OECD CONVENTION ON COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS AND RELATED INSTRUMENTS

Convinced that bribery in international trade and investment is widespread, has many harmful repercussions and that an effective multilateral policy can be a suitable complement to national efforts to combat corruption, the Organisation for Economic Co-operation and Development (OECD) has been a leader in the global fight against bribery and corruption in international business practices. Making use of OECD Secretariat-wide expertise and cultivating synergies with other international initiatives – both public and private – the OECD has provided a unified and comprehensive front against corruption. The OECD addresses corruption from the perspective of both the recipients of illicit payments, through work on public service ethics, and the providers of illicit payments, by taking actions against bribe givers.

The fight against bribe givers gathered momentum in 1999 with the entry into force of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. This Convention, signed in Paris on 17 December 1997 under the auspices of the OECD, imposes criminal penalties on those who bribe foreign public officials in order to obtain business deals. It covers corruption of public officials of any state, not just of the states that are parties to the Convention.

The Convention is open to accession by any country that becomes a full participant in the OECD Working Group on Bribery in International Business Transactions in accordance with its procedures. Signatories currently include all 30 OECD Members and five non-Members (Argentina, Brazil, Bulgaria, Chile and Slovenia). As of November 2002, 34 signatories had ratified the Convention.

The reasons behind the development of an Anti-Bribery Convention

The work on the Convention began in 1989. It primarily aimed to level the playing field for companies active on the international market. Companies originating from a country where bribery of foreign public officials was criminalized felt that they were facing competitive disadvantages for accessing international markets compared to their counterparts from countries where foreign bribery was not criminalized. However, other reasons further supported the efforts of the OECD in this field, including the recognised increase in corruption globally, heightened public awareness of it, the perceived weakening of the major arguments against taking anti-corruption action multilaterally, and a growing sense that unilateral measures could sometimes have limited impact. The effort had as its purpose to organise effective co-operation between the principal actors in the international economy. That co-operation, building a consensus based on shared objectives, would work to promulgate an effective legal instrument containing reciprocal and comparable legal commitments to combat transnational bribery.

Discussions in the ad hoc Working Group, established in 1989 and composed of all OECD Member countries, resulted in the development of the Recommendation on Combating Bribery in International

Business Transactions, which was adopted at ministerial level by the OECD Council in 1994. This recommendation invited Member states to adopt "effective measures to detect, prevent and combat bribery of foreign public officials in international business". Those measures were to apply both to national political institutions and legislation and to the reinforcement of international co-operation. The Recommendation had the dual effect that Members, in any event, adopt national laws by the end of 1998, and open negotiations immediately to conclude a convention by the end of 1997.

Questions remained about the best way to criminalize bribery of foreign public officials in an effective and co-ordinated manner, as had been decided in the 1994 Recommendation. Clearly, the different structures of the Member countries' criminal-law systems would render impossible any agreement on the inclusion of identical provisions, either in a treaty or in national implementing legislation. To resolve this conundrum, the Group developed the concept of "functional equivalence". Differences would not matter and would be admitted, provided they led to equivalent results, namely effective prosecution and sanctions.

Based on the political commitment made by the Member states in the 1994 Recommendation and the work already accomplished since 1989, progress came rapidly. The Group, transformed into a negotiating conference of both the Member countries and those non-members already participating in its work, concluded negotiations on the text of the Convention in November 1997. The Convention was officially signed on 17 December 1997 by all OECD members and 5 non-member countries.

What is bribery?

Bribery is defined by the Convention as the offering, promising or giving of something in order to influence a public official in the execution of his/her official duties. Bribes can take the form of money, other pecuniary advantages, such as a membership in an exclusive club or a promise of a scholarship for a child, or non-pecuniary advantages, such as favorable publicity. Similar definitions concerning bribery of corporate employees are used in private sector codes of conduct. Every bribery transaction involves a supply side (the briber) and a demand side (the public official).

However, it is not necessarily a simple two-sided transaction, as in some cases intermediaries are involved in the transmission of the bribe, and in certain instances the bribe is transferred to a third party for that person's benefit rather than for the benefit of the public official. Normally, a private individual or business carries out the supply side of the transaction, but public officials may also initiate bribes to those in the private sector.

What are the requirements under the Convention?

The Convention on Combating Bribery of Foreign Public Officials in International Business Transactions is the principal tool at this time for fighting bribery of foreign public officials. In addition to joining the Working Group, signatories must accept the Revised Recommendation of 1997 of the Council on Combating Bribery and the Recommendation on the Tax Deductibility of Bribes of Foreign Public Officials, adopted on 11 April 1996. The Convention requires that each Party establish the criminal offence of bribery of foreign public officials and further establish the liability of enterprises (referred to as "legal persons" in the Convention) for the offence. The additional provisions in the Convention chiefly reinforce this requirement by enabling its effective application and enforcement. Although the objective of the Convention is to combat foreign bribery through equivalent measures, the Convention is flexible in that Parties may adapt the requirements according to their individual legal systems.

Countries that join the Convention agree to establish the offence of bribing a foreign public official in the following manner:

- It must apply to all persons.
- It must apply to the offering, promising or giving of a bribe. It is an offence regardless if the offering, promising or giving of a bribe is done through an intermediary and regardless if the advantage is for a foreign public official or a third party.
- It must apply regardless of the form that the bribe takes. Thus the offering of an advantage that is tangible or intangible as well as pecuniary or non-pecuniary must be prohibited.
- It must prohibit bribery for the purpose of obtaining or retaining "business or other improper advantage in the conduct of international business". This is not limited to the procurement of contracts, but also includes the obtaining of regulatory permits and preferential treatment in relation to taxation, customs and judicial and legislative proceedings. It is irrelevant that the person concerned was the best-qualified bidder or could properly have been awarded the business. And it is an offence irrespective of "the value of the advantage, its results, perceptions of local custom, the tolerance of such payments by local authorities, or the alleged necessity of the payment".
- A "foreign public official" must include any person holding a legislative, administrative or judicial office of a foreign country, whether appointed or elected; any person exercising a public function for a foreign country, including for a public agency or public enterprise; and any official or agent of a public international organization.

Each Party must also satisfy the following requirements under the Convention:

- Each Party must establish effective, proportionate and dissuasive criminal penalties for the foreign bribery offence. Where a Party's legal system does not apply criminal responsibility to enterprises, they shall be subject to effective, proportionate and dissuasive non-criminal penalties for the offence.
- Each Party must establish its jurisdiction over the foreign bribery offence when the offence is committed in whole or in part in its territory. Where a Party has jurisdiction to prosecute its nationals for offences committed abroad, it shall establish such jurisdiction over the foreign bribery offence according to the same principles.
- Where a Party has established a money laundering offence in relation to the bribe and/or proceeds of domestic bribery, it shall do so on the same terms for foreign bribery.
- Each Party is required to prohibit certain accounting and auditing practices that facilitate the concealment of foreign bribery.
- Each Party is required to provide prompt and effective legal assistance to other Parties seeking assistance in the investigation and prosecution of foreign bribery offences. In addition, the bribery of a foreign public official shall be deemed to be an extraditable offence under the laws of the Parties and the extradition treaties between them.

In addition, to comply with the 1997 Recommendation, Parties commit themselves to the following measures for deterring, preventing and combating international bribery:

- Encouraging the introduction of sound internal company controls, including standards of conduct and controls applicable down to the operational level. In the area of public procurement, companies responsible for bribing foreign public officials should be suspended from future public contract bids.

- Requiring that anti-corruption provisions be included in bilateral aid-funded procurement, promoting the proper implementation of anti-corruption provisions in international development institutions, and working closely with development partners to combat corruption in all development co-operation efforts.

How is implementation monitored?

The Convention and the 1997 Recommendation are enforced through a program of systematic follow-up to monitor and promote their full implementation. This is essentially accomplished through a rigorous peer-review process involving two evaluative phases.

Phase 1: Determining the conformity of the implementing legislation with the Convention

Phase 1 of this process, which began in April 1999, involves an examination of the relevant laws and secondary legal sources of each Party to determine whether they conform to the requirements under the Convention.

In preparation for the Phase 1 examination, each Party to the Convention is required to reply to a questionnaire designed to evaluate compliance with the Convention. A provisional review is prepared on the basis of a Party's responses and the comments of the two countries that serve as lead examiners as well as the OECD Secretariat.

Once the provisional review is transmitted to the Working Group, two rounds of consultations take place in the Working Group for the purpose of further assisting Members in understanding the country's legal system and approach to implementing the Convention and providing the Group with an opportunity to clarify specific issues. The Working Group concludes the examination with the adoption of an evaluation that targets specific issues requiring further examination in Phase 2 of the evaluation process (see further below), and in some cases, recommends remedial action. Together the final review and evaluation comprise the report of a Party's implementation of the Convention and 1997 Recommendations.

As of November 2002, out of the thirty-four countries that have deposited their instruments of ratification/accession with the Secretary-General (see Table in Annex 1), thirty-one have had their implementing legislation examined by the Working Group to assess conformity with the Convention. Brazil and Chile, which have just passed their implementing legislation, will soon be reviewed. Turkey will be reviewed once its implementing legislation is enacted. Slovenia has announced a revision of its foreign bribery offence and will be examined once its modifications are passed by Parliament.

The overall assessment of countries' compliance with the Convention has been positive, even though the Working Group has identified certain deficiencies in its review of some countries, as well as

specific issues of varying magnitude that need addressing for almost all of the countries reviewed. The Group made specific recommendations for remedial action wherever potential loopholes or gaps were observed, or where it considered that the provisions fell below the standards set by the Convention. Parliamentary amendments have been made in several countries to address issues raised in their Phase 1 examinations. For example, in the Slovak Republic, legislation was adopted to extend the foreign bribery offence to third party beneficiaries and to raise the level of sanctions and the statute of limitations for this offence. In Japan, amendments to the Unfair Competition Prevention Law broadened the definition of public officials in relation to public enterprises. In the United Kingdom, Parliament recently passed an Anti-Terrorism Law which includes provisions clarifying the foreign bribery offence. The resulting reports and recommendations by the Working Group are available on the OECD website at www.oecd.org/daf/nocorruption.

Phase 2: Evaluating the application of the implementing legislation in practice

In November 2001, June and October 2002 the Group conducted its first Phase 2 consultations with Finland, the United States and Iceland. Phase 2 focuses on the application of the laws in practice. It studies the structures put in place to enforce the laws and rules implementing the Convention and to assess their application in practice. Phase 2 broadens the focus of monitoring to encompass more fully the non-criminal law aspects of the 1997 Revised Recommendation. Phase 2 also serves an educational function as participants discuss problems and different approaches.

Similar to Phase 1, the Parties to the Convention are required to reply to a questionnaire adopted by the Working Group in December 2000. Supplementary questions to this questionnaire, specific to the country concerned, take account of the results of the country's evaluation in Phase 1 in order to follow up on issues identified in its review. The questionnaire also elicits information concerning implementation of the Revised Recommendation.

A team of experts from the OECD Secretariat and two designated lead examining countries then carry out on-site visits of approximately 2-3 days to obtain information on practice with respect to a number of elements such as enforcement and prosecution. On-site visits also offer the possibility to talk with magistrates, police, tax and other authorities responsible for applying the law. The on-site visits also provide an opportunity to consult on other matters covered by the Recommendation. In addition to consultations with public authorities, the Phase 2 also benefits from informal exchange of views with key representatives of the private sector and civil society in order to determine the impact that the laws and enforcement have had on behaviour, including compliance schemes. Each country is consulted on the best manner of obtaining input from the private sector and civil society.

As for Phase 1, the Phase 2 report, which is drafted by the OECD Secretariat together with the lead examiners, has a standard format that includes sections on description, evaluation and recommendations for improvement. The preliminary reports are based on the reply to the questionnaire and information obtained during the on-site visit to the examined country. Previous to the consultation on this report in the Working Group, the country undergoing evaluation is given an opportunity to comment on the preliminary report.

The mutual evaluation of the country undergoing evaluation is undertaken through a consultation in the Working Group. The consultation provides an opportunity to discuss difficult issues, to listen to the evaluated country's explanations of its legal system and approach, and to formulate the recommendations that the Group would agree to make.

Following these discussions, the Working Group formulates an evaluation concerning the country's performance to be incorporated in the final report. The examined country has the right to have its views, comments, and explanations fully reflected in the final report and the evaluation adopted by the Working Group. Phase 2 country reports are equally available to the public on the OECD website upon adoption by the Working Group.

What is the role of the private sector?

In addition to governments establishing the offence of foreign bribery in their national legal framework and ensuring the effective application of the corresponding laws, the private sector has an important role, and interest, in taking measures to curb foreign bribery and to comply with the relevant laws.

Some companies have established their own anti-corruption strategies, including the adoption of codes of ethical conduct that include provisions concerning bribery and extortion between the private and public sectors as well as between private companies. These codes express the companies' serious commitment to comply with international efforts to combat corruption, and are intended to modify the corporate culture and attitudes of its employees to reduce the risk of corrupt behavior. They often are accompanied by the creation of management systems for monitoring and reviewing compliance.

At the OECD's annual Council meeting at ministerial level in June 2000, an agreement was reached on a revised set of Guidelines for Multinational Enterprises (non-binding recommendations to enterprises made by the Member countries). The Guidelines include rules for combating bribery that address the supply and demand sides of the bribery transaction. They focus on the bribery of public officials and the employees of business partners, as well as preventing the channeling of payments through the use of subcontracts, purchase orders and consulting agreements to public officials, employees of business partners, relatives and business associates. In addition, the Guidelines address the issue of remuneration of agents. Further provisions require enterprises to adopt management control systems, including financial and tax and auditing practices, for discouraging bribery and corrupt practices, and requires them to promote public and employee awareness of their programs and policies in this regard. Finally, there should be no illegal contributions to candidates for public office, political parties and other political organizations, and enterprises should disclose political contributions.

A second instrument which complements the OECD Anti-Bribery Convention – the OECD Corporate Governance Principles – was adopted by Member governments of the OECD in 1999. The Principles intend to assist Member and non-Member governments in their efforts to evaluate and improve the legal, institutional and regulatory framework for corporate governance in their countries, and to provide guidance and suggestions for stock exchanges, investors, corporations, and other involved parties. The Principles focus on publicly traded companies, however to the extent they are deemed applicable might also be a useful tool for non-traded companies, for example, privately held and state-owned enterprises. Based on these principles, regional corporate governance roundtables have been established, including for Asia with the participation of the People's Republic of China. These roundtables aim to assist decision-makers from both the private and public sectors in their efforts to improve the understanding and practice of corporate governance, and to facilitate the continuous dialogue between the private and public sectors on these issues.

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Annex 1: Dates of ratification and entry into force of implementing legislation

Country	Deposit of instrument of ratification/ acceptance	Entry into force of the Convention	Entry into force of implementing legislation
Argentina	8 February 2001	9 April 2001	10 November 1999
Australia	18 October 1999	17 December 1999	17 December 1999
Austria	20 May 1999	19 July 1999	1 October 1998
Belgium	27 July 1999	25 September 1999	3 April 1999
Brazil	24 August 2000	23 October 2000	11 June 2002
Bulgaria	22 December 1998	20 February 1999	29 January 1999
Canada	17 December 1998	15 February 1999	14 February 1999
Chile (*)	18 April 2001	17 June 2001	--
Czech Republic	21 January 2000	21 March 2000	9 June 1999
Denmark	5 September 2000	4 November 2000	1 May 2000
Finland	10 December 1998	15 February 1999	1 January 1999
France	31 July 2000	29 September 2000	29 September 2000
Germany	10 November 1998	15 February 1999	15 February 1999
Greece	5 February 1999	6 April 1999	1 December 1998
Hungary	4 December 1998	15 February 1999	1 March 1999
Iceland	17 August 1998	15 February 1999	30 December 1998
Ireland	--	--	26 November 2001
Italy	15 December 2000	13 February 2001	26 October 2000
Japan	13 October 1998	15 February 1999	15 February 1999
Korea	4 January 1999	5 March 1999	15 February 1999
Luxembourg	21 March 2001	20 May 2001	11 February 2001
Mexico	27 May 1999	26 July 1999	18 May 1999
Netherlands	12 January 2001	13 March 2001	1 February 2001
New Zealand	25 June 2001	24 August 2001	3 May 2001
Norway	18 December 1998	16 February 1999	1 January 1999
Poland	8 September 2000	7 November 2000	4 February 2001
Portugal	23 November 2000	22 January 2001	9 June 2001
Slovak Republic	24 September 1999	23 November 1999	1 November 1999
Slovenia	6 September 2001 (accession instrument)	5 November 2001	--
Spain	4 January 2000	4 March 2000	2 February 2000
Sweden	8 June 1999	7 August 1999	1 July 1999
Switzerland	31 May 2000	30 July 2000	1 May 2000
Turkey (*)	26 July 2000	24 September 2000	--
United Kingdom	14 December 1998	15 February 1999	14 February 2002
United States	8 December 1998	15 February 1999	10 November 1998