34]

The question now is, given the ratification of these four conventions by the U.K., what has it done in the recently enacted Bribery Act to embed or promote whistleblower protection? After all, the OECD Working Group in its Phase II Report did recommend that "the United Kingdom pursue its efforts to make the measures of encouraging and protecting whistleblowers better known to the general public." They also encourage "business organisations to promote internal mechanisms in this respect."[35]

BUSINESS INTEGRITY IN THE U.K. BRIBERY ACT 2010

The U.K. Bribery Act 2010 came about as a result of intense criticisms from the international community when the Serious Fraud Office ("SFO")

dropped its investigation of corruption allegations in the BAE arms deal with Saudi Arabia on grounds of national security. At the time the SFO took this decision the U.K. was already facing intense criticism from the OECD Working Group examining the implementation of the OECD Anti-bribery Convention by the U.K. The Working Group highlighted a number of shortcomings in the anti-corruption legislation existing at the time and these included the unsatisfactory nature of the law relating to criminal liability of legal persons. They recommended that the U.K. revisit the narrow application of the "directing mind" test used for finding companies liable. The "directing mind" principle was formulated in *Lennard's Carrying Co Ltd v Asiatic Petroleum Co*[36] in holding that the fault of the director involved in the operation of the company was the fault of the company. According to Viscount Haldane:

> A corporation ... has no mind of its own any more than it has body of its own; its active and directing will must consequently be sought in the person of somebody who for some purposes may be called an agent, but who is really the directing mind and will of the corporation, the very ego and centre of the personality of the corporation.[37]

However, the identification of the acts and states of mind of officers within a company with that of the company is applied narrowly to officers higher up the command chain. For instance, in *Tesco Supermarkets Ltd v Natrass*[38] it was held by the House of Lords (as it was then called) that a manager of one of the Tesco supermarkets where goods were sold at a price higher than that advertised at that branch was not a directing mind. Other jurisdictions, such as Canada, that have adopted this approach to finding corporate fault seem more ready to find the directing mind further down the command chain.[39] The U.K. approach in looking for the directing mind at higher levels of management is a centralized one and is unsuited to the current operational procedures of companies which are diffused geographically and functionally.[40] Since the current approach is dependent on the identification of that one individual within a company, it does not allow for the aggregation of the mental states of more than one person within the organization.

However, the question of examining and revising the "directing mind"

approach to the criminal liability of legal persons was left for another day by the Law Commission. Instead, Section 7(1) of the Bribery Act 2010 establishes the following offense:

> A relevant commercial organisation ('C') is guilty of an offence under this section if a person ('A') associated with C bribes another person intending
>
> (a) to obtain or retain business for C, or
>
> (b) to obtain or retain and advantage in the business for C.

However, under s. 7(2) it is possible for a relevant commercial organization,[41] in its defense, to show that it had adequate procedures in place to prevent persons associated with it from undertaking such conduct.

It is evident from making a commercial organization liable for the acts of bribery by persons associated with it that the Act is focusing on raising business integrity and expecting the organization, by allowing a defense, to seriously adopt procedures to address the risks of corruption. As part of this, one would expect that some mention would be made of whistleblowers since they are acknowledged as an important tool in raising integrity and accountability of an organization.

The Act itself does not mention whistleblower protection and neither does it provide any details of the procedures to be followed by companies. The issue of procedures to be put in place by a company was left to the Secretary of State, who produced a Guidance Document[42] under s. 9(1) of the Act. The silence in respect of whistleblower protection in the Act could perhaps be explained due to the already well-established whistleblower protection law in the U.K. It is one of the few countries with whistleblower protection legislation and the Public Interest Disclosure Act 1998 ("PIDA") seems to be working well according to the statistics published by Public Concern at Work.[43]

It would be reasonable to expect that the Guidance Document, in addressing procedures for preventing bribery, would provide an enabling environment for employees to voice their concerns to senior management and protect such employees from reprisals from their institution and other employees. The Guidance Document sets out the following six principles:

- Principle 1 entitled "Proportionate Procedures" sets out that "[a] commercial organisation's procedures to prevent bribery by persons associated with it are proportionate to the risks it faces and to the nature, scale and complexity of the commercial organisation's activities. They are also clear, practical, accessible, effectively implemented and enforced;"
- Principle 2 entitled "Top-Level Commitment" sets out that "[t]op level management in a commercial organisation (be it board of directors, the owners or any other equivalent body or person) are committed to preventing bribery by person associated with it. They foster a culture within the organisation in which bribery is never acceptable;"
- Principle 3 entitled "Risk Assessment" sets out that "[t]he commercial organisaton assesses the nature and extent of its exposure to potential external and internal risks of bribery on its behalf by persons associated with it. The assessment is periodic, informed and documented;"
- Principle 4 entitled "Due Diligence" sets out that "[t]he commercial organisation applies due diligence procedures, taking a proportionate and risk based approach, in respect of persons who perform or will perform services on behalf of the organisation, in order to mitigate identified bribery risks;"
- Principle 5 entitled "Communication (including Training)" sets out that "[t]hat the commercial organisation seeks to ensure that bribery prevention policies and procedures are embedded and understood throughout the organisation through external and internal communication, including training, that is proportionate to the risks it faces;" and
- Principle 6 entitled "Monitoring and Review" sets out "[t]hat the commercial organisation monitors and reviews procedures designed to prevent bribery by persons associated with it and make improvements where necessary."

Each principle is supplemented by a commentary and the issue of whistleblowing is taken up under Principles 2 and 5. Under Principle 2, in communicating commitment to "zero tolerance" to bribery internally and

externally, it is expected that the organization will put in place procedures and protection for confidential reporting of bribery or whistleblowing. Under this Principle it is also expected that there will be procedures for "speaking-up" or "whistleblowing." Under Principle 5, reference is again made to the usefulness of speak-up procedures as an important management tool for improving the detection and prevention of bribery and that if such procedures were to be used adequate protection must be given to this who report concerns.

Even though whistleblowing and whistleblower protection is not included as a separate principle for increasing business integrity and accountability, it is gratifying to see the acknowledgment of whistleblowing as an important tool within the commentaries to two of the six Principles. Further detail about how whistleblowers are to be protected or the procedures that a whistleblower has to follow to raise concerns is not provided in the Guidance Document. This is understandable to some extent since the Guidance Document covers all commercial organizations and must therefore be flexible and of general application. The expectation is that the application of the Principles will vary across organizations depending on factors such as size, nature of their business, and geographic presence. The expectation of the Guidance Document is outcome-oriented in that "the outcome should always be robust and effective anti-bribery procedures." Since the emphasis is on effective anti-bribery measures then whistleblowing procedures and whistleblower protection should form important aspects of anti-bribery arrangements in virtually all relevant commercial organizations.

The next question is whether in the absence of details on the whistleblowing procedures an organization must have, are there any standardized rules that could be used by an organization? In the international commercial context the ICC Guidelines on Whistleblowing may provide a framework.[44] However, as with all frameworks, it is general in nature but provides adequate directions for an organization to work out the details to suit its needs. Another document that may provide practical assistance is the *Whistleblowing Arrangement Code of Practice*[45] which is very detailed in its advice and recommendations.

CONCLUSION

This article began with the premise that business corruption is a global problem that undermines global development and promotes poverty and that whistleblowers play an important role in exposing corrupt activities taking place in their organizations. Given that the anti-corruption conventions ratified by the U.K. have all promoted the protection of whistleblowers, either in the body of the text or in the recommendations post implementation review, it would be reasonable to expect that the recently enacted U.K. Bribery Act would address this issue vigorously by weaving it into the fabric of the statute. There is no doubt that the Bribery Act by including the new s.7 offense will force businesses to address integrity and accountability. While the Act does not integrate whistleblowing mechanisms, the Guidance Document does promote whistleblowing procedures and protection for those who speak out. Unfortunately, these suggestions are hidden in the commentaries. This is disappointing because whistleblower protection could have been promoted more energetically by making reference to the availability of PIDA both in the statute and in the Guidance Document. After all, did not the OECD recommend that the "United Kingdom pursue its efforts to make the measures of encouraging and protecting whistleblowers better known to the general public"?[46] It is too early to see what whistleblowing procedures are being put in place by relevant commercial organizations, but it will be worth visiting this issue when the Guidance Document has been in effect for a few years. It is hoped that businesses will become more transparent and make their anti-corruption arrangements publicly available so that researchers can assess the effectiveness of s.7 of the Bribery Act and the Guidance Document in promoting integrity and preventing bribery.

NOTES

[1] PHENAL, Je "India Journal: Companies Need to Ride the Anticorruption Wave" *The Wall Street Journal,* September 13, 2011, *available at* http://blogs.wsj.com/indiarealtime/2011/09/13/india-journal-companies-need-to-ride-the-anticorruption-wave (accessed September 24, 2011).

[2] SWALLOW, Deborah "Russia: bribery: corruption & the High Price of Bad

Business" *available at* http://www.deborahswallow.com/2010/05/24/russia-bribery-corruption-the-high-price-of-bad-business/ (accessed September 24, 2011).

[3] "Leaked Report on Quebec Construction Industry Corruption Shows Sickness in the System" *available at* http://canadians4accountability.org/blog/2011/09/16/leaked-report-on-quebec-construction-industry-corruption-shows-sickness-in-the-system/ (Accessed October 10, 2011).

[4] *See* SHALI-ESA, Andrea "FBI Eyes Corruption in Aerospace" Reuters, 9 September 2011 *available at* http://www.reuters.com/article/2011/09/09/us-aero-arms-summit-bribery-idUSTRE78876G20110909 (accessed September 30, 2011).

[5] *See* CARR, Indira and OUTHWAITE, Opi (2008) "The OECD Anti-Bribery Convention Ten Years On" 5(1) *Manchester Journal of International Economic Law* 3 — 35.

[6] *See* s. 221 Companies Act 1985. *See also R v BAE System PLC* [2010] EW Misc 16(CC). There is an increasing tendency on the part of the SFO to using plea bargaining in corruption cases. For more on this see CARR, Indira, "Use of Plea Bargaining in Corruption Cases — A Desirable Development?" (forthcoming). *See also* LOTZ, A (2011) "BAE Systems & Tanzania: Investigating 1999s Suspect Radar Deal" *Consultancy Africa Intelligence,* January 17, 2011, *available at* http://www.consultancyafrica.com/index.php?option=com_content&view=article&id=642:bae-systems-and-tanzania-investigating-1999s-suspect-radar-deal&catid=60:conflict-terrorism-discussion-papers&Itemid=265 (Accessed February 1, 2011).

[7] This phrase was coined by the then President of the WB James D. Wolfensohn. While the World Bank had been aware of corruption in WB funded projects they had not addressed the issue since it was seen as a political matter. But under Wolfensohn there was a change in the approach to corruption. According to Wolfensohn, "[T]he 'C' word [being corruption] was not [to be defined] as a political issue but as something social and economic." JD Wolfensohn, "Remarks at a Global Forum on Fighting Corruption" February 24, 1999 *available at* http://www.worldbank.org (Accessed March 1, 2010). On corruption in WB funded projects see for instance "Dams On Trial The World Bank and the 'Cancer Of Corruption,'" *available at* http://www.odiousdebts.org/odiousdebts/publications/DamsOnTrial.pdf (accessed March 1, 2010), which describes the bribing of officials by major companies

in the Lesotho Highland Dam project. In the WORLD BANK (2005) *World Bank Annual Report on Investigation and Sanctions of Staff Misconduct and Fraud and Corruption in Bank Financed Projects Fiscal Year* 2004 (Washington DC, The World Bank) the then President of WB succinctly observed that:

> it is not just the financial damage from fraud and corruption that should be of concern…It is the fact that corruption sets in motion a chain of events that wreak havoc on a development project. The money to pay a bribe must come from some part of the project; as a result, prices may be raised, and/or quality and performance lowered. Less qualified bidders win by bid rigging while qualified bidders become discouraged and stop bidding. In addition, citizen awareness of unchallenged corruption undermines trust in government and public institutions …. At p, v.

[8] GROSS, Gross (2011) "Accenture Pays $63.7 Million to Resolve Gov't Kickbacks Case" *PC World Business Center*, September 12, 2011, *available at* http://www.pcworld.com/businesscenter/article/239866/accenture_pays_637_million_to_resolve_govt_kickbacks_case.html (Accessed September 30, 2011).

[9] *See* http://web.worldbank.org/WBSITE/EXTERNAL/NEWS/0,,contentMDK:20190295~menuPK:34457~pagePK:34370~piPK:34424~theSitePK:4607,00.html (undated interview with Daniel Kaufmann); *see also* "Costs of Corruption," April 8, 2004, *available at* http://web.worldbank.org/WBSITE/EXTERNAL/NEWS/0,,contentMDK:20190187~menuPK:34457~pagePK:64003015~piPK:64003012~theSitePK:4607,00.html(Both accessed March 1, 2010).

[10] *Ibid*.

[11] The conventions in force are: (1) Organisation of American States Inter-American Convention Against Corruption ("OAS Convention"), (adopted 1996, entered into force March 6, 1997); (2) Organisation for Economic Co-operation and Development Convention on Combating Bribery of Foreign Public Officials in International Business Transactions ("OECD Anti-Bribery Convention") (adopted 1997, entered into force February 15, 1999) — for further on this see CARR, I. and OUTHWAITE, O. (2008) "The OECD Anti-Bribery Convention Ten Years On" 5(1) *Manchester Journal of International Economic Law* 3- 35; (3) Council of Europe Criminal Law Convention on Corruption ("COE Criminal Convention") and Civil Law Convention on

Corruption ("COE Civil Convention") (both adopted 1999, entered into force July 1, 2002); (4) African Union Convention on Preventing and Combating of Corruption ("AU Convention") (adopted 2003, entered into force on August 5, 2006 — for further on this see CARR, Indira (2007) "Corruption in Africa: Is the African Union Convention on Combating Corruption the Answer?" *Journal of Business Law* 111- 136; and (5) the United Nations Convention against Corruption ("UNCAC") (adopted 2003, entered into force on December 14, 2005 — for further on this see CARR, Indira (2006) "The United Nations Convention on Corruption: Improving the Quality of Life of Millions in the World?" (2006) 3(3) *Manchester Journal of International Economic Law* 3 - 44.

[12] The control of corruption and the introduction of good governance practices are seen as important for economic growth, eradication of poverty and development of vital infrastructures. According to Daniel Kaufman the business sector benefits greatly with lower corruption. He states:

> [T]here is a '400 % governance dividend' of good governance and corruption control: countries that improve on control of corruption and rule of law can expect (on average), in the long run, a four-fold increase in incomes per capita. Thus, a country with an income per capita of US$ 2,000 could expect to attain US$ 8,000 in the long run by making strides to control corruption.

We have also found that the business sector grows significantly faster where corruption is lower and…the rule of law is safeguarded. On average, it can make a difference of about 3% per year in annual growth for the enterprises. *See* http://web.worldbank.org/WBSITE/EXTERNAL/NEWS/0,,contentMDK:20190295~menuPK:34457~pagePK:34370~piPK:34424~theSitePK:4607,00.html (accessed March 1, 2010).

[13] For an interesting account of the types of police work, *see* MARX, Gray T (1988) *Undercover: Police Surveillance in America* Berkeley: University of California Press; ASHWORTH, Andrew (1994) *The Criminal Process* Oxford: OUP.

[14] For a fuller discussion of the motivations, *see* CARR, Indira "Whistleblower Protection and India" (forthcoming).

[15] JUBB, Peter B. (1994) "Whistleblowing: A Restrictive Definition and Interpretation" 21 *Journal of Business Ethics* 77-94, at 83.

[16] MICELI, MP and NEAR JP (1984) "The Relationships among Beliefs,

Organisational Position and Whistle-blowing Status: A Discriminant Analysis" 27(4) *Academy of Management Journal* 687-704, at 689.

[17] JUBB, Peter B. (1994) "Whistleblowing: A Restrictive Definition and Interpretation" 21 *Journal of Business Ethics* 77-94, at 86.

[18] Recommended Draft Principles for Whistleblowing Legislation *available at* http://www.transparency.org/global_priorities/other_thematic_issues/towards_greater_protection_of_whistleblowers (Accessed September 10, 2011).

[19] *Whistleblowing, Fraud and the European Union*. Report written for the European Commission (1996) by Guy Dehn, former Director of Public Concern at Work as cited in para. 17 Doc. 12006, September 14, 2009, *available at* http://assembly.coe.int/Main.asp?link=/Documents/WorkingDocs/Doc09/EDOC12006.htm (Accessed September 10, 2011).

[20] *See,* for instance, LARMER, Robert A. (1992) "Whistleblowing and Employee Loyalty" 1992 (11) *Journal of Business Ethics* 125 - 128; GLAZER, Myron (1983) "Ten Whistleblowers and How they Fared: 1983 *Hasting Ctr Rpt* 33-49.

[21] There are other regional anti-corruption conventions in force. *See supra note* 11.

[22] *See* http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-14&chapter=18&lang=en (accessed September 5, 2011).

[23] Council of Europe "The Protection of 'Whistle-Blowers'" Doc. 12006, 14 September 2009, *available at* http://assembly.coe.int/Main.asp?link=/Documents/WorkingDocs/Doc09/EDOC12006.htm (accessed September 10, 2011).

[24] *See* fn 10 *Travaux Préparatoires of the Negotiations for the Establishment of the United Nations Convention against Corruption* Vienna: UNODC p, 281.

[25] It must be added that there is a separate provision dealing with the protection of witnesses, experts and victims.

[26] 317 US 57 (1943). *See also* note 29*, infra.*

[27] "Justice Department Recovers $1.4 Billion in Fraud and False Claims Act in Fiscal Year 2005" *available at* http://www.usdoj.gov (Accessed January 1, 2011). *See also,* for whistleblower protection and rewards, the recently enacted Dodd-Frank Wall Street Reform and Consumer Protection Act 124 Stat. 1376 Public Law 111–203-July 21, 2010. Also *available at* http://

www.gpo.gov/fdsys/pkg/PLAW-111publ203/pdf/PLAW-111publ203.pdf (Accessed September 11, 2011).

[28] Paras. 27 & 28, Doc. 12006, 14 September 2009, *available at* http://assembly.coe.int/Main.asp?link=/Documents/WorkingDocs/Doc09/EDOC12006.htm (Accessed September 10, 2011).

[29] Britain, until 1951, recognized the common informer action or *qui tam* action. These actions were explicitly or implicitly included in statutes due to the difficulties faced in enforcing penal laws. The common informer was given a share of the fines obtained by the Crown. The common informers however abused the system by demanding money from the law breaker with threat of court action. The abuse associated with such actions continued into the twentieth century and in 1951 the decision was taken to abolish such actions with the Common Informers Act 1951. *Qui tam* is short for the Latin phrase *"qui tam pro domino rege quam pro se ipso in hac parte sequitir"* that is "who pursues this action on our Lord the King's behalf as well as his own."

[30] Para. 30, 13CAC/COSP/2011/2, August 25, 2011.

[31] The Report notes:

> In one case, the matter was partly regulated by the anti-corruption law, and draft legislation had been introduced; however, there was no comprehensive legislation protecting whistle-blowers, and the protection of victims and witnesses was not extended to informants, despite an obligation for civil servants to report cases of corruption. A recommendation was issued to enact appropriate legislation. In one case where no specific system existed for protecting whistle-blowers, the provisions on witness protection were applicable, and a recommendation was issued to explore the possibility of establishing a comprehensive system for the protection of whistle-blowers, which was also under consideration by the national authorities.

Ibid.

[32] The OECD Convention contains a provision on monitoring and follow-up and according to Article 12 the parties are required to co-operate in "carrying out a programme of systematic follow-up to monitor and promote the full implementation" of the OECD Convention and this is to be done in the "framework of the OECD Working Group on Bribery in International Financial Transactions." The systematic monitoring is carried out in two phases — Phase I assesses the conformity of a state's anti-bribery laws with the OECD Convention and in Phase II there is a one-week on-site meeting

with various stakeholders ranging from government officials and business councils to civil society organizations and on the basis of which various recommendations for change and improvement are made.

[33] *See* Para. 46 — 49 Phase II Report UK *available at* http://www.oecd.org/dataoecd/62/32/34599062.pdf (accessed October 21, 2010).

[34] OECD (2011) *Stocktaking Report on Business Integrity and Anti-bribery Legislation, Policies and Practices in Twenty African Countries, available at* http://www.oecd.org/dataoecd/7/18/47655067.pdf (accessed June 10, 2011).

[35] Para. 49, Phase II Report UK *available at* http://www.oecd.org/dataoecd/62/32/34599062.pdf (accessed October 21, 2010).

[36] [1915] AC 705.

[37] *Ibid*. at 713.

[38] [1972] AC 153.

[39] *See* the Canadian case, *Canadian Dredge & Dock Ltd v The Queen* (1985) 19 CCC (3d) 1 (SCC); HANNA, D (1988-89) "Corporate Criminal Liability" 31 *Criminal Law Quarterly* 452-470.

[40] WELLS, Celia (1993) *Corporations and Criminal Responsibility,* Oxford: Clarendon Press.

[41] "Relevant commercial organisation" is defined in s. 7(5) as

(a) a body which is incorporated under the law of any part of the United Kingdom and which carries on a business (whether there or elsewhere),

(b) any other body corporate (wherever incorporated) which carries on a business, or part of a business, in any part of the United Kingdom,

(c) a partnership which is formed under the law of any part of the United Kingdom and which carries on a business (whether there or elsewhere), or

(d) any other partnership (wherever formed) which carries on a business, or part of a business, in any part of the United Kingdom, and, for the purposes of this section, a trade or profession is a business.

[42] *Guidance about Procedures which Relevant Commercial Organisation can Put in Place to Prevent Persons Associated with them from Bribing (Section 9 of the Bribery Act 2010)* was adopted in March 2011. *Available at* http://www.justice.gov.uk/guidance/bribery/htm (Accessed April 10, 2011).

[43] PCAW (2010) *Where is Whistleblowing Now? Available at* http://www.pcaw.co.uk/policy/policy_pdfs/PIDA_10year_Final_PDF.pdf (Accessed

October 1, 2011).

[44] *See* http://www.iccwbo.org/uploadedFiles/ICC%20Guidelines%20Whistleblowing%20%20as%20adopted%204_08(2).pdf (Accessed July 1, 2010).

[45] PAS 1998:2008 http://www.bsigroup.com/upload/Standards%20&%20Publications/Risk%20Management/PAS1998_Whistleblowing.pdf (accessed October 10, 2011).

[46] *See supra* note 35.