



DIRECTORATE FOR FINANCIAL, FISCAL AND ENTERPRISE AFFAIRS

**ANTI-CORRUPTION INSTRUMENTS AND THE OECD GUIDELINES
FOR MULTINATIONAL ENTERPRISES**

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ANTI-CORRUPTION INSTRUMENTS AND THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES*

Executive Summary

- The Guidelines seek to promote and facilitate companies' contribution to the fight against corruption.
- The anti-corruption content of the Guidelines is broader than that of the Convention and the Revised Recommendation, as the Guidelines cover private sector bribery, solicitation of bribes and extortion. They also encourage companies to extend their anti-corruption programmes to their subsidiaries and business partners.
- The standards promoted by the Guidelines reflect more than just the perspectives of developed countries. These standards can be found in other inter-governmental instruments adhered to by a wide range of non-member countries. They have also been integrated in the anti-corruption initiatives of several international private sector associations.
- The Guidelines' distinctive contribution as an anti-corruption instrument is that it provides a framework through which governments and civil society can encourage companies' contribution to the fight against corruption.

Introduction

The problem of corruption has been receiving growing attention in the past 15 years and various inter-governmental and non-governmental organisations have developed anti-corruption instruments. The OECD has adopted several policy instruments that contribute, directly or indirectly, to the fight against corruption.

The 2000 Review of the *OECD Guidelines for Multinational Enterprises* resulted in the addition of a new chapter on combating bribery. This new dimension of the OECD Guidelines for Multinational Enterprises (hereafter the Guidelines) has been highlighted in the OECD Ministerial Communiqué of 2002. Under the heading "Ensuring integrity and transparency in the international economy", OECD Ministers agreed "to continue to promote implementation of the OECD Guidelines for Multinational Enterprises, which provide recommendations for responsible corporate behaviour, in particular in such areas as transparency and anti-corruption."

How do the Guidelines relate to other inter-governmental and non-governmental anti-corruption instruments? This paper provides information that helps to answer this question.

This paper is structured as follows. Part I gives an overview of the OECD integrity instruments and of seven major international anti-corruption instruments. Part II presents, in detail, the anti-bribery contents of

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the Guidelines and compares these with other instruments. Part III reviews the main international private initiatives in this field.

I. Overview of Key Inter-Governmental Integrity Instruments

I.1 OECD integrity instruments

The OECD has 9 instruments that contribute to the fight against corruption. These instruments differ in their scope and functions.

A first set of five instruments tackle the problem of bribery in international transactions: these instruments focus exclusively on bribery of foreign public officials in international business transactions “to obtain or retain business or other improper advantage”. This means, for example, that they do not cover facilitation payments, i.e. payments “made to induce public officials to perform their functions, such as issuing licences or permits”¹.

They are, in chronological order of adoption:

- The Recommendation of the Council on Combating Bribery in International Business Transactions and its revised version;
- The Recommendation of the Council on the Tax Deductibility of Bribes to Foreign Public Officials;
- The Recommendation on Anti-Corruption Proposals for Aid-Funded Procurement;
- The Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (hereafter the Convention)²; and
- The Action Statement on Bribery and Officially Supported Export Credits.

The second set of OECD instruments has not been designed exclusively to address corruption, but nevertheless contribute to the fight against it:

- The Recommendation of the Council on Improving Ethical Conduct in the Public Service Including Principles for Managing Ethics in the Public Service;
- The OECD Principles of Corporate Governance;
- The OECD Guidelines for Multinational Enterprises; and
- The Draft Guidelines for Managing Conflicts of Interest in the Public Service³.

These instruments have a broader anti-corruption scope than the first set of instruments. The Recommendation on Anti-Corruption Proposals for Aid-Funded Procurement, the Recommendation on Ethical Conduct in the Public Service and the Guidelines on Conflicts of Interest address both domestic and international public corruption. Even broader, the Principles on Corporate Governance and the Guidelines (see part II) can impact domestic and international, public and private-to-private corruption practices.

Most of the measures recommended in these instruments, other than the Guidelines and the Principles on Corporate Governance, are to be implemented by governments. They fulfil four main complementary functions:

- *Repression*: this includes defining offences (of bribery and related offences, such as money laundering) and setting up State mechanisms to investigate and sanction the breaching of the law.
- *Detection*: this includes defining and supporting the role different actors can play detecting potential cases of corruption (for instance tax inspectors, auditors).
- *Prevention in a repression perspective*: increasing the transparency of public and private operations, through for instance the adoption of measures to facilitate access to information.
- *Prevention in an incitation perspective*: changing the logics of action which lead public or private actors to bribery. For instance, managing conflicts of interest in the public service allows protecting the integrity of official decision-making.

Certain instruments also address the role of the private sector and recommend that companies undertake measures to make sure that their internal organisation and culture help prevent corruption. It is the focus of the chapter on bribery of the OECD Guidelines for Multinational Enterprises.

These instruments present different synergies. For example, the Revised Recommendation on Combating Bribery in International Business Transactions (hereafter the Revised Recommendation) complements the Convention, as it contains the non-criminal elements of the sets of action engaged to curb bribery in international business transactions. Another instance is that both the Tax Deductibility Recommendation and the Exports Credits Action Statement derive from the criminalisation of bribery of foreign public officials: they define related rules and call for implementing measures, and in doing so, consolidate the definition of bribery of foreign public officials as an offence⁴. Yet another example is the Recommendation on ethical conduct in the public service, which addresses the demand side of international (and domestic) public bribery and thereby complements instruments focusing on the supply side.

Synergies also exist between the Guidelines and other OECD integrity instruments in that the Guidelines encourage companies to comply with the standards spelled out in other instruments and therefore contribute to their enforcement. This function is a crucial contribution to the overall anti-corruption framework and it should not be overlooked. Theory and evidence suggest that compliance with the law does not depend only on the risk of being caught and the consequences associated with it, balanced against the profits provided by breaking the law (see Scholz, 1997)⁵. This in itself justifies the need for policy instruments such as the Guidelines and for measures that enhance and complement the deterrence effect of laws and sanctions⁶.

1.2 Some major inter-governmental instruments

Other anti-corruption instruments have been developed by inter-governmental organisations, covering different geographical regions. This paper considers seven such instruments:

- The Forty Financial Action Task Force Recommendations;
- The Inter-American Convention against Corruption, developed by the Organisation of American States;

- The European Union Convention on the Fight Against Corruption Involving Officials of the European Communities or Officials of Member States
- The Council of Europe Criminal Law Convention on Corruption;
- The Council of Europe Civil Law Convention on Corruption;
- The Southern African Development Community Protocol on Corruption; and
- The United Nations Draft Convention against Corruption.

The Inter-American Convention and the EU Convention address domestic and international public corruption. The other five have a broader anti-corruption scope, as they address domestic and international public and private corruption. The strategies underpinning these instruments are similar to that of OECD integrity instruments, in that they aim to fulfil similar functions. We will see in part II how they address the role of companies in the fight against corruption.

Table 1 summarises information on the year of adoption, the participating countries, the anti-corruption scope and the supporting institutional mechanisms for implementation of these 16 policy instruments.

Box 1 – Major Inter-Governmental Anti-Corruption Instruments⁷

The OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions

The OECD Convention is relatively narrow and specific in its scope. Its sole focus is the use of domestic law to criminalise the bribery of foreign public officials. It focuses on “active bribery”, meaning the offence committed by the person who promises or gives the bribe, as contrasted with “passive bribery”, the offence committed by the official who receives the bribe. It does not apply to forms of corruption other than bribery, bribery which is purely domestic, or bribery in which the direct, indirect or intended recipient of the benefit is not a public official. It also does not include cases where the bribe was paid for purposes unrelated to the conduct of international business and the gaining or retaining of some undue advantage in such business.

The OECD Revised Recommendation on Combating Bribery in International Business Transactions

Whereas the Convention focuses on a specific issue, the criminalising of bribery of foreign public officials in a commercial framework, the Revised Recommendation contains the entire programme defined by participant countries to curb corruption in international transactions. It covers such areas as: taxation; company and business accounting and audit rules and procedures; banking, financial and other relevant provisions; public subsidies, licenses, government procurement contracts or other public advantages that could be denied as sanctions for bribery in appropriate cases.

The Forty Financial Action Task Force Recommendations

The Financial Action Task Force on Money Laundering (FATF) is an inter-governmental body whose purpose is the development and promotion of policies to combat money laundering -- the processing of criminal proceeds in order to disguise their illegal origin. These policies aim to prevent such proceeds from being utilised in future criminal activities and from affecting legitimate economic activities. The Task Force members agreed to implement the forty FATF Recommendations, which set out the basic framework for anti-money laundering efforts. They cover the criminal justice system and law enforcement; the financial system and its regulation, and international cooperation.

The Inter-American Convention against Corruption

The Inter-American Convention against Corruption (IACC) is the first international convention against corruption ever adopted (from 6 March 1997). It has been ratified by 29 countries, and is broader in scope than the European and OECD instruments. The IACC provisions can be broadly classified into three groups: Preventive Measures; Criminal Offences; and Mutual Legal Assistance.

The European Union Convention on the Fight against Corruption Involving Officials of the European Communities or Officials of Member States

This Convention stems from an attempt on the part of the European Union to address forms of malfeasance which are harmful to its own financial interests. It only deals with conduct on the part of officials of the European Community and its Member States. The conduct to which it applies is essentially bribery and similar offences, which States Parties are required to criminalise. It does not deal with fraud, money laundering or other corruption-related offences.

The Council of Europe Criminal Law Convention against Corruption

The Convention is drafted as a binding legal instrument and applies to a broad range of occupations and circumstances. It contains provisions criminalising a list of specific forms of corruption, and extending to both active and passive forms of corruption, and to both private and public sector cases. The Convention also deals with a range of transnational cases: bribery of foreign public officials and members of foreign public assemblies is expressly included, and offences established pursuant to the private-sector criminalisation provisions would generally apply in transnational cases in any State Party where a sufficient portion of the offence to trigger domestic jurisdictional rules had taken place.

The Council of Europe Civil Law Convention against Corruption

This is the first attempt to define common international rules for civil litigation in corruption cases. Where the *Criminal Law Convention* seeks to control corruption by ensuring that offences and punishments are in place, the *Civil Law Convention* requires States Parties to ensure that those affected by corruption can sue the perpetrators civilly, effectively drawing the victims of corruption into the Council's anti-corruption strategy. The Civil Law Convention is narrower than its criminal law counterpart in the scope of the forms of corruption to which it applies, extending only to bribery and similar acts. It is not in force.

The Southern African Development Community⁸ Protocol on Corruption

In addition to defining and describing corruption as a problem, the purposes of the SADC Protocol on Corruption are threefold: to promote the development of anti-corruption mechanisms at the national level, to promote cooperation in the fight against corruption by States Parties, and to harmonise anti-corruption national legislation in the region. The Protocol provides a wide set of preventive mechanisms which include the development of codes of conduct for public officials, transparency in the public procurement of goods and services, access to public information, protection of whistle-blowers, establishment of anti-corruption agencies, development of systems of accountability and controls, participation of the media and civil society, and the use of public education and awareness as a way of introducing zero tolerance for corruption.

The United Nations Draft Convention against Corruption

During 1999-2001, negotiations began to develop this binding international legal instrument, which would be global in both its approach to the subject and in its geographical application. The negotiations are expected not only to produce the specified instrument, but also to provide a valuable forum in which all Member States of the United Nations can assemble to discuss corruption issues, to develop effective measures against corruption, and to build broad international consensus in support of such measures.

Table 1. OECD Integrity Instruments and Other Inter-Governmental Anti-Corruption Instruments

Instruments	Anti-Corruption Scope	Adopted in	Participating Countries in February 2003	Supporting Institutional Mechanisms for Implementation
OECD Instruments on Bribery of Foreign Officials in International Business Transactions				
1. Revised Recommendation	Bribery of foreign public officials in international business transactions	1994, revised in May 1997	OECD member countries + Argentina, Brazil, Bulgaria, Chile and Slovenia.	OECD Working Group on Bribery in International Business Transactions (peer review monitoring mechanism)
2. Rec. on Tax Deductibility of Bribes to Foreign Public Officials	Bribery of foreign public officials in international business transactions	April 1996	OECD member countries + Argentina, Brazil, Bulgaria, Chile and Slovenia.	- OECD Committee on Fiscal Affairs (self-assessment reports) - OECD Working Group on Bribery in International Business Transactions (peer review monitoring mechanism)
3. Rec. on Anti-Corruption and Aid-Funded Procurement	Bribery of foreign public officials in international business transactions	May 1996	OECD member countries + Argentina, Brazil, Bulgaria, Chile and Slovenia.	- Development Assistance Committee (implementation reports) - OECD Working Group on Bribery in International Business Transactions (peer review monitoring mechanism)
4. Convention	Bribery of foreign public officials in international business transactions	Signed in Nov. 1997; Entered into force in Feb. 1999.	OECD member countries + Argentina, Brazil, Bulgaria, Chile and Slovenia. (Only Ireland has not ratified yet)	OECD Working Group on Bribery in International Business Transactions (peer review monitoring mechanism)
5. AS on Bribery and Export Credits	Bribery of foreign public officials in international business transactions	December 2000	OECD member countries – Iceland (and not relevant for Ireland)	OECD Working Party on Export Credits and Credit Guarantees (survey of member countries)
Other OECD Integrity Instruments				
6. Rec. on Ethical Conduct in the Public Service	Public corruption	April 1998	OECD member countries	OECD Public Management Committee (comparative analysis and information sharing)
7. Principles of Corporate Governance	Public and private corruption	May 1999	OECD member countries	OECD Steering Group on Corporate Governance

8. Guidelines for Multinational Enterprises	Public and private corruption	First adopted in 1976, revised in June 2000	OECD member countries + Argentina, Brazil, Chile, Estonia, Israel, Lithuania and Slovenia.	- OECD Committee on International Investment and Multinational Enterprises (oversight responsibility, reporting, clarification of meaning of recommendations) - National Contact Points (promotion, soft whistle-blowing facilities called "specific instances", mediation and consultations)
9. Draft Guidelines on Conflicts of Interest	Public corruption	Will be considered in April 2003	OECD member countries	OECD Expert Group on Managing Conflicts of Interest (comparative analysis and information sharing)
Other Inter-governmental Integrity Instruments				
10. FATF Rec.	Money laundering (public and private corruption being considered a predicate offence in most countries)	1990, revised in 1996	OECD member countries – Czech Republic, Hungary, South Korea, Poland and Slovak Republic + Argentina, Brazil, Hong Kong China, Singapore + European Commission + Gulf Co-operation Council	FATF (peer review monitoring mechanism)
11. Inter-American Convention against Corruption	Public corruption	March 1996; Entered into force in March 1997	Argentina, The Bahamas, Belize, Bolivia, Brazil, Canada, Chile, Colombia, Costa Rica, the Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Guyana, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Saint Lucia, Saint Vincent and the Grenadines, Suriname, Trinidad and Tobago, the United States, Uruguay and Venezuela. (Barbados and Haiti have signed but not ratified yet.)	Committee of Experts of the Mechanism for Follow-up on the Implementation of the Inter-American Convention against Corruption (peer review follow-up mechanism)
12. EU Convention on the Fight against Corruption	Public corruption	May 1997; Not entered into force yet	<u>Austria</u> , <u>Belgium</u> , <u>Denmark</u> , <u>Finland</u> , <u>Germany</u> , <u>Greece</u> , <u>France</u> , <u>Ireland</u> , <u>Italy</u> , <u>Luxembourg</u> , <u>the Netherlands</u> , <u>Portugal</u> , <u>Spain</u> , <u>Sweden</u> and <u>the United Kingdom</u> (underlined: countries that have ratified)	Council of the European Union

13. Council of Europe Criminal Law Convention on Corruption	Public and private corruption	January 1999; Entered into force in September 2002	<u>Albania</u> , <u>Andorra</u> , <u>Austria</u> , <u>Belarus</u> , <u>Belgium</u> , <u>Bosnia-and-Herzegovina</u> , <u>Bulgaria</u> , <u>Croatia</u> , <u>Cyprus</u> , <u>Czech Republic</u> , <u>Denmark</u> , <u>Estonia</u> , <u>Finland</u> , <u>France</u> , <u>Georgia</u> , <u>Germany</u> , <u>Greece</u> , <u>Hungary</u> , <u>Iceland</u> , <u>Ireland</u> , <u>Italy</u> , <u>Latvia</u> , <u>Lithuania</u> , <u>Luxembourg</u> , <u>Malta</u> , <u>Mexico</u> , <u>Moldova</u> , <u>Netherlands</u> , <u>Norway</u> , <u>Poland</u> , <u>Portugal</u> , <u>Romania</u> , <u>Russia</u> , <u>Serbia and Montenegro</u> , <u>Slovakia</u> , <u>Slovenia</u> , <u>Sweden</u> , <u>Switzerland</u> , <u>the Former Yugoslav Republic of Macedonia</u> , <u>Turkey</u> , <u>Ukraine</u> , <u>United Kingdom</u> and the <u>United States</u> (underlined: countries that have ratified)	The Group of States against Corruption (GRECO) monitors the observance of the Guiding Principles in the Fight against Corruption (peer review monitoring mechanism) and, in the future, the implementation of the international legal instruments adopted in pursuit of the Programme of Action against Corruption, including the Criminal Law Convention (for those countries who will have ratified).
14. Council of Europe Civil Law Convention on Corruption	Public and private corruption	September 1999; Not entered into force yet	<u>Albania</u> , <u>Andorra</u> , <u>Austria</u> , <u>Belgium</u> , <u>Bosnia-and-Herzegovina</u> , <u>Bulgaria</u> , <u>Croatia</u> , <u>Cyprus</u> , <u>Czech Republic</u> , <u>Denmark</u> , <u>Estonia</u> , <u>Finland</u> , <u>France</u> , <u>Georgia</u> , <u>Germany</u> , <u>Greece</u> , <u>Hungary</u> , <u>Iceland</u> , <u>Ireland</u> , <u>Italy</u> , <u>Lithuania</u> , <u>Luxembourg</u> , <u>Malta</u> , <u>Moldova</u> , <u>Norway</u> , <u>Poland</u> , <u>Romania</u> , <u>Slovakia</u> , <u>Slovenia</u> , <u>Sweden</u> , <u>the Former Yugoslav Republic of Macedonia</u> , <u>Turkey</u> , <u>Ukraine</u> , <u>United Kingdom</u> (underlined: countries that have ratified)	The Group of States against Corruption (GRECO) monitors the observance of the Guiding Principles in the Fight against Corruption (peer review monitoring mechanism) and, in the future, the implementation of the international legal instruments adopted in pursuit of the Programme of Action against Corruption, including the Civil Law Convention (for those countries who will have ratified).
15. Southern African Development Community Protocol on Corruption	Public and private corruption	August 2001	Angola, Botswana, the Democratic Republic of Congo, Lesotho, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, Tanzania, Zambia and Zimbabwe	Committee for the implementation of the Protocol (self-assessment reports and information sharing)
16. UN Draft Convention against Corruption	Public and private corruption	<i>Under negotiation</i>	-	<i>To be determined</i> - Ad Hoc Committee for the Negotiation of a Convention against Corruption

II. The Anti-Bribery Content of the OECD Guidelines for Multinationals, in Perspective with OECD Instruments and Other Major Inter-Governmental Instruments

The OECD Guidelines inter alia provide recommendations to multinational enterprises on what they should do to contribute to the fight against corruption. One of the ten chapters of the Guidelines, Chapter VI, focuses on bribery. Complementary elements can be found in two other chapters: Chapter II on General Policies and Chapter III on Disclosure.

A first sub-part presents the anti-bribery contents of the text of the Guidelines, in comparison with the Convention and the Revised Recommendation. A second sub-part compares with other international instruments.

II.1 - The anti-bribery contents of the Guidelines, in comparison with the Revised Recommendation and the Convention

A broad anti-bribery scope

The introductory sentence of the sixth chapter, on bribery, states:

"Enterprises should not, directly or indirectly, offer, promise, give, or demand a bribe or other undue advantage to obtain or retain business or other improper advantage."

As the identity of the other party involved in the bribery act is not specified, this party can therefore be a public official, a business person or a political party official. The anti-bribery scope of the Guidelines is therefore potentially broader than that of the Revised Recommendation and of the Convention. These two instruments apply to the active side of bribery of foreign public officials, whereas the Guidelines potentially cover public sector bribery⁹, bribery involving political party officials as well as both the active and passive sides of private sector bribery (bribery transactions between private individuals or entities). As in the 1997 Revised Recommendation, the Guidelines do not cover bribery practices which are not for obtaining or retaining business or other improper advantage: this means that facilitation payments are excluded.

Paragraphs 1 and 2 illustrate in more practical terms the general normative statement against bribery practices. These developments are particularly useful for business readers as they help clarify what is meant by combating bribery.

"In particular, enterprises should:

1. Not offer, nor give in to demands, to pay public officials or the employees of business partners any portion of a contract payment. They should not use sub-contracts, purchase orders or consulting agreements as means of channelling payments to public officials, to employees of business partners or to their relatives or business associates.

2. Ensure that remuneration of agents is appropriate and for legitimate services only."

Chapter II states general principles that support the contents of the chapter on bribery. For instance, Chapter II states that companies should "refrain from seeking or accepting exemptions not contemplated in the statutory or regulatory framework (...)", which is consistent with the avoidance of situations potentially conducive to corruption acts¹⁰.

Solicitation of bribes and extortion¹¹

If the issue of solicitation is mentioned in its preamble, the 1997 OECD Convention is exclusively aimed at criminalising the “supply” of bribes to foreign public officials. Solicitation and extortion fall outside of the scope of application of the Convention. The Working Group on Bribery organised in June and October 1999 two informal meetings with the private sector on solicitation¹². The purpose of the meeting was to consider whether governments should undertake actions to assist and support the private sector’s fight against solicitation and, if so, what actions would be most appropriate in the framework of the OECD.

One of the conclusions of the June meeting was that the revised version of the Guidelines could provide the opportunity to give more prominence to the issues of bribe solicitation and extortion. Several references have thus been inserted in the Guidelines. The second sentence of the chapter on bribery: “Nor should enterprises be solicited or expected to render a bribe or other undue advantage” reflects the business community’s concern about the problems of the solicitation and extortion of bribes by public officials¹³. Paragraph 45 of the Commentary on the Guidelines reinforces this statement, by saying that “governments should assist companies confronted with solicitation of bribes.” The recommendations made to companies in the rest of the chapter target both the fight against bribery and that of extortion (Cf. for instance paragraph 3: “their activities in the fight against bribery and extortion”).

Recommendations to multinationals

Recommendations of measures companies should take to fight against bribery and extortion are made in paragraphs 2, 3, 4 and 5 of Chapter VI and in Chapters II and III. It includes the development of activities specifically targeting bribery and extortion, with training programmes and disciplinary procedures to ensure the adherence of the staff, and a proper remuneration of agents.

The Guidelines (Paragraph VI.3 and III.5) also stress the importance of adopting a policy of transparency on these activities and of external communication more generally. This reflects well the fact that non-governmental organisations are an indispensable partner in facilitating co-ordination between the public and the private sector and in helping to build effective coalitions.

The Guidelines recommend the adoption of adequate control systems, accounting and auditing practices. The Convention (Article 8: “Accounting”), the Revised Recommendation and the Principles of Corporate Governance (Section IV: “Disclosure and Transparency”) also include requirements or recommendations on accounting standards and auditing practices. For each of these instruments, the terms used slightly differ. For instance, the Revised Recommendation calls for “internal company controls, with monitoring bodies independent of management”, whereas the Guidelines call for the adoption of “management control systems”, without specifying whether these should be under the supervision of a independent body or of the CEO. The Guidelines specifically mention the need to disclose contributions to political parties, issue which falls outside of the scope of the Revised Recommendation and of the Convention. On the other hand, the Revised Recommendation addresses, in a quite detailed manner, the issue of external audit, which the Guidelines do not cover, except indirectly through references in the Commentary to ICC’s work and in general terms in the Preface.

Paragraph 9 of Chapter II, General Policies, adds the important element of non-discrimination against “employees who make *bona fide* reports to management or as appropriate, to the competent public authorities, on practices that contravene the law, the Guidelines or the enterprise’s policies”. This is consistent with the emphasis given by BIAC and TUAC to the need to protect whistle-blowers, i.e. the employees who expose corruption in organisations, as these may suffer victimisation.

Subsidiaries and other business partners

The Negotiating Conference of the 1997 OECD Convention noted that further work was needed on a number of issues, including on the role of foreign subsidiaries in bribery transactions. Members of the Working Group on Bribery share the view of the crucial importance of this subject for the effective implementation of the Convention¹⁴.

The Guidelines target a broad application of the principles and recommendations against bribery and extortion, encompassing business partners. Paragraph 10 of Chapter II states that enterprises should “encourage, where practicable, business partners, including suppliers and subs-contractors, to apply principles of corporate conduct compatible with the Guidelines.” The Commentary (paragraph 10) gives further indications on this issue.

Table 2 gives a synthetic overview of the anti-bribery contents of the Guidelines, in comparison with the Revised Recommendation and the Convention.

Table 2. Comparing the Guidelines with the Convention and the Revised Recommendation

	GUIDELINES Enterprises should:	CONVENTION Each Party shall:	REVISED RECOMMENDATION Member countries should:
Scope			
Private sector bribery	<i>Covered</i>	<i>Out of scope</i>	<i>Out of scope</i>
Solicitation of bribes and extortion	<i>Covered</i>	<i>Out of scope</i>	<i>Out of scope</i>
Bribery of candidates for public office or to political parties	<i>Covered</i> Contributions should fully comply with public disclosure requirements and should be reported to senior management.	<i>Partially covered – further discussion in the Five Issues</i>	<i>Partially covered – further discussion in the Five Issues</i>
Business partners	<i>Covered</i>	<i>Partially covered – further discussion in the Five Issues (subsidiaries)</i>	<i>Partially covered – further discussion in the Five Issues (subsidiaries)</i>
Measures to be taken by companies			
Standards of conduct	<i>Implied: role of the Guidelines</i>	-	Encourage the development and adoption of (...) standards of conduct.
Internal communication, training and disciplinary procedures	Promote employee awareness of and compliance with company policies against bribery and extortion through appropriate dissemination of these policies and through training programmes and disciplinary procedures.	-	-
Employment of agents	Ensure that remuneration of agents is appropriate and for legitimate services only. Where relevant, a list of agents employed in connection with transactions with public bodies and state-owned enterprises should be kept and made available to competent authorities.	-	-

External communication	<ul style="list-style-type: none"> - Enhance the transparency of their activities in the fight against bribery and extortion. Measures could include making public commitments against bribery and extortion and disclosing management systems the company has adopted in order to honour these commitments. - Foster openness and dialogue with the public so as to promote its awareness of and co-operation with the fight against bribery and extortion. 	-	Encourage company management to make statements in their annual reports about their internal control mechanisms, including those which contribute to preventing bribery.
Internal control systems	Adopt management control systems that discourage bribery and corrupt practices	-	<ul style="list-style-type: none"> - Encourage the development and adoption of adequate internal company controls, including standards of conduct. - Encourage the creation of monitoring bodies, independent of management, such as audit committees of boards of directors or of supervisory boards.
Accounting practices	Adopt financial and tax accounting and auditing practices that prevent the establishment of “off the books” or secret accounts or the creation of documents which do not properly and fairly record the transactions to which they relate.	<ul style="list-style-type: none"> - Take such measures as may be necessary, within the framework of its laws and regulations regarding the maintenance of books and records, financial statements disclosures, and accounting and auditing standards, to prohibit the establishment of off-the-books accounts, the making of off-the-book accounts or inadequately identified transactions, the recording of non-existent expenditures, the entry of liabilities with incorrect identification of their object, as well as the use of false documents, by companies subject to those laws and regulations, for the purpose of bribing foreign public officials or of hiding such bribery. - Provide effective, proportionate and dissuasive civil, administrative or criminal penalties for such omissions and falsifications in respect of the books, records, accounts and financial statements of such companies. 	<p>Adequate accounting requirements:</p> <ul style="list-style-type: none"> - Require companies to maintain adequate records of the sums of money received and expended by the company, identifying the matters in respect of which the receipt and expenditure takes place. Companies should be prohibited from making off-the-books transactions or keeping off-the-books accounts. - Require companies to disclose in their financial statements the full range of material contingent liabilities. - Adequately sanction accounting omissions, falsifications and fraud.

External audit		-	<p>Independent external audit:</p> <ul style="list-style-type: none"> - Consider whether requirements to submit to external audit are adequate. - [professional associations] Maintain adequate standards to ensure the independence of external auditors which permits them to provide an objective assessment of company accounts, financial statements and internal controls. - Require the auditor who discovers indications of possible illegal act of bribery to report this discovery to management and, as appropriate, to corporate monitoring bodies. - Consider requiring the auditor to report indications of a possible illegal act of bribery to competent authorities.
Whistle-blowing	Refrain from discriminatory or disciplinary action against employees who make <i>bona fide</i> reports to management or, as appropriate, to the competent public authorities, on practices that contravene the law, the Guidelines or the enterprise's policies.	-	Encourage companies to provide channels for communication by, and protection for, persons not willing to violate professional standards or ethics under instructions or pressure from hierarchical superiors.

II.2 Comparing with other inter-governmental instruments

To complement this comparison, it is interesting to review the provisions of other anti-corruption inter-governmental instruments regarding what multinational enterprises should do to prevent bribery. Table 3 shows whether the recommendations made in the Guidelines are echoed by five major non-OECD anti-corruption instruments.

Table 3. What Other Inter-Governmental Anti-Corruption Instruments Recommend Companies Should Do to Prevent Corruption?

Anti-corruption instruments Issues addressed	OECD Guidelines for Multinational Enterprises	Inter-American Convention against Corruption	Council of Europe Criminal Law Convention on Corruption	Council of Europe Civil Law Convention on Corruption	SADC Protocol on Corruption	UN Draft Convention against Corruption
Standards of conduct	Yes					Yes
Internal communication training and disciplinary procedures	Yes					
Employment of agents	Yes					
External communication	Yes					
Internal control systems	Yes	Yes			Yes	Yes
Accounting practices	Yes	Yes	Yes	Yes	Yes	Yes
External audit				Yes		Yes
Whistle-blowing	Yes		Yes	Yes		

Note: A blank means no.

Generally speaking, this shows that several of the practices promoted by the Guidelines are recognised world wide as effective anti-corruption prevention practices (see the Annex for details). The standards they promote cannot be considered to only reflect the perspective of OECD countries. In particular, all instruments converge on the importance of accounting practices in the prevention of bribery.

II.3 The implementation mechanism of the OECD Guidelines for Multinational Enterprises

A policy instrument is much more than a text. Implementation procedures of the Guidelines have been significantly improved.

While the Guidelines' recommendations are addressed to business, governments through their network of National Contact Points (NCP) are responsible for promoting the Guidelines, handling inquiries and helping to resolve issues that arise in specific instances. The Committee on International Investment and Multinational Enterprises remains the responsible body for clarifying the meaning of the Guidelines and overseeing their effectiveness.

Pressure from peer governments and civil society can also contribute to ensure the effectiveness of the Guidelines. The exercise of peer pressure is much more formalised for the implementation of the Convention and of the Revised Recommendation than for the Guidelines. It is indeed the fundamental principle underlying the mechanism adopted to monitor the 1997 instruments.

The network of National Contact Points materialise the commitments made by governments to promote the Guidelines as a model code of conduct. The implementation of the Revised Recommendation is not buttressed by such a public entity in charge of the implementation of this instrument. The fact that NCP are the focus point for several corporate responsibility issues increases their visibility.

III. Major Private Initiatives on Corruption

Several international private sector associations have developed initiatives on corruption. This section presents some of these initiatives, looking in particular at the correspondences with the norms set by the Guidelines. The review is limited to initiatives that aim primarily at promoting preventing measures to be taken by companies in an anti-corruption perspective, as the Guidelines do. This means that initiatives that advocate policy or institutional changes are out of the scope of this paper¹⁵.

III.1 Two major international private sector initiatives

There are two major international private sector initiatives that encourage companies to adopt internal measures to prevent corruption:

- The ICC Rules of Conduct to Combat Extortion and Bribery; and
- The Business Principles for Countering Bribery.

First published in 1977, last revised in 1999, the ICC Rules of Conduct to Combat Extortion and Bribery outline the basic measures companies should take to prevent corruption. The Commentary on the Guidelines (paragraph 46) makes reference to ICC's activity in this field. A Standing Committee on Extortion and Bribery works with the ICC National Committees to promote the use of the Rules of Conduct. This Committee ensures liaison with international organisations active in the anti-corruption field, and stimulates cooperation between governments and the private sector.

More recently, Transparency International and Social Accountability International developed the Business Principles for Countering Bribery. These principles are "a tool to assist enterprises to develop effective approaches to countering bribery in all of their activities". They were designed to "give practical effect to recent initiatives such as the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, the ICC Rules of Conduct to Combat Extortion and Bribery and the anti-bribery provisions of the revised OECD Guidelines for Multinationals." More detailed than the ICC Rules of Conduct, these Business Principles are meant to be used as a starting point for companies wanting to develop their own anti-bribery systems, or as a benchmark.

Table 4 gives an overview of these two initiatives, summarising information the date of their start, their overall purpose and the normative fields they cover. It shows that the recommendations made in the Guidelines are echoed by these private instruments.

It is interesting to see also that these instruments introduce elements that were not addressed by the Guidelines. The ICC Rules of Conduct, for instance, recognises that “under current conditions in some parts of the world, an effective programme against extortion and bribery may have to be implemented in stages”. The ICC recommends focusing efforts on ending large-scale bribery involving politicians and senior officials. The Business Principles are also broader than the Guidelines in some respects. For example, they cover facilitation payments and gifts.

III.2 Industry initiatives

Several international industry associations have developed collective initiatives with an anti-corruption component, which are, according to Mark Pieth, Chair of the OECD Working Group on Bribery, called to further develop in the future¹⁶. The first example is the International Federation of Consulting Engineers (FIDIC), an industry association that represents the international business interests of firms belonging to national member associations of engineering-based consulting companies (see Table 4). To be part of a national member association, firms have to comply with FIDIC’s Code of Ethics and Policy Statements, including that on Integrity. This integrity policy statement aims at reducing corruption in aid-funded public procurement from the private sector side. The FIDIC Integrity Policy Statement introduces the notion of evaluation of the measures adopted to prevent corruption. The Statement also includes a number of recommendations tailored to the specificity of the industry.

Another example is the group of 12 leading international banks that have developed the Wolfsberg Anti-Money Laundering Principles, a set of global anti-money-laundering guidelines for international private banks (issues covered include: guidelines for client acceptance, practices when identifying unusual or suspicious activities, monitoring, control responsibilities and reporting, etc.). The banks collaborated with a team from Transparency International who invited two international experts to participate, including Prof. Mark Pieth, Chairman of the OECD Working Group on Bribery. These Principles do not deal with the issues of corruption directly, but contribute by raising the risks of exposure for the corrupt, by curbing money laundering.

Table 4. Three Major Private Initiatives that Promote Anti-Bribery Programmes for Companies in Perspective with the OECD Guidelines for Multinational Enterprises

	OECD Guidelines for Multinational Enterprises	ICC Rules of Conduct to Combat Extortion and Bribery	Business Principles for Countering Bribery	FIDIC Code of Ethics and Integrity Policy Statement
Developed by	OECD	The International Chamber of Commerce	Transparency International and Social Accountability International	The International Federation of Consulting Engineers
Date	2000	(1977, 1996) 1999	2002	
Broad purpose	To promote responsible business conduct	To encourage companies to adopt corruption prevention measures	To help companies develop their anti-bribery systems	To provide consulting services that are not biased by corruption
Implementation mechanism (principles)	OECD Committee on International Investment and Multinational Enterprises and the National Contact Points	Standing Committee on Extortion and Bribery, National Committees (promotion, information sharing, policy dialogue)	Steering Committee	FIDIC (disciplinary actions against members found to have violated the FIDIC Code of Ethics)
Issues covered				
Solicitation of bribes and extortion	Yes			
Standards of conduct	Yes	Yes	Yes	Yes
Internal communication, training and disciplinary measures	Yes	Yes	Yes	Yes
Employment of agents	Yes	Yes	Yes	
External communication	Yes		Yes	
Internal control systems	Yes	Yes	Yes	Yes
Accounting practices	Yes	Yes	Yes	
External audit		Yes	Yes	
Disclosure of contributions to political parties	Yes	Yes	Yes	
Whistle-blowing	Yes		Yes	
Others		Allows for implementation in stages.	Broad scope, covering all business relationships.	Evaluation of the Business Integrity Management System, measures specific to the industry.

Note: A blank means no.

Yet another example is the International Association of Oil and Gas Producers (OGP), a worldwide association of oil and gas companies involved in exploration and production. The members include private and state-owned oil and gas companies, national associations and petroleum institutes. OGP recently defined its position on transparency: OGP is “in favour of transparency and opposes corruption in any form. [OGP is] committed to honest, legal and ethical behaviour in all [their] activities, wherever [they] operate”. Furthermore, “OGP is committed to working with multilateral institutions, regulatory bodies and other appropriate parties in their efforts to reduce corruption and maximise transparency”.

Leading companies from around the world in the mining and mineral industry set up the International Council on Mining and Metals (ICMM) to develop their industry's role in the transition to sustainable development. The ICMM adopted a Sustainable Development Charter, which expresses the commitment of its members to principles of sustainable development, in four key areas: Environmental Stewardship; Product Stewardship; Community Responsibility and General Corporate Responsibilities. This Charter includes a commitment to contribute to the fight against corruption: members commit to “adhere to ethical business practices and, in doing so, contribute to the elimination of corruption and bribery, to increased transparency in government-business relations (...)”.

III.3 Other private initiatives

Other associations have set up anti-corruption initiatives with different purposes. For example, TRACE (Transparent Agents and Contracting Entities) is an international non-profit membership organization working to reduce corruption in transactions involving business intermediaries. It provides a mechanism that helps select business intermediaries who commit voluntarily, publicly and decisively to greater transparency and ethical business practices. TRACE prepares extensive background reports on member intermediaries to the highest standard internationally and makes them available to companies requesting them. It also helps provide anti-corruption training to intermediaries on their own anti-bribery laws and on international standards. This initiative contributes to the creation of standards for the use of agents.

Another example is UNICORN, which is a trade union anti-corruption network. Its overall mission is to mobilise workers to share information and coordinate action to combat international corruption. It is a joint initiative of TUAC, the International Confederation of Free Trade Unions and Public Services International. UNICORN is undertaking empirical research into the corrupt practices of multinational enterprises, particularly in the context of privatisation and public procurement. It is also undertaking policy research on a range of initiatives aimed at detecting and deterring international bribery.

ANNEX

Corruption Prevention Measures Recommended to Companies by Five Major International Anti-Corruption Instruments

The Inter-American Convention against Corruption:

Article III: *Preventive measures*, paragraph 10: State parties have agreed “to consider the applicability of measures within their own institutional systems to create, maintain and strengthen: (...)

10. Deterrents to the bribery of domestic and foreign government officials, such as mechanisms to ensure that publicly held companies and other types of associations maintain books and records which, in reasonable detail, accurately reflect the acquisition and disposition of assets, and have sufficient internal accounting controls to enable their officers to detect corrupt acts.”

The Criminal Law Convention on Corruption:

Article 14: *Account offences*: “Each Party shall adopt such legislative and other measures as may be necessary to establish as offences liable to criminal or other sanctions under its domestic law the following acts or omissions, when committed intentionally, in order to commit, conceal or disguise the offences referred to in Articles 2 to 12, to the extent the Party has not made a reservation or a declaration:

- a) creating or using an invoice or any other accounting document or record containing false or incomplete information;
- b) unlawfully omitting to make record of a payment.

Article 22: *Protection of collaborators of justice and witnesses*: “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.”

The Civil Law Convention on Corruption:

Article 9: *Protection of employees*: “Each 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.”

Article 10: *Accounts and audits*:

- “1) Each Party shall, in its internal law, take any necessary measures for the annual accounts of companies to be drawn up clearly and give a true and fair view of the company’s financial position.
- 2) With a view to preventing acts of corruption, each Party shall provide in its internal law for auditors to confirm that the annual accounts present a true and fair view of the company’s financial position.”

The Southern African Development Community Protocol on Corruption

Article 4: *Preventative measures*: “For the purposes set forth in Article 2 of this Protocol, each State Party undertakes to adopt measures, which will create, maintain and strengthen:

(...)

1.h) deterrents to the bribery of domestic public officials, and officials of foreign States, such as mechanisms to ensure that publicly held companies and other types of associations maintain books and records which, in reasonable details, accurately reflect the acquisition and disposition of assets, and have sufficient internal accounting controls to enable the law enforcement agencies to detect acts of corruption.”

The United Nations Convention against Corruption (draft of November 2002):

Article 10: *Funding of political parties*: “Each State Party shall adopt, maintain and strengthen measures and regulations concerning the funding of political parties. Such measures and regulations shall serve:

(...)

(d) To incorporate the concept of transparency into funding of political parties by requiring declaration of donations exceeding a specified limit.”

Article 11: *Private sector*: “Each State Party shall endeavour, in accordance with the fundamental principles of its domestic law, to prevent corruption involving the private sector through measures that focus, inter alia, on:

(...)

(b) Promoting the development of standards and procedures designed to safeguard the integrity of relevant private entities, including codes of conduct for the correct, honourable and proper performance of the activities of business and all relevant professions and the prevention of conflicts of interest;

(...)

(d) Promoting transparency among private entities, including, where appropriate, measures regarding the identity of legal and natural persons involved in the establishment and management of corporate entities and of holders of the capital and shares of corporate entities.”

Article 12: *Accounting standards for the private sector*:

“1. In order to prevent corruption effectively, each State Party shall take the necessary measures, in accordance with its domestic laws and regulations regarding the maintenance of books and records, financial statement disclosures and accounting and auditing standards, to prohibit the following acts carried out for the purpose of committing any of the offences established in articles [...] of this Convention:

- (a) The establishment of off-the-books accounts;
- (b) The making of off-the-books or inadequately identified transactions;
- (c) The recording of non-existent expenditure;
- (d) The entry of liabilities with incorrect identification of their objects; and
- (e) The use of false documents.

2. Each State Party shall establish effective, proportionate and dissuasive civil, administrative or criminal penalties for the omissions and falsifications referred to in paragraph 1 of this article.

3. Each State Party shall take such measures as may be necessary, in accordance with the fundamental principles of its domestic legal system, to ensure:

- (a) That private entities, taking into account their size, have sufficient internal accounting controls to assist in preventing and detecting acts of corruption; and

(b) The accounts and required financial statements of such private entities are subjected to appropriate auditing and certification procedures.”

NOTES

- 1 Cf. paragraph 9 in the commentaries on the Convention.
- 2 The Convention encompasses the three previous instruments. State Parties to the Convention commit to implement the Revised Recommendation (cf. Commentaries on the Convention, Article 13). Besides, the Revised Recommendation makes reference to both the Recommendation on Tax Deductibility and to the Recommendation on Anti-Corruption in Aid-Funded Procurement. Doing so, it extends their membership to the signatories of the Convention.
- 3 This instrument will be considered for approval by the OECD Expert Group on Managing Conflicts of Interest early April 2003.
- 4 To be precise, these two recommendations are included in the Revised Recommendation.
- 5 This paragraph is inspired by John T. Scholz (1997) "Enforcement Policy and Corporate Misconduct: The Changing Perspective of Deterrence Theory", in *Law and Contemporary Problems*, n. 127.
- 6 OECD (2001) *Corporate Responsibility: Private Initiatives and Public Goals* explores the relationship between deterrence and other determinants of companies' decisions to comply with the law or with expectations for business behavior that might be written down in law books.
- 7 This box borrows text from the CMI Policy Brief on International Legislation and Conventions on Corruption, December 2002, www.cmi.no
- 8 The Southern African Development Community (SADC) is an inter-governmental organisation established in April 1980 by Governments of the nine Southern African countries of Angola, Botswana, Lesotho, Malawi, Mozambique, Swaziland, Tanzania, Zambia and Zimbabwe. This organisation has a Programme of Action, covering several broad economic and social sectors, namely, Energy, Tourism, Environment and Land Management, Water, Mining, Employment and Labour, Culture, Information and Sport and Transport and Communications. Other sectors are Finance and Investment, Human Resource Development, Food, Agriculture and Natural Resources, Legal Affairs and Health.
- 9 Theoretically both domestic and international public bribery, as the other party involved in the bribery act can be a public official, a business person or a political party official, from a foreign country or from the same country as the enterprise's country of origin.
- 10 Links can be made between the following paragraphs: II. 5 and the chapeau of Chapter VI; II.6 and VI.5; II.7 and VI.3 and VI.5; II.8 and VI.4; II.11 and VI.6.
- 11 The solicitation of bribes is the act of asking or enticing another to commit bribery. It becomes extortion when this demand is accompanied by threats that endanger the personal integrity or the life of the private actors involved. The threat to refuse a due investment license or to tear down a plant's buildings for instance cannot be considered as creating a situation of extortion.
- 12 See DAF/IME/BR(99)15 and DAF/IME/BR(99) 34.

- 13 Cf. December 1999 Statement of the BIAC MNEs Committee – Task Force on Bribery and Corruption: www.biac.org.
- 14 See DAF/IME/BR(98)13/REV1.
- 15 For more information on these two approaches of business action, see I. Hors (2000) “Fighting Corruption in Developing Countries and Emerging Economies: The Role of the Private Sector”, OECD Development Centre.
- 16 See Gemma Aiolfi and Mark Pieth (March 2002) “How to Make a Convention Work: the OECD Recommendation and Convention on Bribery as an Example of a New Horizon in International Law”, DAF/IME/BR/WD(2002)4.