



Fighting Bribery in International Business Deals

Why fight corruption?

How does the Convention combat bribery?

How are implementation and enforcement monitored?

How does the Convention fit in the international context?

What lies ahead?

For further information

For further reading

Where to contact us?

Introduction

Bribing public officials to obtain advantages in international business raises serious moral and political concerns, undermines good governance and sustainable economic development, and distorts international competition.

For more than a decade, the OECD has played a leading role in the battle against bribery and corruption in international business. The OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (“the Convention”) makes it a crime to bribe a foreign public official in exchange for obtaining, or retaining, international business. Focusing on the “supply side” of bribery – the person or entity who offers, promises or gives a bribe – the Convention contributes to building a stronger alliance between governments, businesses and citizens working towards transparent and honest business transactions.

The Convention represents a landmark in international co-operation to fight bribery and corruption.

A total of 37 countries have ratified the Convention and transposed it into domestic legislation. This is a remarkable achievement; before the Convention, foreign bribery was a criminal offence in only a few countries. Through a rigorous monitoring process, the OECD ensures that all signatory countries fully implement the Convention.

Countries are required to establish the criminal offence of bribing a foreign public official in their national laws, and to have in place adequate sanctions and reliable means for detection and enforcement. Parties must also deny the tax deductibility of such bribes.

Criminalising bribery is not enough, however. Businesses must contribute by changing the corporate culture. The OECD Guidelines for Multinational Enterprises include measures that enterprises should take to prevent bribery, and the OECD Principles of Corporate Governance call for more disclosure and financial transparency to discourage bribery.

The OECD’s work in public governance addresses the related issues of preventing, detecting and penalizing misconduct by public officials. The 2006 OECD Recommendation on Bribery and Officially Supported Export Credits, which requires members to take measures to deter bribery before export credits are granted, also contributes to the fight against corruption.

This *Policy Brief* focuses on the OECD Anti-Bribery Convention, and its implementation and enforcement. ■

Why fight corruption?

There is no scarcity of scandals that illustrate the depth and pervasiveness of corruption: bribes to high-level officials for government contracts (e.g. defence contracting, infrastructure projects, and oil and gas concessions), plundering of national assets, and endemic “confusion” between private and public funds in some developing and transition economies.

Corruption in awarding business contracts has social, political, environmental and economic costs – which no country can afford. If public officials take bribes when awarding contracts to foreign businesses for public services such as roads, water or electricity, serious consequences result: prices are inflated, allocation of resources is distorted, foreign investment becomes less appealing, and competition is undermined. The effects on investment, growth and development are devastating. A one-million-dollar bribe can rapidly amount to a one-hundred-million-dollar loss in a poor country, through derailed development plans and incoherent investment decisions. Furthermore, corruption exacts an inordinately high price on the poor by denying them access to vital basic services. Unwilling to tolerate these abuses, citizens and financial markets called for a united, international fight against corruption. The Convention is one response. It came into effect in 1999, and to date 37 countries have signed up – the 30 OECD members, plus Argentina, Brazil, Bulgaria, Chile, Estonia, Slovenia and South Africa. ■

How does the Convention combat bribery?

Countries that accede to the Convention agree to make bribing foreign public officials in international business transactions a criminal offence. The Convention covers bribery for the purpose of obtaining or retaining “business or other improper advantage in the conduct of international business”. This applies to obtaining government contracts, and also includes obtaining regulatory permits, and preferential treatment in taxation, customs, or judicial and legislative proceedings.

The Convention requires that legislation making bribery of a foreign public official a criminal offence applies to both individuals and companies; and that it covers offering or promising a bribe, as well as actually giving one. Foreign bribery is an offence regardless of whether the bribe is done through an intermediary, or whether the advantage is for the foreign public official or a third party, such as a spouse, political party, or company in which the official has an interest. It must prohibit all forms of bribes, including tangible or intangible and pecuniary and non-pecuniary advantages such as membership in a club or a job in the private sector.

Bribery is a crime even if the briber was the best-qualified bidder in a procurement process, and would have been awarded the contract purely on merit. Criminality also applies regardless of whether the bribe was accepted or the official provided the desired advantage, or if bribery is tolerated or even widespread in the country concerned.

The Convention defines a “foreign public official” as any person holding a legislative, administrative or judicial office in 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 organisation.

The Convention also requires each Party to:

- Establish effective, proportionate and dissuasive criminal penalties for the foreign bribery offence. Where a country’s legal system does not apply criminal responsibility to enterprises, they must be subject to effective, proportionate and dissuasive non-criminal penalties.
- Establish jurisdiction in accordance with its legal principles when the foreign bribery offence is committed in whole or in part in its territory, as well as when it is committed abroad. The ability to prosecute foreign bribery that takes place overseas is essential, as the offence usually takes place in the foreign public official’s country. Parties must also establish an offence of laundering bribes and the proceeds of foreign bribery; this deters foreign bribery and also provides a tool for detecting it.
- Prohibit accounting and auditing practices that make it easier to conceal foreign bribery.
- Provide prompt and effective legal assistance to other Parties for sharing evidence in investigating and prosecuting foreign bribery. Countries’ own laws and treaties between parties must require extradition in cases of bribery of a foreign public official.

Signatories also accept the OECD Revised Recommendation on Combating Bribery in International Business Transactions (the “revised Recommendation”), which complements the Convention with non-criminal provisions for combating transnational bribery. These measures include: eliminating tax deductibility of bribes, ensuring transparent book-keeping and auditing practices, and adopting preventive and repressive measures against corruption in public procurement.

Recognising that countries have different legal systems and structures, the Convention does not mandate that signatory countries use uniform measures to implement its standards. Instead it seeks a consistency of results – what matters is that all countries who have ratified the Convention implement it in a way that is effective and enforceable. This principle is referred to as “functional equivalence”. ■

How are implementation and enforcement monitored?

To ensure the effective implementation of the Convention and the revised Recommendation, signatory countries adopted an ongoing monitoring process based on the OECD's peer review principles. The OECD Working Group on Bribery in International Business Transactions (the "Working Group") – which includes representatives of each party to the Convention – is in charge of this monitoring process.

The OECD's peer-driven monitoring mechanism – called the "gold standard" of monitoring implementation by Transparency International – motivates State Parties to honour their commitments to uphold the Convention, and allows sharing of ideas and good practices.

Phase 1 evaluations are an initial in-depth review of the national laws and other legal texts through which State Parties implement the Convention. Two State Parties designated as lead examiners for each evaluation assess the review country's legal measures to determine whether they meet the standards set in the Convention.

Phase 2 examinations study the structures to enforce these laws and rules to assess their application in practice. Lead examiners participate in an on-site visit to the examined country, where they meet with police and prosecutors, members of the judiciary, and government officials from relevant ministries (e.g. justice, foreign affairs, finance). They also meet with the private sector, civil society, and the legal profession, as well as reviewing enforcement issues related to bribery investigations and prosecutions.

Countries are required to present oral follow-up reports detailing their progress in addressing the recommendations included in the Phase 2 report within one year after completing the review. Written follow-up reports cover efforts during the two years following a country's Phase 2 examination. Phase 2 continues with a second oral follow-up report to assess progress in implementing any recommendations that were not previously addressed in a satisfactory manner; these oral reports are delivered to the Working Group three years after adoption of the original Phase 2 report.

When the Working Group finds serious deficiencies in a country's implementation and enforcement of the Convention, it has the option of conducting an additional Phase 2 evaluation – a Phase 2 *bis* review. The Phase 2 *bis* process includes another on-site visit, albeit shorter and focused on specific identified problem areas. If there is continued failure to adequately implement the Convention following a Phase 2 *bis* review or the follow-up to a Phase 2 review, the Working Group can take further action.

As of mid-2008, all State Parties had completed their Phase 1 reviews. Only South Africa, which joined the Working Group in April 2007, had yet to undergo its Phase 2 review; this was due to take place in 2009.

As the Phase 2 evaluation process nears its end, the Working Group on Bribery is working to create a structure and procedures for the next phase of evaluations of compliance with the Convention. The Group has agreed that this third phase will include an on-site visit and will focus on: key cross-cutting issues; the progress made by parties on specific weaknesses identified in their Phase 1 and 2 evaluations; enforcement efforts and results; and any issues raised by changes in countries' legislation or institutional frameworks. ■

How does the Convention fit in the international context?

The OECD Anti-Bribery Convention is the first, and so far the only, international instrument focusing on bribery of officials by foreign companies in order to obtain business. Its provisions on the “supply” side of bribery are very detailed and its standards are tough. However, strong action by governments to address both the supply of bribes and the demand for bribes is necessary to reduce corruption.

Several other international conventions provide a broader framework for addressing all aspects of the bribery equation, and the “demand” side in particular: the officials who ask for or accept bribes. These include regional instruments such as the Organization of American States' Inter-American Convention against Corruption, and the Council of Europe's anti-corruption conventions, and the United Nations Convention against Corruption (UNCAC).

Because UNCAC is open to all States for signature, it adds significant momentum to the anti-corruption movement. It complements and strengthens some requirements under other international instruments and tackles new issues not previously addressed. ■

Table 1.
COUNTRIES THAT HAVE RATIFIED THE OECD ANTI-BRIBERY CONVENTION

Argentina (2001)	Czech Republic (2000)	Iceland (1998)	Netherlands (2001)	South Africa (2007)
Australia (1999)	Denmark (2000)	Ireland (2003)	New Zealand (2001)	Spain (2000)
Austria (1999)	Estonia (2004)	Italy (2000)	Norway (1998)	Sweden (1999)
Belgium (2000)	Finland (1998)	Japan (1998)	Poland (2000)	Switzerland (2000)
Brazil (1998)	France (2000)	Korea (1999)	Portugal (2000)	Turkey (2000)
Bulgaria (1998)	Germany (1998)	Luxembourg (2001)	Slovak Republic (1999)	United Kingdom (1998)
Canada (1998)	Greece (1999)	Mexico (1999)	Slovenia (2001)	United States (1998)
Chile (2001)	Hungary (1998)			

What lies ahead?

Since its entry into force almost 10 years ago, the OECD Anti-Bribery Convention has proven successful in advancing the fight against international bribery. But there is still much work to be done; the Working Group on Bribery would like to see more investigations and prosecutions of foreign bribery in State Parties, and is working to strengthen the Convention and continue the monitoring process to this end.

Today's global environment and technological advances are changing the face of business. For example, electronic transfers make corruption easier to commit and more difficult to detect.

In this environment, it is even more vital that State Parties remain vigilant in continuing their individual and co-operative efforts to encourage a business environment that does not tolerate unfair, unethical and unlawful behaviour. State Parties must keep up vital monitoring activities, and work together across borders to enforce their anti-bribery laws. To ensure that the OECD anti-bribery instruments remain at the forefront, the Working Group launched a comprehensive review of these instruments in 2007. This is expected to be completed in 2009.

The Convention will also need to extend its reach to the new emerging economies. In 2007, South Africa became the first African country to adhere to the Convention. But it is essential that other countries – such as China, India and Russia – join in the efforts to combat international corruption. The Organisation is stepping up its relationship with China and India, and Russia is a candidate for OECD membership, along with Israel.

Box 1.
**THE ROLE OF CIVIL
SOCIETY AND
THE PRIVATE SECTOR**

Civil society plays a key role in fighting corruption, and many civil society and private sector organizations work with the OECD in implementing the Convention.

The Working Group on Bribery conducts annual consultations with civil society, trade unions and business representatives; these groups are also invited to comment on the country reviews, particularly during the on-site visits as part of the Phase 2 monitoring process. Their feedback provides an independent perspective on government efforts, and can also put pressure on governments to comply with their commitments under the Convention.

To increase the impact of the OECD Anti-Bribery Convention, companies must become full partners in ensuring compliance with the Convention and with national anti-bribery laws. Some companies have voluntarily established their own anti-corruption strategies, which express their serious commitment to comply with international efforts to combat corruption – and are intended to modify the corporate culture and change employee attitudes to reduce the risk of corrupt behaviour. They are often accompanied by management systems for monitoring and reviewing compliance, and mechanisms allowing employees to report suspicions of corrupt conduct.

Finally, the Convention has also set an international benchmark for non-OECD countries' efforts to combat bribery; it is essential that the OECD maintains its role as a driving force in the fight against international corruption. The Organisation is continuing its policy dialogue with non-members.

The Anti-Corruption Network for Eastern Europe and Central Asia and the ADB/OECD Anti-Corruption Initiative for Asia and the Pacific, as well as efforts in Latin America and Africa, will continue to help participating countries work towards meeting international anti-corruption standards and enhance their capacity to fight corruption. These initiatives will also continue to bring together donors, governments, private enterprise and civil society to provide mutual support and to share successful experiences and techniques for curbing corruption.

For the fight against international bribery to succeed, sustained political commitment is essential. ■

For further information

For more information about the OECD's work on combating bribery, please contact Patrick Moulette, Head of the Anti-Corruption Division, at patrick.moulette@oecd.org or tel.: +33 1 45 24 91 02.



For further reading

Phase 1 and Phase 2 monitoring reports, Mid Term Study of Phase 2 reviews conducted between September 2001 and the end of 2005 (during this period, Phase 2 reports were completed for 21 Parties): www.oecd.org/daf/nocorruption.

Bribery in Public Procurement: Methods, Actors, and Counter-Measures: www.oecd.org/document/60/0,3343,en_2649_34855_38446908_1_1_1_1,00.html.

Specialised Anti-Corruption Institutions: Review of Models: www.oecd.org/document/16/0,3343,en_2649_34859_40460240_1_1_1_1,00.html.

Corruption: Glossary of International Criminal Standards: www.oecd.org/document/2/0,3343,en_2649_34859_40460290_1_1_1_1,00.html.

Mutual Legal Assistance, Extradition and Recovery of Proceeds of Corruption in Asia and Pacific: www.oecd.org/document/9/0,3343,en_34982156_34982460_37892041_1_1_1_1,00.html.

Curbing Corruption in Public Procurement in Asia and the Pacific: www.oecd.org/document/61/0,3343,en_34982156_34982460_37504509_1_1_1_1,00.html.

Consultation Paper: Review of the OECD Instruments on Combating Bribery of Foreign Public Officials in International Business Transactions Ten Years after Adoption: www.oecd.org/dataoecd/18/25/39882963.pdf.

OECD Anti-Corruption website: www.oecd.org/bribery.

OECD publications can be purchased from our online bookshop:

www.oecd.org/bookshop

OECD publications and statistical databases are also available via our online library:

www.SourceOECD.org

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