OECD Working Group on Bribery

Public Comments:
Review of the 2009 Anti-Bribery Recommendation
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As part the review of the 2009 OECD Anti-Bribery Recommendation, the OECD Working Group on Bribery held an online public consultation between 22 March 2019 and 6 May 2019. Interested parties were invited to comment on a consultation paper which identified the main cross-cutting issues that have emerged over the last decade from the implementation of the OECD anti-bribery instruments, as well as provide any other input they consider appropriate. This document compiles the public comments received.

ACCOUNTING AND AUDITING PROFESSION

Association of Chartered Certified Accountants (ACCA)

General Comments

ACCA (the Association of Chartered Certified Accountants) is the global body for professional accountants. We aim to offer business-relevant, first-choice qualifications to people of application, ability and ambition around the world who seek a rewarding career in accountancy, finance and management.

Founded in 1904, ACCA has consistently held unique core values: opportunity, diversity, innovation, integrity and accountability. We believe that accountants bring value to economies in all stages of development. We aim to develop capacity in the profession and encourage the adoption of consistent global standards. Our values are aligned to the needs of employers in all sectors and we ensure that, through our qualifications, we prepare accountants for business. We work to open up the profession to people of all backgrounds and remove artificial barriers to entry, ensuring that our qualifications and their delivery meet the diverse needs of trainee professionals and their employers.

We support our 208,000 members and 503,000 students in 179 countries, helping them to develop successful careers in accounting and business, with the skills required by employers. We work through a network of 104 offices and centres and more than 7,300 Approved Employers worldwide, who provide high standards of employee learning and development. Through our public interest remit, we promote appropriate regulation of accounting, and conduct relevant research to ensure accountancy continues to grow in reputation and influence.

ACCA welcomes this opportunity to contribute to the process of enhancing the effectiveness of the OECD Anti-bribery Convention through the review of the 2009 Recommendation. There have been fundamental changes in the business environment over the last ten years, and both the pressures on business and the tools and processes available to businesses and regulators have developed to a point where updated and expanded guidance can offer significant benefits to all stakeholders.

In addition to the specific comments set out below, ACCA is pleased to support and endorse, as a member of the Anti-Corruption Committee, the recommendations of the BIAC response to the consultation.
Areas for specific comment

What are your general impressions concerning the effectiveness and implementation of the 2009 Anti-Bribery Recommendation?

The Recommendation is an invaluable resource for policy makers, high-level corporate decision-takers and professional advisers in. In order to build upon the foundations laid over the last ten years to maximise the impact and effectiveness of the guidance, the development of specific concrete guidance for businesses, especially smaller businesses, should be explored in collaboration with business and their representative bodies, such as BIAC.

ACCA has members who work directly in private sector business, large and small, with responsibility for developing policies and implementing procedures to combat corruption, as well as those who advise businesses, and who work in the public sector and SOEs. There is a recognition across all three groups of the value of consistent and widely available guidance that is relevant to the target audience, built upon peer experience and coordinated with other initiatives.

What recommendation(s) could be envisaged to address issues related to foreign bribery, concerning, for instance the demand side of bribery or the bribery of officials from sports organisations, bearing also in mind the specific focus of the Anti-Bribery Convention and the work carried out in other fora on these issues?

While there are other instruments which address the issue of bribery, in both public and private sector, there is nevertheless still clearly plenty to be done to address the harm which corruption does to society and the economy. The demand side of bribery in particular is an area of particular importance to smaller business.

The combined impact of the current focus on supply side and the exclusion of Small Facilitation Payments from the formal scope of the Convention is to reduce the assistance and protection it offers to smaller businesses.

What recommendation could be envisaged to further address the issues of responsibility of legal persons for foreign bribery through intermediaries?

The use of intermediaries to conceal and facilitate the offence of bribery is a clear indicator of intent and knowledge of wrongdoing. With this in mind, consideration should be given to the introduction of aggravated offences where intermediaries are used in an attempt to disguise criminal behaviour. Where local jurisprudence recognises corporate offences then prosecutors should consider the relative merits of pursuing natural persons or bodies corporate in the light of evidential process in all affected jurisdictions, parties to the offences.

Active consideration should be given to the impact of technological change on both the nature and importance of intermediaries in bribery offences. The role and culpability of internet platform and service providers in the facilitation of bribery offences should be investigated and the scope for guidance, codes of conduct and even regulatory measures to assist in the prevention, detection and deterrence of bribery offences explored. Cooperation with tax authorities, who are similarly exercised by the digitalisation of the wider economy, would improve both the measures proposed and their impact on business, reducing the risk of disruption to compliant businesses and business models.
How could the Good Practice Guidance on Internal Controls, Ethics, and Compliance (the GPG) annexed to the 2009 Anti-Bribery Recommendation be revised to reflect evolving global standards?

The Annex II Guidance states in the preamble that its primary audience is companies developing and implementing internal controls, ethics, and compliance programmes or measures for preventing and detecting the bribery of foreign public officials in their international business transactions. The principles set out in the guidance are high level and applicable mostly to larger organisations with formal structures and reporting lines, and often subject to other regulatory and reporting obligations. The availability of consistent and coherent guidance which is applicable to and comparable between the largest organisations is invaluable in the fight against corruption, but it is essential that such guidance remains relevant and appropriate.

With that in mind, active consideration should be given to updating the guidance to reflect the enormous changes which the digitalisation of the economy has brought both to the internal structures and process of big businesses, and also to the wider economic environment within which they operate and the pressures which are brought to bear on them as a result. The scope for technological solutions to prevent, detect and deter corrupt behaviours should be highlighted in the revised guidance.

The usefulness of the guidance as a resource for business owners of all sizes should be considered and addressed. The existing high level principles function as a sound framework for larger businesses with the resources to research and develop their own process and policies with a view to developing an internal culture which educates and enables employees at all levels to identify and address corrupt behaviours.

For smaller businesses, the challenges they face and the resources they have available to address them are very different. In the ten years since the guidance was developed the technological advances discussed above have fundamentally changed the environment for small businesses and doing business across international borders is now within the reach of the smallest of organisations.

With that greater freedom to explore new markets comes the exposure to new threats. Whereas corporate culture is an important factor in behaviour and performance for larger businesses, it is simply not a relevant concept for small, medium and in particular micro-enterprises. The culture which is relevant to a smaller business is not the internal approach to colleagues and business partners, but rather the external factors and pressures which come to bear on the business owners on a daily basis, whether in terms of their business relationships or as members of their local community. In the fight against corruption it is essential that these smaller businesses are given the tools to recognise the threats that they face and to enable them to deal with them.

When developing guidance for smaller businesses the relative importance of different factors changes. The demand side of bribery is of relatively greater importance, as they will typically not have the resources to offer bribes of their own initiative. Equally it will very often be the case that the demands made of smaller businesses may be closer in character to small Facilitation Payments rather than bribery as defined for the Convention.

However, regardless of the precise legal nature of the payments made, they will almost invariably represent a proportionately far greater burden on a small enterprise than they would a larger multinational business. Even where the business can “afford” such payments itself, they still represent an unfair advantage over competitors who cannot or will not pay the price. The importance of providing support to small businesses cannot be
overemphasised, along with the need for formal regulatory frameworks which recognise the particular challenges they face. Criminalising the solicitation of bribes by those who are in a position of power relative to small business is of course an essential first step to protecting those businesses which cannot protect themselves, but it is if anything even more important that businesses are aware that corrupt practices, far from being the acceptable norm, should be seen as inappropriate and resisted.

The OECD guidance should be expanded and developed so as to clearly support and encourage small businesses in resisting corrupt business behaviours, both individually and collectively. At a practical level this should recognise the limited time available to small business owners to devote to what they might see as non-core activities.

Guidance must be short, simple and to the point, and available in a range of easily accessible formats.

**What recommendation could be envisaged to address the issue of incentivising antibribery compliance?**

Consideration should be given to the recognition of antibribery compliance measures within the formal guidelines for dealing with prosecutions and non-trial resolutions in respect of bribery offences. Emphasis should be placed upon the importance of substance over form in implementing policies and processes. The importance of proportionate measures for different sized businesses should be highlighted in order to encourage smaller businesses that there are steps which they can and should take to mitigate the risks of corruption.

**What recommendation could be envisaged to address non-trial resolutions in the enforcement of the foreign bribery offence?**

A more complete exploration and explanation of the benefits of non-trial resolutions would aid their acceptance as an acceptable outcome. In particular, authorities should highlight the benefit to society of reduced costs in resolution.

When a bribery offence is identified, then the outcomes for the business paying the bribe should comprise behavioural changes and financial penalties which have a direct effect on the business itself. These will have an impact on society, but in order to fully appreciate the overall consequences of the process then we need to consider also the costs and impacts which sit outside the business such as the costs of the process borne by society – legal investigation, prosecution etc. In order to properly assess the overall costs and benefits to society the costs both within and without the business need to be brought into account, so as to reflect not just the future benefits of a compliant business but also the opportunity cost to society of investigating the offence in the first place.

The final outcome of the behavioural changes required of the business should not be affected per se by cooperation. While it may well be that a business which has already shown itself to be on the path to better behaviour by cooperating will have fewer steps to take to reach an acceptable level, the final outcome (ethical business) will remain the same.

However, the level of any financial penalties imposed should be netted off against the costs of the actions required to bring the business to a point of compliance. The costs of investigating a cooperative business will typically be far lower than for a non-cooperative business. The prosecutorial authority will ultimately want to see a similar level of evidence to support the outcome and justify it, whether the matter proceeds to a trial or is disposed of by non-trial resolution but the cost to society of gathering that evidence can be
significantly affected by the cooperation of the business. Where the business cooperates and reduces that cost to society then there is a strong argument that the level of financial penalties imposed should to an extent be mitigated by that lower cost to society of resolution. The longer term impact on the health of the reformed business can also be considered. Where the business has demonstrated that it will make the effort to use its funds responsibly there is less imperative to deprive the business of those funds and divert them to society to spend directly on useful outcomes; conversely, a business which has shown itself to be wilfully non-compliant might legitimately be considered both deserving of greater sanction and also to be a

less able to guarantee responsible stewardship of the funds for the benefit of society. Nevertheless it will remain essential for any non-trial resolution outcomes to be used openly and transparently, and for the reasoning behind any differential in financial penalties between cooperative and non-cooperative businesses to be clearly and comprehensively set out, possibly even with an expectation that if the business re-offends then any future sanction will take into account the precise circumstances of the re-offence and the extent to which it might be appropriate to reflect that in the terms and outcomes of a prosecution.

**What recommendation could be envisaged to address the issue of judicial specialisation and training?**

The more that bribery offence resolutions rely upon an analysis of the effectiveness and appropriateness of internal processes to assess culpability, the greater the need for specialised knowledge of the current state of the art with respect to business practices and technology. As the pace of technological change accelerates, so it becomes increasingly difficult to keep abreast of changes in what it is reasonable and appropriate to expect of a business. In particular the availability of technological tools which might enable smaller businesses to implement processes which were previously available only to the largest of businesses can be expected to change with increasing rapidity.

Consideration should be given to calling upon recognised experts in the field to support the judiciary in their consideration of these factors. The level of specialisation required to ensure equitable treatment of businesses of different sizes at different times is likely to require a level of training that is not necessarily delivered most effectively by directly training judges in this extremely complex and fast changing area. Courts should be open to the appointment of expert witnesses from the audit and accountancy communities to inform and support the judiciary, allowing the judges to focus on core skills and competencies rather than short-lived expertise which will be relevant only to a minority of the cases that they hear.

**What step could the Working Group take to further address small facilitation payments?**

Small Facilitation Payments are a proportionally far greater concern for smaller businesses than they are for larger businesses. The impact is felt at a number of levels. In direct financial terms a payment of eg $100 will have a proportionally greater impact on a smaller business than a larger one. The effect is to distort the competitive environment in favour of larger businesses which are more easily able to bear the costs of Facilitation Payments.

The opportunity cost to an SME will be felt in different ways than for a larger business. The funds removed from the business can no longer be reinvested into growth. The marginal benefit of the compounding effect of that lost investment will be far greater than for a larger business, permanently stunting the growth of the business.
Where the costs are borne out of the owners’ share of the profits it will be reflected directly in a reduced standard of living for the business owner and their family. Whereas in a larger business the costs will be shared across hundreds or even thousands of employees, for a small or micro business the burden will be felt by only a tiny handful of individuals, who are also statistically less likely to have the disposable income out of which to fund such expenditure.

**What recommendation(s) could be envisaged to:**

**a. Enhance detection and reporting of foreign bribery by financial and non-financial professions subject to AML requirements?**

Anecdotal evidence from the accountancy profession suggests that many professionals have become cynical about the effectiveness of reporting suspicions of illegal activities. Highlighting the effectiveness of such reports through publicity for successful investigations and prosecutions, whether directly for money laundering or for the underlying offences, such as bribery would help to counter any such trends. Regulators and supervisors should give consideration to coordinated and cooperative efforts between FIUs and other investigatory bodies to ensure effective local enforcement regimes which recognise and highlight the importance of intelligence provided by professional advisers and other regulated sectors to counter all aspects of financial crime.

The mandatory identification of Politically Exposed Persons and their relatives and close associates as part of the standard AML processes would highlight for obliged entities the presence of aggravated risk factors. A widespread understanding of the enhanced risks of detection would also help to act as a deterrent for potential perpetrators.

**What recommendation could be envisaged to enhance detection and reporting of foreign bribery by external auditors and accountants?**

Auditors are required to consider the impact of fraud on the financial statements, including documenting a discussion with the audit team on the risk of fraud on the financial statements. Something similar for bribery and corruption could be useful (e.g. a requirement to consider the sector / service the audit client is in and whether bribery is common). At the moment bribery and corruption is covered under compliance with laws and regulations and the impact on non-compliance on the accounts (i.e. fines).

However it is important to recognise the limitations in scope of an audit, and in particular the conflict between the audit concept of materiality which is in tension with the absolute liability for criminal offences, no matter the size of sums involved. A fundamental principle of audit is that it builds trust in the financial statements of a business, and by extension its management. However that trust is founded upon recognised and common frameworks of legislation and standards which both impose duties on and offer protections to auditors in the discharge of their duties.

Any duty on auditors to investigate and report on suspicions of bribery would need to be set in a recognised framework of rights and responsibilities. In particular, any expectation that auditors should be under a duty to report bribery offences would need to be clearly defined, and the legal requirements spelled out, so as to protect the auditor from the conflict of interest that would otherwise arise, as well as issues around breach of confidence where privileged audit information is shared with third parties, whether with or without the knowledge of the audit client.
33. Should the recommendation address the issue of reporting of foreign bribery by other professional advisers, and if so, how?

A level playing field for all professional advisers would aid the fight against bribery and corruption. However it is important to recognise and reflect in any obligation to report that professional advisers will typically have obligations to protect the confidence of their clients, and in particular not to disclose commercially sensitive or otherwise privileged information to third parties without their clients’ consent. The imposition of a recognised legal requirement to report will in many cases be the strongest defence for a professional adviser to accusations of improper conduct where a disclosure has to be made, and this should be an element of any recommendation.

What recommendation could be envisaged to enhance the enforcement of false accounting offences and accounting requirements in foreign bribery cases?

Offences related to false accounting are a common feature of legal systems across the globe. In order to aid effective and comprehensive enforcement common definitions and standards should be applied along with recognised requirements relating to corporate liability for such offences. The UK has implemented “failure to prevent” offences for bribery and tax evasion which recognise and encourage the importance of process and structure to foster environments where every employee is aware of their responsibilities under the law. Ensuring that false accounting offences are clearly identified as an essential element in the education elements of the defences to the “failure to prevent” offences should be given a high priority.

The impact of technological change on this area needs to be considered. Developments in electronic payment processes, and the availability of anonymisable payment mechanisms such as cryptocurrencies, will pose new challenges for investigators. A balance must be sought between the needs of investigators to trace payments and the rights of individuals.

What recommendation could be envisaged to strengthen the independence of external auditors in practice so that they can provide an objective assessment of company accounts, financial statements and internal controls?

The independence of audit, and indeed the role and responsibilities of auditors as a whole, is currently an area of significant debate and controversy. The biggest perceived obstacle to audit independence is the fact that auditors get paid by the client that they are auditing - this especially true in the owner-managed business arena. Decoupling who appoints and retains auditors and who pays them would improve independence but at significant cost in other areas.

It is essential to bear in mind that independence is just one indicator of audit quality, and needs to be kept in balance with competence to effectively and sceptically scrutinise the business. Some degree of familiarity with the business is essential in order to effectively assess the risk areas and recognise warning signs. This is equally important for managing bribery risks, and the ability to properly appreciate the significance of relevant transactions and structures will inevitably demand sector specific knowledge.
Consultative Committee of Accountancy Bodies (CCAB)

Dear Sirs

The CCAB Economic Crime Panel welcome the opportunity to respond to the Review of the 2009 OECD Anti-Bribery Recommendation.

The Consultative Committee of Accountancy Bodies (‘CCAB’)s core purpose is to promote sustainable growth in the UK economy through the UK accountancy profession.

CCAB has five members - ICAEW, ACCA, CIPFA, ICAS and Chartered Accountants Ireland - and provides a forum for the bodies to work together collectively in the public interest on matters affecting the profession and the wider economy. The CCAB Economic Crime Panel consists of representatives from all five member bodies and focuses on matters of Anti-Money Laundering and wider Economic Crime.

We have provided comments on some of the consultation questions where the panel have particular interest.

QUESTION 30 a

What recommendations could be envisaged to enhance detection and reporting of foreign bribery by financial and non-financial professions subject to AML requirements?

If not already the case, bribery should be a predicate offence for money laundering. Identification of PEPs and RCAs should be mandatory (if not already the case) so that obliged entities can be alert to a higher risk of bribery.

Guidance could be issued nationally by AML regulators to ensure that obliged entities are familiar with risks and typologies.

Question 32/33

What recommendation could be envisaged to enhance detection and reporting of bribery by external auditors and accountants?

An audit of the financial statements of the company is not primarily designed to detect corruption and it can be difficult to identify. However, the IESBA has issued an ethical standard to auditors in relation to Non-compliance with laws and regulations (NOCLAR), which may assist. Auditors in general would be expected to understand the nature and purpose of material transactions, so any significant commission payments or similar should be identified and understood.

Including a recommendation imposing an obligation to report suspected bribery would assist, but there must be clear legal protection from action for breach of confidentiality.

Question 36

What recommendation could be envisaged to enhance the enforcement of false accounting offences and accounting requirements in foreign bribery cases?

The concept of false accounting appears in the legal code of most jurisdictions. The issue is often about the scope and available evidence to demonstrate that there has been false accounting. For example, bribes may be called “Commission”. There may be a legal document purported to set out the services rendered to generate the commission.

However, the overall nature of the transaction may be one of bribery. The recommendation could be to ensure local law provides that any attempt to disguise the true nature of a
payment by a company which amounts to a bribe falls within the definition of false accounting.

There can also be an issue of identifying corporate responsibility for this act. So appropriate thresholds for liability should be established (eg like the “failure to prevent” corporate offences).

**Question 38**

*What recommendation could be envisaged to strengthen the independence of external auditors in practice so that they can provide an objective assessment of company accounts, financial statements and internal controls?*

This is an area which is under scrutiny in a number of jurisdictions. Additionally, the accountancy sector is itself reviewing independence standards, including restrictions on non-audit work carried out by the audit firm for the client. Similar principles could be included in a recommendation.

We look forward to seeing the outcome of the review.

Yours faithfully,

CCAB Economic Crime Panel
The Institute of Internal Auditors (IIA)

Dear Chair Kos and Members of the Working Group:

The Institute of Internal Auditors (IIA) thanks you for the opportunity to share comments on the Organisation for Economic Co-operation and Development’s (OECD) review of the 2009 “Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions.”

The IIA has aided sound governance and risk management efforts in public- and private-sector organizations for 78 years. Our more than 200,000 members are part of a global voice that encourages strong internal controls and an enterprise-wide approach to risk management.

The IIA fully supports the OECD Anti-Bribery Convention and its related instruments to address the serious effects of bribery. The IIA’s Audit Executive Center, an exclusive membership of heads of audit, issued “Ensuring Compliance with the OECD’s Anti-Bribery Recommendation” in 2010 to help audit executives create and provide recommendations to enhance the effectiveness of ethics and compliance programs.

This 10th anniversary of the release of the 2009 Anti-Bribery Recommendation is an appropriate time to review for improvements to reflect how the world has changed over the past decade. What clearly strikes The IIA is that the critical role internal audit plays in detecting and deterring bribery and corruption is absent from both the 2009 Recommendation and its Annex II, “Good Practice Guidance on Internal Controls, Ethics, and Compliance.”

Given the increased need for organizations to look beyond financial reporting threats to the litany of issues the current geopolitical culture and advances in digital technology are generating, The IIA believes the addition of internal audit in these documents is a necessary and valuable step, and will align the Recommendation with recent OECD findings.

The OECD’s own 2017 study undertaken by the Working Group and reported in “The Detection of Foreign Bribery” shows internal audit as the source of detection in 22 percent of bribery schemes discovered through self-reporting. In the section on fraudulent use of official development assistance, the report points out that “corruption risk must be assessed throughout the project cycle” and states that systems “should provide for internal audit services and access to investigatory capacity, within or outside the agency, to respond to audit findings.”

Internal audit, as an independent and objective assurance and consulting activity designed to add value and improve the organization, serves a vital role in supporting good governance within the organization. This includes providing assurance on the accuracy of financial reporting and regulatory compliance. When internal audit is allowed to operate at the highest levels, in conformance with The IIA’s International Professional Practices Framework (IPPF), the only globally recognized standards for the professional practice of internal auditing, it becomes a trusted advisor to executive management and the governing body, providing assurance as well as insight and foresight on risk management and control issues across the organization. Internal audit can be used as an instrument on both the supply and demand side of bribery, increasing the arsenal against bribery and corruption.

In these circumstances, internal audit can provide significant assistance to external audit, as well. A well-resourced and independent internal audit function not only provides reliable work upon which external audit should depend, it also brings transparency to internal
control and governance processes that support external examination beyond financial reporting and related processes.

Regulators around the world have stepped up their attention to corporate governance – or more accurately, a deficiency thereof – which can lead to misconduct and corruption, as The IIA reported in its April 2019 edition of “Tone at the Top.” For an organization to avoid criminal charges, monetary penalties, and other punishments, it must be able to show it understood the compliance risks in its operations and took appropriate steps to mitigate those risks. Internal audit can act as a clear guard against the solicitation and receipt of bribes in the work it does evaluating the culture of the organization.

Internal auditors are uniquely positioned to see across an entire organization, connect the dots, and bring critical information to management and governing bodies to support good decisions, and help an organization mitigate risks and be successful. Internal auditors not only identify and investigate red flags in high-risk areas, their observations can be used by organizations to develop anti-bribery and anti-corruption programs and prioritize initiatives. Internal audit can provide assurance on the effectiveness and efficiency of existing anti-bribery and anti-corruption programs, as well.

The IIA recommends that the best way to include in the 2009 Anti-Bribery Recommendation the additional protection and foresight internal audit provides is to add a new section under Recommendation X. Adding “Independent Internal Audit” with a short list of considerations (as shown in the attached Public Consultation Response) will clarify the confusion that often exists between the respective roles of internal and external audit, and reflect more clearly the Three Lines of Defense model used globally to understand and organize measures aimed at managing risk.

In addition, The IIA offers thoughts on General Question 1, articulates in Question 7 details of how internal audit can be added to the Annex II “Good Practice Guidance on Internal Controls, Ethics, and Compliance,” and offers responses to several other questions related to standards and external audit.

Heads of audit and internal audit activities are increasingly seen as the independent voices in an organization, providing a 360-degree view of uncertainties that may impact goals. It is important that this critical document encourages the 44 Parties to the OECD Anti-Bribery Convention to better incorporate and leverage internal audit.

The OECD’s “Detection of Foreign Bribery” report references academic research by Elizabeth Hart, Ph.D., assisted by OECD, in which it is recommended: “A direction toward an appropriate OECD integrity standard or guideline might be to examine in more detail the various functions carried out by internal auditors, to establish more clearly the linkages between these functions, on the one hand, and integrity/anti-corruption objectives, on the other.” The IIA would welcome the opportunity to assist with an endeavor such as this or with any effort by the Working Group to expand its recommendations regarding internal audit.

Please do not hesitate to reach out to Francis Nicholson, The IIA’s Global Advocacy Managing Director (francis.nicholson@theiia.org), should you have any questions.

Sincerely,

Richard F. Chambers, CIA, QIAL, CGAP, CCSA, CRMA

President and CEO

The Institute of Internal Auditors
ARLEN Jennifer (Norma Z. Paige Professor of Law and Faculty Director of the Program on Corporate Compliance and Enforcement, New York University School of Law)

The potential promise and perils of introducing deferred prosecution agreements outside the U.S.

Using Corporate Liability and Negotiated Resolutions to Deter Corporate Misconduct

This section examines the important role that companies play in deterring corporate crime and the role that corporate liability can play in inducing them to do so. It also discusses the essential role of individual liability and why adequate deterrence depends on implementing measures, such as whistleblowing programs, that enhance enforcement authorities’ ability to obtain information about misconduct when companies are not forthcoming.

How to Deter Corporate Crime: Role of Private Prevention and Private Policing

Although corporations are legal persons, and we often speak as though a particular corporation “committed” a crime, this is a legal fiction. The corporation is not like a natural person, with a single mind that controls the individual’s actions. A corporation is an entity whose actions to comply with, or violate, the law are determined by the decisions of a variety of different actors, ranging from senior executives, compliance officers, line supervisors with authority over promotion, termination, and compensation; and the employees on the ground with authority to take the actions that could cause the firm to violate the law. Unlike with a natural person, no one person—no single “brain”—either can completely control whether those empowered to act for the firm will violate the law. Indeed, those on top of the firm—the mind of the firm so to speak—often will not even know if a violation has occurred. Thus, in order to deter corporate misconduct, it is important to target the threat of criminal enforcement at those who directly controlled whether a company violated the law: the individual employees who committed, or otherwise were materially responsible for\(^1\), the crime\(^2\). Corporate crime would cease to be a significant problem if

\(^1\) Employees responsible for misconduct can include managers who play a responsible role in the misconduct—either by creating the pressures that lead to it or through failure to respond to evidence of misconduct, knowing (or willfully blind) that misconduct is likely to result (or continue) as a result of their actions.

each employee contemplating misconduct was convinced that she would pay a price for violating the law—for example imprisonment—that far exceeded any benefit she could hope to attain.

Individual liability is essential but not sufficient to deter corporate crime. Employees commit crimes, notwithstanding the risk of criminal sanctions, because they reasonably do not expect to be detected and convicted. Corporate crime is, after all, hard to detect and even harder to prove. The low risk of sanction undermines deterrence in multiple ways. First, people tend to ignore consequences that are not salient and thus may be willing to violate the law for simple benefits—such as helping their team or a friend—because the help they are providing others looms large and the consequences appear non-existent. Second, and related, employees may come to view the crime as accepted if the misconduct becomes the norm in an industry or firm in the shadow of largely non-existent sanctions. Thus, in order to deter misconduct enforcement authorities must create a genuine, material risk that any corporate crime committed will be detected and punished. Unfortunately, enforcement officials cannot do so on their own.

Companies are better positioned than are enforcement officials — both in terms of resources and opportunities — to undertake actions that deter corporate crime. They can implement “prevention measures” that make crimes harder to commit, such as compliance program procedures that require approval and oversight of corporate actions that could be criminal. Corporations also are uniquely position to deter crime by reducing employees’ incentives to commit it. Unlike theft or embezzlement, employees do not expect to profit directly from corporate crimes. Instead, the company benefits directly. Employees benefit indirectly, through the enhanced career prospects, bonuses, or improved job security that result from their actions to benefit the firm. This means that companies control employees’ incentives to commit crimes. They can reduce the benefit by altering compensation, promotion and retention policies to reduce employees’ incentives to commit crimes to achieve performance goals.


3 Polinsky and Shavell, supra note 2; Arlen, Potentially Perverse Effects, supra note 2; see Kornhauser, supra note 2

4 Arlen, Potentially Perverse Effects, supra note 2; see Gary Becker, Crime and Punishment: An Economic Approach, 76 J. Pol. Econ. 169 (1968) (discussing how criminal liability deters crime by individuals); cf. Eugene Soltes, Why Do They Do It (discussing the many reasons people violate the law)

5 Bad cultures can more easily emerge, and small motivations for misconduct (such as friendship) can more easily lead people to commit crimes when people do not even contemplate the risk of getting caught. See Soltes, supra note 4


7 See, e.g., Arlen and Kraakman, supra note 6; see Arlen, Corporate Criminal Liability, supra note 6
Companies also can deter crime by intervening to help enforcement officials detect crime and punish the employees who commit it. Corporate intervention, in other words, is needed to ensure that employees face a salient risk of being punished. Corporate “policing” efforts include compliance measures designed to detect misconduct (e.g., internal reporting systems), internal investigations, self-reporting and full cooperation. Corporate policing is important because the outcomes from corporate crimes—for example, large government contracts—often do not look materially different than other legitimate transactions. Detecting misconduct often requires information residing within the firm that companies can more easily monitor for, access and analyze. Companies also often can more readily investigate misconduct involving conduct in other jurisdictions. Corporate detection also can result in quicker cessation and remediation of misconduct. Thus, to effectively deter misconduct, governments need to induce corporations to help police by undertaking effective compliance, investigations, self-reporting, and full cooperation.

**Effective Use of Corporate Liability to Deter Corporate Crime**

Although companies can take a variety of actions to deter crime, they will not do so unless they face a properly structured risk of serious liability for their employees’ crimes. Corporate crimes tend to be profitable. Absent liability, companies often face market pressures to commit crimes in order to profit. Moreover, even when management is not inclined to commit crimes, firms will not actively spend money on prevention and policing unless adequately incentivized to do so because both prevention and policing are very costly. Absent liability, a corporation might eschew such costs in order to stay competitive, even if senior management believed the firm should not knowingly violate the law.

Corporate liability is needed to provide firms with adequate and appropriate incentives to both prevent crime and engage in corporate policing to enable enforcement officials to detect and sanction any misconduct committed by their employees. Corporate liability can achieve these aims if it achieves several goals. First, companies must have incentives to spend resources to prevent all misconduct, including potentially profitable misconduct by lower level employees because they expect to face higher costs if crime occurs. Second, companies must be motivated to—and thus be better off if they—detect misconduct, investigate to determine its scope and the identity of those responsible, and then self-report to the government and cooperate by providing enforcement officials with information about the misconduct and the involvement of those responsible. Of particular importance, companies must be provided strong incentives to self-report. Finally, in addition to appropriately structured corporate liability, enforcement authorities must ensure that the

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8 Arlen & Kraakman, supra note 6.

9 For a more detailed discussion see Arlen & Kraakman, supra note 6; Arlen, Corporate Criminal Liability, supra note 6. The relative efficacy of corporations and enforcement officials at obtaining information about corporate misconduct is likely to vary materially among different countries depending, in part, on background laws, including employment laws and data privacy. See Jennifer Arlen and Samuel Buell, The Global Expansion of Corporate Criminal Liability: Effective Enforcement Across Legal Regimes (working paper 2019) (comparing the relative efficacy of government and corporate investigations in the U.S. and abroad). For a discussion of investigations in the U.S. see Miriam Baer, When the Corporation Investigates Itself, 308, in RESEARCH HANDBOOK ON CORPORATE CRIME AND FINANCIAL MISDEALING 87 (Jennifer Arlen ed. 2018).

10 Arlen, Potentially Perverse Effects, supra note 2; Arlen and Kraakman, supra note 6.
individuals responsible for the misconduct (and for any subsequent corporate cover-up) are convicted for only in this way can they ensure that crime does not pay. Satisfying each of these goals of an effective enforcement regime requires that liability for corporation crime have certain features, as described below and as shown in Table One.  

2.2.1 Goal One: Corporations Should Want to Prevent Misconduct  
Countries can most effectively deter misconduct by employees committed in the scope of employment if they ensure that corporations want to prevent it. Yet, absent liability, companies have little reason to do so. Companies earn considerable sums from many corporate crimes, such as corruption. Moreover, corporate prevention measures—including effective compliance programs, are costly. Firms are not going to spend the substantial sums required to prevent crime if companies are allowed to retain the profits of misconduct even when it is detected. Countries seeking to deter misconduct must therefore adopt a corporate liability regime that imposes liability on companies for all misconduct by all employees committed in the scope of employment. The sanctions must be sufficiently large, and imposed with a sufficiently large probability, to lead corporations to conclude that corporate crime does not pay. Corporations must be held liable for all crimes committed by all employees in the scope of employment—instead of only crimes by senior managers—because many other employees can commit crimes that the firm both profits from and can deter. Companies will not have adequate incentives to deter such crimes if they can profit from them. Companies need to be liable for all crimes—even if the company had an effective “compliance program”—in order to motivate them to prevent crime through measures going beyond a compliance program. These measures include appropriate adjustments to compensation and promotion policies, adoption of effective internal reporting systems, and, as discussed below, appropriate corporate policing (e.g., self-reporting, investigations, and full cooperation designed to induce employees to conclude they face a material risk of being criminally sanctioned for any crimes they commit). Broader liability, if properly structured, also is needed to induce firms with effective compliance program to help deter by self-reporting and cooperating.  

Corporate liability need not take the form of criminal liability. What matters is liability is imposed by enforcement officials who are dedicated and insulated from political pressures, and that potential sanctions are sufficiently large to motivate firms to spend money to prevent misconduct, even when it could profit them a great deal and is unlikely to be detected. Criminal sanctions often are particularly effective because they tend to include the potential threat of collateral sanctions (such as debarment) and prosecutors often are

11 See, e.g., Arlen and Kraakman, supra note 6. This discussion focuses on the necessary conditions for the laws that are internal to a corporate liability regime. For a discussion of the impact on deterrence of background laws residing outside the substantive laws governing corporate liability—such as criminal procedure, employment law, attorney-client privilege, and data privacy—see Arlen & Buell, supra note 9.

more independent than agencies. Yet properly structured administrative sanctions also can suffice\textsuperscript{13}.

\textbf{Goal Two: Inducing Corporate Self-reporting, Fully Cooperation and Remediation}

Corporate compliance cannot prevent all employees from criminal acts. In order to reduce crime, employees also must face a material threat of imprisonment. To create this risk, governments must induce corporations to help them and generally must use corporate liability to do so\textsuperscript{14}.

Corporations will not detect, investigate, self-report and cooperate unless they are held liable for their employees’ crimes, and the form and magnitude of liability is structured to ensure that companies face much higher expected costs on companies if they fail to self-report or cooperate, and remediate than if they do—where expected costs are defined as the actual cost adjusted by the probability of sanction.

To achieve this goal, corporate liability must satisfy two conditions. First, companies must be liable for all crimes but all employees committed in the scope of employment. Broad liability is needed because the government cannot use leniency to induce self-reporting and cooperation if the company faces no risk of liability for the misconduct if it fails to self-report or cooperate\textsuperscript{15}. Second, the government must implement a corporate liability regime that imposes different costs on firms that self-report or cooperate than on those that do not. Since a corporation that does not self-report is very likely to escape sanction altogether, corporations are unlikely to self-report unless they face truly enormous sanctions if they fail to self-report and cooperate. In turn, companies that do self-report, fully cooperate, and remediate must be guaranteed to be able to enter into a resolution that substantially mitigates the sanctions imposed (for example, lowering them to the benefit of the misconduct). A particularly effective approach is to reserve forms of liability which trigger debarment and other collateral sanctions—such as criminal conviction—for situations where the company did not self-report or cooperate, and enable companies that do self-report or fully cooperate and remediate to enter into a form of resolution (such as a DPA) that does not trigger collateral sanctions. Firms that fail to self-report or cooperate also should be subject to fines that are many times higher than those that do self-report and cooperate\textsuperscript{16}.


\textsuperscript{14} See supra Section 2.1.

\textsuperscript{15} This system has some advantages over a regime that imposes a duty on firms to self-report and cooperate enforced by serious sanctions. In this regime, the prosecutor only needs to focus on the observable action—self-reporting—whereas in the other regime the prosecutor observing a failure to self-report cannot sanction the firm unless she can prove the firm detected the misconduct.

\textsuperscript{16} Consider a firm that detects misconduct that would be associated with a $100 million fine if detected, but the likelihood of the government detecting the misconduct and having sufficient
Firms that fail to self-report detected misconduct or that fail to fully cooperate also should be subject to a monitor, particularly when it appears management was acting to protect itself. To induce self-reporting, enforcement authorities must pre-commit to pursuing a specific, more favorable, form of settlement with companies that do self-report or fully cooperate and remediate. Companies are generally will not incur the cost of self-reporting if, instead, government policy simply treats self-reporting as one of many factors that may be taken into account in determining the form of settlement and magnitude of sanctions. Without assurances, companies keep silent when they can for fear that self-reporting could subject them to serious criminal penalties that could be avoided by silence.

In addition, governments must ensure that companies that do not self-report or cooperate face a material risk that enforcement officials will detect and successfully prosecute them for unreported misconduct. Thus, governments must provide the resources and institutional structure needed to enable enforcement authorities to create a salient material risk of detecting and successfully prosecuting undisclosed corporate crime. Techniques include providing adequate funding for enforcement and creating teams of investigators and prosecutors who specialize in complex corporate cases. It also generally is important to adopt whistleblower laws that provide adequate protections, and incentives, for private citizens—such as employees—to collect and provide information about misconduct to enforcement authorities, because corporate misconduct is often so difficult to detect from outside the firm. Finally, they can facilitate investigations by enabling enforcement authorities to enter into negotiated criminal resolutions on more favorable terms with employees with material information who are not the appropriate primary target of the investigation.

Finally, countries need to determine what settlement benefits should be reserved for companies that self-report and cooperate, and not available to those that only cooperate. The benefits thus reserved serve two goals. First, they help incentivize companies to invest in effective compliance programs designed to detect misconduct. Second, they can induce evidence to sanction the firm is only 1/10. In this situation, the firm’s expected sanction if it does not self-report and cooperate is only $10 million (one-tenth of $100 million). The firm will not be willing to turn itself in and cooperate—thereby raising the likelihood of sanction from 1/10 to 100 percent—unless the government reduces its expected costs to one-tenth of what they otherwise would be (or to $10 million (or less). Arlen & Kraakman, supra note 6; Arlen, Corporate Criminal Liability, supra note 6; see Arlen, Potentially Perverse Effects, supra note 2.

When enforcement policy is appropriately structured to incentivize self-reporting and cooperation, it is reasonable to conclude that companies that fail to do generally have management that cannot be relied on to manage corporate policing in the company’s best interests. In this situation, prosecutors may need to impose monitors and use other techniques to provide needed additional oversight of management. Arlen and Kahan, supra note.


companies to self-report detected misconduct rather than remain silent unless the
government detects. Since countries have a finite amount of total mitigation available—
since there is a limit on the maximum sanction that can be imposed—inevitably rewards
reserved for self-reporting and cooperation are not available to induce cooperation by firms
that did not self-report. The determination of how much benefit to reserve should depend
on the relative benefit to enforcement officials of inducing corporate self-reporting as
opposed to corporate cooperation.20

Table One
Structuring Corporate Liability to Deter Misconduct

<table>
<thead>
<tr>
<th>Goals</th>
<th>Implications</th>
<th>Policy Conclusion</th>
</tr>
</thead>
</table>
| Preventing misconduct
Companies must want to prevent all misconduct by all employees | Corporations that self-report or cooperate must not be debarred or excluded |
| Corporate Policing
Companies that detect misconduct must want to self-report and provide material information to authorities about those responsible for it. | A company must face lower total expected costs if it self-reports, cooperates and remediates than if it does not self-report or cooperate. | Corporations that self-report or fully cooperate must be entitled to a form of resolution that does not trigger debarment, exclusion or delicensing |
| Corporate Self-reporting
Companies should be guaranteed better treatment if they self-report and cooperate than if they merely cooperate | Companies that fail to report misconduct must face a material risk that the government will detect the misconduct and punish the firm | Government authorities must have sufficient resources and expertise to detect and investigate material corporate criminal misconduct |

20 Background laws that impact corporation’s ability to detect and investigate misconduct by employees can impact whether enforcement policy should aim to induce detection, investigation and self-reporting or should focus on inducing investigation and cooperation with respect to already detected misconduct. See Arlen and Buell, supra note 9. The less emphasis is placed on corporate detection and early-stage investigations, the more important it is likely to be to adopt measures that encourage employees and others to report suspected misconduct to the government.
**Goal Three: Deterring Individuals From Committing Corporate Misconduct**

Corporate self-reporting and cooperation deters corporate misconduct if prosecutors use the information provided to actively pursue, and successfully convict, the appropriate individuals responsible for the crime expect to be convicted. Individual criminal liability is needed to deter the people who actually commit corporate crimes—the firm’s employees and agents. Individual criminal liability deters in a variety of ways. First, it reinforces, in a salient way, the message that employees who commit crimes on the firm’s behalf as committing a moral wrong that society condemns. Second, it provides employees who are tempted to commit misconduct to save their jobs or get a promotion a reason not to commit the crime notwithstanding the personal benefits.

Deterrence thus requires that enforcement official actively seek to convict all appropriate individuals who are responsible for the crime. Legislatures and enforcement officials can take several steps to achieve this goal, and counter-act line-prosecutors understandable temptation to move on to the next crime after they conclude a corporate resolution. They can ensure that prosecutors have the information they need to convict individuals by providing them adequate investigative resources. They also can draft rules that deny corporations credit for cooperation unless they not only provide a full and accurate account of all misconduct, but also provide actionable evidence against individuals with a material role in committing or condoning the misconduct. Finally, they can provide oversight to ensure that prosecutors do indeed pursue individuals, and provide them tools to do so expeditiously (such as the ability to enter into guilty pleas and to provide cooperation credit to less culpable individuals with material information about others who are more responsible for the misconduct.

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21 Employees who expect to be fired for underperforming if they do not violate the law will not be deterred from misconduct by the threat of detection and retaliation alone, if the chances of being caught and fired are less than the chances of being fired for underperforming. See Jennifer Arlen and William Carney, Vicarious Liability for Fraud on Securities Markets: Theory and Evidence, 1992 U. ILL. L. REV. 691 (1992) (identifying last period concerns as a motivation for securities fraud). Indeed, employees can reduce the potential consequence of termination if they can use the good results generated by misconduct to find employment elsewhere before misconduct is detected.

22 This is the existing policy of the U.S. Department of Justice as stated in the Justice Manual. Citation.
The Potential Promise and Perils of Negotiated Settlements

Countries generally can most effectively use corporate and individual liability to satisfy the deterrence goals outlined in Section 2 if they both adopt a broad corporate criminal liability regime and introduce an appropriately structured regime that permits different forms of negotiated corporate criminal resolutions, such as guilty pleas and DPAs. This Section draws on the lessons from Section 2 to identify the legal and institutional features needed to ensure that DPAs will operate to help deter corporate crime.

Section 2 reveals that effective use of DPAs requires countries to take several actions. First and most obviously, countries must structure their DPA laws—specifically the principles governing when corporations are eligible for favorable negotiated settlements (e.g., DPAs) and mitigated fines—so that companies know that DPAs, and mitigated fines, are reserved for companies that took genuine, proactive, actions to enhanced prosecutors’ ability to detect, investigation and sanction those responsible for misconduct by self-reporting or cooperating. Countries also must ensure the firms are liable for all their employees’ misconduct, both to ensure they want to prevent crime and to create the material threat of enforcement needed to induce them to self-report and cooperate in order to obtain a DPA. To ensure that companies fear enforcement even if they do not self-report and cooperate, countries must adequately fund enforcement and create mechanisms for obtaining information about misconduct from sources other than the firm, including effective whistleblower laws, government data analytics, and giving cooperation credit to culpable individuals who provide material information to prosecutors. Finally, legislatures should ensure that prosecutors focus on convicting the individuals responsible for the crime—a goal which is facilitated by laws that allow lower level culpable employees to provide evidence on misconduct by those above them in return for a more lenient sentence.

By contrast, DPAs are unlikely to be effective if the corporate liability rule insulates companies from liability for most of their employees’ misconduct. Beyond this, countries risk undermining deterrence if they adopt DPA regimes that allow companies to resolve through a DPA without taking any steps to render enforcement more effective by either reporting misconduct or cooperating by providing prosecutors with previously unknown material information about the scope of the misconduct or the role of individuals responsible for it. Government authorities should preclude such companies from entering into more favorable forms of settlement, such as DPAs. Allowing DPAs in this context undermines deterrence by lowering companies’ expected cost of crime and removes prosecutors’ ability to use DPAs to achieve the vital goal of inducing vital corporate self-reporting and cooperation. While settlement can be valuable in resolving cases, companies that refuse to cooperate or self-report should be restricted to resolving cases with a guilty plea that imposes close to maximal sanctions. To motivate companies to settle, countries need to invest sufficient resources in enforcement and courts to ensure that corporations that refuse to settle face a material risk of being convicted in a reasonable time, and subject to ruinous sanctions, when appropriate. Mechanisms, such as whistleblower regimes, that enable enforcement authorities to obtain material information about misconduct from companies even when management is being recalcitrant tend to be vital to this effort. Finally, corporate liability is only effective if countries ensure that prosecutors also pursue the individuals responsible for misconduct, when appropriate.
Conditions Governing Access to, and Sanctions Imposed by, a DPA

Negotiated corporate criminal resolutions can enhance deterrence if they are appropriately structured to retain the most important features of criminal solutions, while providing incentives for companies to both prevent crime and help enforcement authorities detect it.

Negotiated corporate criminal resolutions can take a variety of forms. The first is a guilty plea, which mirrors a conviction following a trial, except that the factual statement of the firm’s guilt emerges from a negotiation with the prosecutor, potentially supervised by a court. But the firm is required to admit guilt, pay a fine or restitution when appropriate, engage in various undertakings, and, as a result of conviction, often, faces mandatory or presumptive debarment or exclusion from a variety of business opportunities (particularly with governments).

Alternatively, countries can allow companies to resolve and be sanctioned for criminal charges through a form of resolution that does not trigger the presumptive or mandatory collateral consequences often produced by a conviction. We use the term DPAs to refer to negotiated corporate criminal resolutions that mirror guilty pleas—in that the facts of the crime and charges are specified, the corporation is required to admit to the misconduct, and fines and mandates can be imposed—but that do not trigger presumptive or mandatory collateral sanctions. We focus on DPAs, as defined above, because these resolutions enable governments to obtain the deterrence benefits of more lenient negotiated corporate resolutions without sacrificing, unnecessarily, the important benefits of criminal resolutions that provide information about the facts, charges, and the firm’s complicity. These benefits include provision of accurate information to those who deal with the firm, deterrence (resulting from both corporate and individual reputational impacts), and the enhanced legitimacy resulting from criminal resolutions that require admission of responsibility.

Governments can enhance the effectiveness of corporate criminal enforcement by introducing both types of negotiated corporate criminal resolutions. Guilty pleas can reduce the litigation cost to both parties of a conviction, thereby enabling governments to use the resources saved to pursue other instances of misconduct. DPAs, if properly structured, can further enhance deterrence by using the resulting avoidance of collateral consequences, and lower fines, to induce companies with an incentive to detect and report misconduct, and share information about the scope of misconduct with the government. DPAs can help deter crime— notwithstanding the resulting reduction in the costs imposed on companies—provided that they are structured to induced detection, self-reporting and cooperation, thereby enabling enforcement officials to detect and sanction misconduct that otherwise might have escaped them.

DPAs only achieve this goal if companies know that self-reporting and/or full cooperation is both a guaranteed path, and the only path, to a DPA. In addition, companies that self-report or fully cooperate should receive substantial fine

23 Across many jurisdictions, one hallmark of corporate criminal liability (or its administrative equivalent in Germany) is that it can trigger presumptive collateral sanctions (such as debarment or delicensing) either in the home country or elsewhere. For example, the European directive provides that conviction for many offenses triggers automatic debarment.

24 See Arlen & Buell, supra note 9.
mitigation\textsuperscript{25} Countries should restrict access to DPAs to companies that self-report or fully cooperate because genuine self-reporting and cooperation is very costly for firms and the only way to reliably induce firms to incur this cost is to ensure that these actions are the only way to avoid the biggest cost governments can impose: debarment or delicensing\textsuperscript{26}. Properly structured DPAs not only can induce self-reporting and cooperation, but also should induce companies to invest in compliance programs designed to detect misconduct, as detection enables the self-reporting needed to get a DPA.

By contrast, DPAs will not help deter misconduct effectively if prosecutors or judges can use DPAs whenever they conclude it is in the public interest because this standard introduces uncertainty that lowers companies’ incentives to self-report or cooperate. Firms will not self-report or cooperate unless they are certain that they will not be prosecuted if they do so. Second, companies will not self-report or cooperate if they conclude judges or prosecutors may deem a DPA to be in the public interest even if the firm did not self-report and fully cooperate. In this situation, DPAs simply lower the cost to corporations of misconduct without providing the offsetting benefit of enhanced enforcement efficacy\textsuperscript{27}.

Properly structured DPAs regimes will not induce self-reporting unless legislatures take other actions. First, the “cooperation” requirement to get a DPA must be defined to ensure that corporations provide enforcement authorities with new material information—either evidence about previously undetected misconduct or previously unknown actionable evidence about individuals’ responsibility. Second, all firms, even those that self-report and cooperate, should be required to disgorge any benefits obtained from the misconduct\textsuperscript{28}.

\textsuperscript{25} DPAs could be aimed at companies that fully cooperate and remediate and NPAs (or declinations) restricted to companies that self-report undetected misconduct and fully cooperate and remediate.

\textsuperscript{26} This analysis is based on the analysis of composite liability in Arlen and Kraakman, supra note 6, and the discussion of DPAs and NPAs in Arlen, Corporate Criminal Liability, supra note 6.

To achieve this goal, countries need to ensure that prosecutors can expeditiously prosecute companies that refuse to cooperate. Prosecutors thus need to be able to enter into guilty pleas, in addition to DPAs. In addition, countries need to structure their laws to enable prosecutors to convict a firm without imposing unfair and ruinous costs on innocent employees or customers. At a minimum, this implies that exclusion and debarment should be presumptive and not automatic. Companies also should be able to avoid such sanctions through actions that redress the on-going risk of misconduct at firms that have refused to proactively cooperate to deal with detected misconduct: such as substantial compliance function reforms, a monitor, and, usually, changes to senior management. See Alexander and Arlen, supra note 10; see Arlen and Kahan, supra note.

\textsuperscript{27} Legislation allowing for DPAs and NPAs also will do little to deter misconduct if legislatures do not ensure that corporations face potential liability for all crimes committed by all employees. If companies are only liable for crimes committed by employees in the “directing mind” of the firm, they will have no need to detect and self-report or cooperate with respect any misconduct by employees outside the directing mind (unless this liability is also subject to prosecution by the U.S.). If companies can avoid liability by establishing they had an effective compliance program, they also will not self-report or cooperate if they are confident that they can establish that their compliance program was effective.

\textsuperscript{28} Corporate cooperation does not deter misconduct unless enforcement officials use the information to bring appropriate charges against those who committed the crimes. Legislatures also should ensure that corporations seeking remediation credit appropriately discipline any managers who are determined, after appropriate process, to have induced or condoned misconduct. This threat of direct and personal sanction is the key to deterrence if the threat is high enough to be salient.
Third, in order to render prosecutors’ threat to pursue a guilty plea that triggers collateral sanctions credible, legislatures should modify laws governing debarment to enable both the imposition of temporary debarment and exclusion and the use of strong oversight—for example, through monitors—as an alternative.29

**Scope of Corporate Liability**

The introduction of properly structured DPAs will not achieve their central goal of inducing corporate self-reporting and cooperation unless companies are motivated to seek a DPA. Companies will not be motivated to seek a DPA unless companies face a credible risk of being sanctioned for its employees’ misconduct if the company does not get a DPA. DPAs thus will have little beneficial impact unless the corporate criminal liability rule ensures that companies are potentially criminal liable for all material crimes by their employees committed in the scope of employment. Companies will not seek to prevent, detect, or assist in enforcement of misconduct if they can walk away legally unscathed if misconduct is detected.30 Countries thus cannot use negotiated settlements to induce companies to self-report, cooperate and remediate crimes involving corruption if liability is limited to employees in senior management because many bribes are paid by other employees, such as sale representatives.31 This suggests that, as indicated earlier, legislation permitting DPAs and NPAs needs to be adopted in concert with legislation holding companies potentially liable for all crimes by all employees in the scope of employment.

**Effective Enforcement Against Non-cooperative Firms: funding and whistleblowing**

Broad corporate criminal liability is necessary, but not sufficient, to ensure that companies fear the consequences of failing to report detected misconduct. In addition, governments must take actions to ensure that companies face a material threat that enforcement authorities will detect their misconduct even if they do not self-report, and successfully prosecute them even if they face to cooperate. This suggest that governments adopting laws promoting negotiated corporate resolutions ideally should both provide increased support for—and the creation of specialized branches of—government enforcement officials and investigators targeted at detecting and prosecuting corporate misconduct. In addition, the government should enhance its ability to detect misconduct by adopting whistleblowing laws that encourage people, such as employees, who have material information about criminal misconduct to serve the public by reporting it to government authorities. The threat of an undisclosed whistleblower can enhance companies’ incentives to self-report detected misconduct and also fully cooperate, as now the government is more likely to know if the company does not come clean.

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29 See Alexander and Arlen, supra note , discussing effective policy governing collateral sanctions.

30 Corporate liability is particularly important when a company would face costs from reputational damage if they were to disclose misconduct. In this case, the market deters disclosure and may, as a result, deter remediation. The threat of criminal liability if the firm fails to self-report or cooperate, and the offer of a DPA if it does, often will be needed to provide the needed incentive to get the firm to come forward, notwithstanding its reputational concerns. See Arlen, supra note 6.

31 See Arlen, Corporate Criminal Liability, supra note 6.
Bringing Appropriate Individuals to Justice

Corporate self-reporting and cooperation is not an end in and of itself. In order to ensure that negotiated corporate resolutions deter enforcement officials need to use them to induce companies to provide actionable evidence to enable enforcement officials to bring actions against the employees directly responsible for the crimes. By contrast, negotiated corporate criminal resolutions that lower corporation’s costs of crime, without causing individuals to face a salient risk of conviction, risk undermining deterrence.

Ensuring appropriate imposition of individual liability may necessitate the adoption of institutional reforms. Prosecutors can be expected to be public-regarding. But they also may have career-advancement concerns that may lead them to want to move on to the next case after completing a high profile, well-publicized, corporate resolution. After all, the corporate resolution will garner the most public attention, and might be viewed as sending the loudest message about the cost of committing misconduct. The enforcement official may be reluctant to take the added time (years) and effort to pursue the individuals who committed the crime if they are likely to fight the charges. The enforcement official may be tempted to want to avoid the swamp of a drawn out, and risky, case against the individuals in favor of pursuing a new investigation against a new corporate wrongdoer. Yet this approach undermines deterrence since the purpose of using negotiated resolutions to induce self-reporting and cooperation in order to cause employees to conclude that crime does not pay.

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32 For a more detailed discussion of these issues in the U.S. context see, e.g., JESSE EISINGER, THE CHICKENSHEIT CLUB: WHY THE JUSTICE DEPARTMENT FAILS TO PROSECUTE EXECUTIVES (2017); BRANDON L. GARRETT, TOO BIG TO JAIL: HOW PROSECUTORS COMPROMISE WITH CORPORATIONS (2014); see also BUELL, CAPITAL OFFENSES, supra note.
GALINDO ROMERO Laura (J.S.M. Candidate, Stanford Law School)

Dear Chairman Kos,

My name is Laura Galindo-Romero, a current J.S.M. Candidate at Stanford Law School. I have devoted the past year to empirically study the work of the Working Group on Bribery (the “WGB”) over the past 20 years, and hope to publish my master thesis on this subject later this year. This letter is to respond to your kind invitation to assist the WGB with input for its upcoming review of the 2009 Recommendation on Further Combating Bribery of Foreign Public Officials in International Business Transactions (the “2009 Recommendation”). My contribution is limited to providing some observations concerning Recommendations XIV and XV, i.e., on the issue of follow-up and institutional arrangements of the WGB.

Over the past two decades, the WGB has made an extraordinary effort in shepherding States to comply with the OECD Anti-Bribery Convention (the “Convention”). It has published more than 241 country reports and over 110 press releases as of December 2018, requiring States to implement a myriad of more than 1400 recommendations. It has also taken the lead in promoting transparency and public engagement, by publishing reports, setting deadlines, providing data, and carefully scrutinizing States’ compliance with the Convention, through its four different monitoring phases. Despite these significant developments, more transparency in its decision-making process, as well as further generation of quantitative content, are encouraged to be spread worldwide.

Below I describe the perceived unconformities concerning two specific features of the monitoring mechanism (i.e., the decision-making process when evaluating the implementation by States with the recommendations given to them by the group; and the lack of consolidated quantitative data measuring State performance). I further propose possible avenues for improving the current institutional arrangements of the WGB by (i) enhancing transparency in the follow-up on the implementation of the recommendations given to its Member States, and (ii) advocating for the creating of an anti-bribery performance indicator.

**Enhancing transparency in the follow-up of the implementation of recommendations given to the Member States**

First, in the follow-up process carried out by the WGB, States receive recommendations in each phase of review for advancing with their implementation of the provisions of the Convention, while also receiving follow-up recommendations examining their progress made. From the interviews, I conducted in December last year with current and former members of the Secretariat, and with current State officials from more than seven States, it became apparent that the way some recommendations are given and later followed-up on the State under review is not entirely objective. This finding raises questions, particularly concerning the rigor, robustness, and legitimacy of the monitoring exercise.

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33 Based on my ongoing empirical research on the work of the Working Group on Bribery.

34 More details about my findings will be available after the publication of my research, later to be published this year. I am able to provide further details upon request.
Even when there are cases in which the evaluation decision is binary and intuitive, i.e., if a State has not enacted a law, then it is deemed not be “fully compliant,” the implementation of another type of recommendations could be more progressive in practice and would even require a different assessment.

For example, in case of recommendations calling for raising awareness, the levels of implementation are less straightforward to measure, here the decision does not come down to two facing options.

To guarantee a more transparent process is vital for the WGB to provide more detailed information describing the methodology used throughout its decision-making process when assessing State compliance. This undefined process is at the heart of defining whether a State has fully complied, partially complied, or not complied with the different recommendations. As of today, the details of this decision-making exercise remain a closed-door issue — neither clear nor accessible to civil society.

More transparency and access is encouraged in this regard.

In the absence of defined yardsticks, the whole monitoring effort may expose itself to risk its legitimacy and effectiveness. Civil society requires more detailed information on how the WGB is coming up with these assessments, together with the benchmarks and methodology used. Sharing information on how the Secretariat is making these decisions is crucial in terms of accountability, legitimacy, and transparency.

**Creating anti-bribery performance indicators**

Once the WGB has published its decision-making process to evaluate the implementation of the recommendations made to States, it could be useful to compact this information and elaborate on more quantitative analysis.

A consequence of improving the issue mentioned above is the creation of “anti-bribery State performance indicators.” I advocate for the creation and publication of an anti-bribery performance indicator measuring how States are performing, that is, how they are implementing the different recommendations made by the WGB and followed-up in later reviews, based on the variables produced as a result of the evaluation process. An anti-bribery performance indicator for each member State would also be an additional tool to help States to identify the different symptoms and most critical aspects that require prioritization in their efforts to fight corruption more effectively.

My suggestion is quite simple: the anti-corruption review mechanism adopted by OECD WGB has developed as a robust system of qualitative information monitoring continuously how States “comply” or not with the Anti-Bribery Convention. In this sense, the WGB has developed a scheme (still to be perfected) on how to assess the State’s performance. The valuable data generated could develop anti-corruption indicators and move States to “perform” better in addition to the peer pressure strategies already in place by this mechanism. This accumulated

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35 I have already introduced part of this research at the first conference on the Transnationalization of Anti-Corruption Law, organized by the ASIL Anti-Corruption Law Interest Group, held in Paris at Science Po University on 6-7 December 2018.
knowledge should be used to get statistical insights on which States are complying with the Convention and what remains to be done. Therefore, an indicator could be created to measure the performance of States in their continuous efforts to adopt these recommendations and abide by the Convention.

Performance indicators are necessary for more meaningful vertical debates about the status of the Convention’s implementation within a State and horizontal compliance debates across all members to the Convention. Also, an anti-corruption indicator is better suited to identify problems with domestic public policies as well as to empower civil society to make governments accountable, something that current “aggregate indicators” such as the Corruption Perception Index developed by Transparency International, unfortunately, fail to provide today.

Through the assessment of States’ performance, an anti-bribery indicator demonstrating the levels of implementation of the recommendations by States could not only inform all stakeholders on the progress made by the State under review, but also on areas that need to be prioritized or that need special attention, in addition of increasing a more targeted pressure on the State.

Naturally, some may question whether the world needs more indicators, I believe that additional statistical data could allow for States’ performance comparison across different peer review mechanisms. Like economists and political scientists who have made extensive use of the Corruption Perception Index (CPI), and later of the broader set of World Bank Governance Indicators, due to the ability to render this traditionally normative and at least somewhat culturally relative phenomenon – corruption – in quantitative terms provides excellent fodder for empirical, comparative research. The idea of creating anti-corruption performance indicators also has the same rationale behind. It is worth trying, and there is already data produced by the WGB to try this out. As suggested by Susan Rose-Ackerman in Corruption and Government, what quantitative indicators can do is an aid in the development of hypotheses about causes and consequences of corruption, and such research, in turn, might suggest ways in which incentive structures could be altered to diminish the likelihood of corruption in specific contexts.

Likewise, an anti-bribery performance indicator would in and of itself constitute an advocacy tool, designed to implement institutional change. It could empower the expected role for civil

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36 It is surely no accident that once a quantitative index of anticorruption efforts is made available not only to the public but to scholars, we will begin to see studies correlating anticorruption implementation to all sorts of development ills, such as lower growth, human rights, press freedom, public integrity, and less foreign investment. Perhaps to the same extent or more significant as the CPI has fed into the quantitative, empirical, data-oriented, behavioralist, and institutionalist turn in the study of politics.

37 Moreover, anticorruption indicators may tackle the recurrent critique regarding the lack of awareness and information about the instrument and its implementation. If this sort of occurrences is looked with indifference by political and business elites and ignored by most citizens, one cannot expect great results from a legal instrument that criminalizes these practices, but that remains unknown to almost everyone. In many States, there have been no government efforts to make the OECD Convention known to magistrates, enforcement agencies, companies and private auditors.
society organizations and reinforce their advocacy before anticorruption peer review mechanisms, by helping them to provide an alternative technical assessment on the level of implementation of the Convention. It is also to ensure that the recommendations of the country reports are taken seriously by governments.

Furthermore, they can use the country reports as input to promote public awareness on the Convention and its effects at the national level.

Final comments

Currently, we have two main opportunities to upgrade how the convention is being implemented by the collective effort of its 44 Member States. On the one hand, the upcoming revision of the 2009 Recommendation, and this call for ideas is an excellent opportunity to make adjustments that do not require changes to the Convention but refer to the institutional arrangements of the monitoring mechanism. Moreover, the UNCAC opened in 2017 the debate on how to coordinate the different monitoring mechanisms across the main anti-corruption conventions. Hence, the intersection of these debates cannot bring a better momentum to address the common challenges shared across the different anti-corruption monitoring mechanisms. We are witnessing the right moment to shape the discussion on the future of anticorruption monitoring mechanisms, and the WGB should actively participate and lead by example on these relevant discussions.

Regarding the reasons why the WGB should implement these two suggestions, i.e., (i) providing more transparent and detailed information describing the methodology used throughout its decision-making process when assessing State compliance; and (ii) creating anti-bribery performance indicators; is critical to think about the expectations from all the stakeholders involved in this process and the horizontal governance dynamics at stake.

By providing more detailed information on how the WGB is, and more specifically its Secretariat, making decisions on which recommendations have been fully complied, partially complied, or not complied, civil society can be informed and ultimately empowered to demand more action from member States. Further, these suggestions would greatly benefit States to revise more objectively on what they and their peers have succeeded and what they still need to work on, as well as on how they all moving forward to comply with the Convention. These adjustments can give stakeholders the tools to validate and follow more thoroughly the WGB’s valuable work. These add-on features would build on the existent work of the monitoring mechanism and bring its efforts to meet the current demands and expectations from its participants and stakeholders.

Altogether, these institutional adjustments would likely enhance peer pressure on the WGB’s member States and thus reinforce the aim and purpose of the Convention and the effectiveness of its monitoring mechanism: to push States towards complying with the Convention. For the first time in the history of public international law, there is a mechanism that has done remarkable work in testing the consistency of the promises made not only by governments but

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38 Anti-bribery performance indicators can also inform aid agencies and multilateral banks on how to determine aid or loans and technical assistance.
also by civil society and the international community. There is still more it can do to enhance States’ policies to fight corruption more effectively.
HOCK Branislav (Lecturer in Counter Fraud Studies, University of Portsmouth, Institute of Criminal Justice Studies)


9. What recommendation(s) could be envisaged to further enhance the effectiveness of foreign bribery enforcement?

50. What steps could the WGB take to further increase enforcement by Parties of the Anti-Bribery Convention and Anti-Bribery Recommendation?

GQ2. Is there a need to increase impact of the OECD anti-bribery monitoring work and, if so, how?

Suggestion 1: The effectiveness of foreign anti-bribery enforcement is not only about placing corporations under strict regulatory scrutiny but also about cooperation and coordination. The OECD regime should function like an enforcement network of national agencies.

In the vast majority of large bribery cases, more than one Convention country have jurisdiction over a foreign bribery offence. The OECD anti-bribery enforcement regime should aim to provide foreign anti-bribery enforcement collectively: as coordinated network of national enforcement agencies. This requires a shift in the perception of what is the effectiveness of foreign anti-bribery enforcement. This shift will require additional monitoring and awareness-raising work. In the future, for example, large and small countries should be expected/required to have different priority tasks within the network when dealing with large cases of international bribery.

The effectiveness of enforcement depends, on the one hand, on the ability to provide public goods by placing corporations under stringer regulatory scrutiny. Consider that, for example, a Czech corporation or a French corporation do not have to be sanctioned by Czech and French authorities but by, for instance, US authorities. On the other hand, the effectiveness of enforcement is also determined by a mechanism that ensures the cooperation and coordination of enforcement. Cooperation and coordination between states can leverage the enforcement reach of the OECD regime, making enforcement less costly, and prevent jurisdictional conflicts that either limit overall enforcement activity, or can lead to major economic, political, as well as legal clashes. These are not problems of the future, but problems that are emerging.

In larger groups, coordination can be incentivized by an external governance mechanism. The problem is that such mechanism is costly to create, and in fact can, to some extent, undermine existing enforcement. Coordination, for example, might delay the provision of enforcement and introduce strategic considerations of other jurisdictions’ legal systems. With the increasing enforcement, a more balanced resolution of this trade-off between the provision of enforcement...
and its coordination should be the key priority. As of now, the policy seems to be that “any enforcement is good”.

Suggestions 2: To provide enforcement collectively, the regime needs gradually develop an external governance mechanism. The effectiveness will not increase by the mere increase in the membership. In fact, the increase in the membership can be counterproductive.

The OECD anti-bribery enforcement regime is based on functional equivalence of measures. The equivalence allows for the heterogeneity of national enforcement policies and legal approaches to international anti-bribery enforcement. Such heterogeneity is acceptable when concerned primarily with relatively small groups based on informal, decentralized, and self-enforcing governance mechanism. When concerned with large and divergent groups, said heterogeneity is problematic without an external governance mechanism such as an intermediary arbitration body or a court.

In the area of foreign anti-bribery enforcement, heterogeneity proved to be acceptable when the OECD regime struggled with a lack of capacity and willingness to enforce foreign anti-bribery laws. This also proves acceptable when states cooperate within relatively small networks. Through direct and informal means, the US, UK, French, Brazilian, German, Dutch, and Swiss enforcement authorities successfully mitigated potential enforcement conflicts whilst still concluding a number of large enforcement actions. As the enforcement of foreign anti-bribery laws is increasing, however, many states that are involved in, and relevant for, foreign anti-bribery enforcement, are not part of such direct and informal networks.

To retain, and potentially increase, the provision of enforcement in the future, the multilateral enforcement has to be accompanied by an external governance mechanism such as an intermediary arbitration body with some limited decision-making tasks. A more centralized anti-bribery model should be based on the shared competence between the OECD, or other international organization, and state members. Without such enforcement mechanisms, the regime will either:

- a) remain regional despite inviting more members (such as China); or
- b) will be accompanied by protectionist enforcement, possibly making the enforcement an element of trade war between competing economies. In other words, inclusiveness is not necessarily beneficial from the perspective of the provision of enforcement as a public good. For example, in large groups, clarity problems might be so costly that a multilateral response to international bribery becomes overall less effective than a unilateral response (US extraterritoriality).

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40 Avinash K Dixit, Lawlessness and Economics: Alternative Modes of Governance (Princeton University Press 2014) 46 (arguing that it is unsure whether large groups with external governance are better than self-governing small groups with optimal size). See also for example Charles Perrings, Our Uncommon Heritage, Biodiversity Change, Ecosystem Services, and Human Well-Being (Cambridge University Press 2014).
Despite the fact that, an external system of governance is what states yet need to transferred onto the OECD, or other body, the OECD can do a lot to incentivize states to act more as a cooperation enforcement network. In this context, suggestions that are more specific follow.

**Suggestion 3: Specify enforcement tasks and recognize cooperation and coordination as a feature of active enforcement. The effectiveness of enforcement should not only be evaluated according to countries’ success in prosecuting large corporations, but according to a broader range of criteria.**

More specificity is needed in defining what is achievable in terms of enforcement for particular countries, taking into account their economic and institutional capacity. Even if this is politically tinged, some elementary distinction between the role of small and big countries is necessary in order to build trust and incentivize more direct cooperation between countries. For example, small countries, despite their lack of primary enforcement activity, may in fact be relatively effective if they, for example, pro-actively provide evidence and other forms of assistance to foreign enforcement authorities.

At present, however, small countries may lack incentives because their contribution to the effectiveness of enforcement may not be sufficiently recognized and acknowledged by others. Hence, countries’ enforcement should not only be evaluated according to their success in prosecuting MNCs, but according to a broader range of criteria. Splitting the roles and comparing between the countries within the OECD regime, at least to some extent, is desirable.

**Suggestion 4: More data is needed about the level of engagement in supporting enforcement processes in multi-jurisdictional cases, regarding, for instance, what state initiated a multijurisdictional cooperation, with which states, and why. (also question 48)**

It is true that the WGB operates a robust peer-review mechanism in which reviewers from state parties become highly familiar with the legal system and some of the enforcement practices of other state parties, however this is not done sufficiently at the operational level, for example in the enforcement practice of national enforcement authorities. The regime needs to ensure that more information about the behaviour of members is available by understanding “work as it is being done” and integrating these findings into explicit agreements about “how work is going to be done before it is performed”. This requires more transparency and awareness about enforcement processes. More data is needed regarding, for instance, what state initiated the cooperation, with which states, and why.
MCINERNEY Tom (Member of American Society of International Law)

These comments are pertinent to the following questions raised in the request for comments.

Introduction

The OECD Convention has achieved notable successes in its first 20 years. These successes have been extensively recognized. Nevertheless, there is a basic weakness in the way the treaty is managed, which have detracted from various aspects of its implementation and operations.

The main issue is the lack of an overall strategy for the treaty to guide its operations, implementation, and performance measurement. Reviewing the practice of the Working Group, it is difficult to know what the priorities are and what the main goals of the Working Group are for the coming years. This shortcoming in the Working Group’s approach to managing the treaty is particularly problematic given the complexity of the issues it faces. The approach to managing the treaty by the Working Group contrasts sharply with the approaches taken by Member Parties in their national governments in which strategic planning is a well established practice. It is also contrary to the approach of the governing bodies of many multilateral treaties in operation today.

Critique. The activities of the Working Group lack a central focus and, while the individual activities are often sensible, they are ad hoc. In addition to the lack of a multi-year strategy, there are no clear annual work plans. The lack of a strategic framework means that a basic question remains unanswered: what constitutes success? Of course, participants in the Working Group, Secretariat, and other stakeholders have some concept of what they hope to achieve, but it is unarticulated and largely unquantified.

Precedent. In recent years, the parties to a number of major multilateral treaties in diverse areas have developed multiyear strategic frameworks to guide action and implementation. Examples include: the Anti-Personnel Mines Convention (Ottawa Convention), the Convention on Biological Diversity, the Framework Convention on Tobacco Control, International Plant Protection Convention, The Ramsar Convention on Wetlands of International Importance, the Palermo Protocol to the United Nations Convention to Combat Organized Crime, and the United Nations Convention to Combat Desertification.

To illustrate the potential impact of strategy for treaty implementation, the CBD’s 2010 Ten-year Strategic Framework for Biodiversity and Aichi targets united a wide range of constituencies, including other treaties, to work towards a single set of measurable targets. Based on the utility of the previous two strategic planning cycles, the CBD is revising its strategy for 2020-2030.

Areas in which strategy could add value. A strategy could assist in addressing a number of the issues raised in the request for comments, including:

- Clarifying mission and defining success
- Synergies with other treaties and instruments (e.g. UNCAC, UNTOC, tax treaties, FATF)
- Linkages with international development agenda and national development strategies
- Facilitating resource mobilization
- Indicators for monitoring results.
SACCO Maria Pia (PhD Student, University of Bologna)

6. What recommendation could be envisaged to further address the issues of responsibility of legal persons for foreign bribery through intermediaries?

Annex I.C of the 2009 Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions (“2009 Recommendation”), in accordance with article 1 of the OECD Anti-Bribery Convention, states that “Member countries should ensure that [...] a legal person cannot avoid responsibility by using intermediaries, including related legal persons, to offer, promise or give a bribe to a foreign public official on its behalf”.

Consistently with this objective, most of the signatories of the OECD Anti-Bribery Convention have extended the application of corporate criminal liability measures beyond the scope of employment. In particular, when bribes are paid, firms are held accountable in 76% of the countries for unrelated intermediaries (e.g. consultants), and in 78% of the member states for related agents (e.g. subsidiaries).

In addition, in both circumstances, corporations are expected to invest in the prevention, detection and sanction of bribes, through compliance programs and third-party due diligence. In particular, according to Annex II A.6 of the 2009 Recommendation, companies are expected to implement “ethics and compliance programmes or measures designed to prevent and detect foreign bribery applicable, where appropriate and subject to contractual arrangements, to third parties such as agents and other intermediaries, consultants, representatives, distributors, contractors and suppliers, consortia, and joint venture partners (hereinafter “business partners”), including, inter alia, the following essential elements: i) properly documented risk-based due diligence pertaining to the hiring, as well as the appropriate and regular oversight of business partners; ii) informing business partners of the company’s commitment to abiding by laws on the prohibitions against foreign bribery, and of the company’s ethics and compliance programme or measures for preventing and detecting such bribery; and iii) seeking a reciprocal commitment from business partners”.

Notwithstanding this regulatory framework, intermediaries are involved in three out of four cases of foreign bribery offenses and still represent an important risk for companies investing abroad. This contribution looks at the existing provisions from a law and economics perspective in order to highlight their weaknesses and to identify efficiency-enhancing solutions. In particular, the analysis focuses on Annex II A.6 of the OECD Recommendation and challenges the effectiveness of anti-bribery compliance programs, when companies address third-party intermediaries.

Weaknesses of anti-bribery compliance programs addressing third parties (vis-à-vis employees).

According to the economic literature on corporate crime, organizational investment in compliance programs is desirable because firms are often better positioned than courts for monitoring and detecting the criminal conduct of their employees. However, when intermediaries are involved, an important distinction should be considered. In particular, third
party agents are not part of the hierarchical structure of organizations but they interact with firms, through horizontal market mechanisms. This condition leads to higher agency costs and to a reduced effectiveness of the preventive and policing activities adopted by corporations. Namely:

• **Monitoring activities:**

Monitoring activities can have ex-ante preventive and ex-post policing effects. In the first instance, audits aim to reduce agents’ opportunities to undertake an unlawful conduct. In addition, whenever a violation occurs, the information collected through these activities can lead to a higher probability of detection. However, monitoring is costly and the full verification of agents’ conduct cannot be achieved. This is especially true when considering that intermediaries are associated with higher information asymmetries than employees. In particular, in order to audit their independent contractors, firms need to carry out costly negotiations and to agree on a ‘right-to-audit’ clause. Even if this agreement is reached, the effective exercise of this right is assessed on a case by case basis. Moreover, contracts are imperfect and firms may need to renegotiate some provisions, when new elements of risk emerge. This is possible only if corporations carry out a continuous and costly verification of the red flags raised by third parties.

According to a survey published by KPMG in 2015, third-parties auditing is perceived to be the highest challenge in the implementation of anti-bribery ethics and compliance programs. Irrespective of the regulatory obligations, only 56% of the companies surveyed admitted to have right-to-audit clauses in the contracts with intermediaries. Moreover, only 41% of them have exercised this right and formal risk-based operations are conducted in 31% of the companies.

• **Ex-post internal sanctioning:**

Corporate entities may also be required to discourage criminal activities by directly sanctioning offenders. Employees can be punished on the basis of their employment relationship (e.g. with a salary reduction, a demotion or a discharge). According to the U.S. Federal Prosecuting Guidelines, their application can be regarded as an important factor, not only, for reducing monetary fines but also for entering into plea, deferred or non-prosecution agreements.

When independent contractors are represented by corporate vehicles, firms can sanction them on the basis of contractual arrangements. In particular, companies are encouraged to negotiate anti-corruption clauses, in which parties agree to take adequate measures to prevent and detect bribery. If, as a result of auditing activities, one party suspects the violation of ethics standards, remedial actions are adopted. In particular, when breaching parties do not show to have implemented sufficient countermeasures, contracts shall be suspended or terminated.

Even though the termination of a contract is a strong deterrent, corporations need to balance its benefits with its costs. In the first instance, non-breaching parties bear the burden of proof of violations and, given the higher information asymmetries faced, this is a costly and difficult exercise. In addition, arbitrators lack the expertise and the resources to carry out independent investigations and they are often reluctant to decide over corruption allegations. Finally, the termination of contracts for bribery violations does not exempt non-breaching parties from paying the amount due by law. This may lead to disputes and the opposing party may be exposed to the risk of being accused of illegal conduct itself.
The role of certification companies in enhancing the effectiveness of anti-bribery compliance programs addressing intermediaries.

Given the challenging role played of corporations in preventing, detecting and reporting corporate offenses committed by third-party intermediaries, it appears desirable to consider, in the context of Annex II A.6 of the 2009 Recommendation, the role that certification systems may play in assisting companies to control their third parties.

Certification bodies can assist corporations in screening and verifying that third-parties have effectively invested in anti-bribery measures. Efficiency-enhancing effects could derive for the following reasons:

- **Greater independence:** as discussed above, the contractual consequences of the violation of anti-bribery clauses can create a tension between different objectives. In particular, since arbitral bodies are often not the adequate forum to decide over criminal allegations, opposing companies may increase their own risk of criminal conviction. Certification bodies are not subject to this tradeoff and may, therefore, be better positioned than companies to audit and screen the compliance of intermediaries with anti-bribery standards.

- **Economy of scale effects:** differently from employees, intermediaries may serve several firms at the same time and the information contained in the certification can be shared among multiple companies. In this context, the certification process can avoid a socially inefficient duplication of auditing and screening activities.

Even though gatekeepers play an important role in reducing information asymmetries, they are not immune from errors and mistakes. Any amendment to the 2009 Recommendation should also introduce specific requirements on effective certification. The publication of ISO 17021-9 represents an important step towards a more transparent and reliable certification of anti-bribery management systems. In particular, together with ISO 17021-1, this standard clarifies the condition for independent certification. For instance, in order to favour impartiality, certification bodies are expected to separate their certification activity from consulting and auditing services. This standard is consistent with the economic literature on gatekeepers and has been adopted by the Sarbanes Oxley Act with regard to auditing firms.

33. Should the recommendation address the issue of reporting of foreign bribery by other professional advisers, and if so, how?

In addition to define specific requirements for efficient certification, the 2009 Recommendation should consider the obligation of certification bodies to report information related to foreign bribery offenses, identified during their certification activity. This obligation would increase the quality of certification and, consequently, the overall level of enforcement. In order to define the standard of compliance, it is important to distinguish between the obligation to apply the normally required diligence (i.e. "obligation de moyen") and the obligation to produce a specific, contractually agreed, result (i.e. "obligation de résultat").

These obligations may vary across the different stages of gatekeepers’ activities. In particular, when certification bodies verify the information provided by the requesting entity (i.e. pre-
issuance stage) and carry out ongoing monitoring and surveillance activities (i.e. post-issuance stage), they should be expected to act according to the normal diligence (i.e. obligation de moyen). On the contrary, an obligation de résultat should apply to the condition of impartiality in the issuance of the certification.
ZHAO Hui (Associate Professor of Law, Deputy Director of International Cultural Exchange Centre, Henan University of Economics and Law, P.R. China*)

How Is OECD Ready with It: Counter Bribery and Corruption with the Chinese Characteristics?

Regulations on the Relevant Matters Concerning the Report of Leading Cadres and Measures for Handling the Results of Checking the Relevant Issues of Leading Cadres

I am very grateful for the invitation to take part in the process of consultation responding to the Review of the 2009 OECD Anti-Bribery Recommendation. In this input, I would like to comment mainly on Question 51 and Question 52 concerning the engagement with key non-Members particularly together with the Comentaries to Article 1 Re paragraph 4 No. 16 of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (Convention) regarding political parties and public officials as per the spirit of GENERAL QUESTIONS FOR CONSULTATION; to a lesser degree, I would also like to comment on some related issues by borrowing the same terminology but with a broadened application.

I am keen on the fact that on one hand I am here on the OECD forum and addressing an international treaty focusing primarily on the “supply side” of bribery which is currently deep in its technicality-specific and advanced stage of Phase 4 of enforcement of the OECD anti-bribery instruments, more than 20 years after the adoption of the Convention. On the other, my country the People’s Republic of China (PRC) is a non-Member country, not a signatory state to the Convention either, “remain[ing] outside the remit of the OECD initiatives in this area”, absent from the round table and with its voice unrepresented. Equally speaking, the outside world neither knows what are exactly going on and how things really fare in PRC, and especially how effective an interaction could be taken between OECD and PRC. As the world’s second largest economy with a population over 1.3 billion, a key non-Member partner of OECD, PRC carries too much weight that the Convention could afford to ignore. The encouraging development is that OECD is actively engaging non-Member countries with PRC included for productive cooperation but still not that in-depth yet because of all the differences which I will discuss below.

My general impression is that the Convention with its subsequent instruments might have been formulated in the previous era not fully anticipating the pace of development and it seems now not inclusive enough to reflect the multi-dimensional or multi-polarized reality of the contemporary world; secondly, because of lack of adequate mutual understanding, a situation of talking “not on the same page” seems to have been resulted. Given the magnitude of the world’s cause of anti-corruption and anti-bribery, it is hard to imagine there is no meaningful involvement of non-Member countries like PRC. It is already the time for the Convention to take some change. With that in mind, the starting point would be to enlarge the vision by understanding more and in so doing it is necessary by going back starting from the basics.

Because of all the differences in culture, history, social-political system and current stage of economic development (in comparison to other countries), PRC is uniquely situated and challenged in combating bribery and corruption. Nevertheless, PRC’s pursuit for the past three decades has been proven effective and successful, and its experience and approach are a
contribution to the world and should be shared in tackling with the problems of common concerns in fighting against bribery and corruption. I believe that these insightful methodology and practice would be helpful and conducive to others which could serve as a foundation for cooperation, at least for a better understanding.

In fighting against corruption (a catch-all description encompassing bribery), there is already in place a comprehensive regime of laws, regulations, mechanisms, systems, institutions and establishments in PRC. Sources are also abundant in addressing anti-bribery and anti-corruption related issues, ranging from the classical governmental bodies of legislative, administrative, judicial branches, to non-governmental entities, business organizations, professional practices and academia, both domestically and from abroad. To highlight the point, the high profile prosecutions of bribery and corruption of high-level officials Bo Xilai and Zhou Yongkang are just two ready cases at hand.

Besides of the arsenal conventionally available as the abovementioned, I would like to bring forward an almost overlooked fact which is either mentioned by passing or less discussed, (if discussed, often construed rather narrowly and inadequately), but doubtlessly it deserves an appropriate place: the ruling (leading) political parties, here the practice adopted by the Communist Party of China (CPC) in its effort of combating corruption and bribery. I bring up the topic in hope that it could serve as an opportunity that the outside world could gain a glimps of an approach from a different perspective, possibly draw some useful lessons from it and hopefully re-orient the mindset in facing an ever increasingly complicated and diversified world.

China’s political structure works basically like this: the Communist Party of China (CPC), or the Chinese Communist Party (CCP), is the founding and ruling political party of the People’s Republic of China (PRC) and the PRC Constitution established the leadership role of CPC which together with eight other political parties forms the Chinese government that carries out a system of people’s democratic dictatorship. The Chinese officialdom is a combination of being elected by as per PRC Election Law for the National People's Congress and Local People's Congresses at All Levels (Amendment 2015), or staffed by the CPC Organization Department which “controls the more than 70 million party personnel assignments throughout the national system...throughout every level of government and industry”. Equally important, the latter category is not necessarily all CPC members, and officials with political party affiliation other than CPC, even no party affiliation, are quite common.

The discussion above has paved the way for the CPC’s ultimate authority as the ruling party and its legitimacy in developing any initiative and overseeing the implementation, here the nationwide effort in combating corruption and bribery. The standing and authority of the Chinese State Council is automatic. In Chinese vernacular, cadres and officials are treated as synonyms and often used interchangeably. “Leading cadres” are those above deputy positions at the county and director level; “leading” means middle level and above.

In 1995, the CPC initiated the reporting system of cadres’ personal matter as a component under a broader scheme of promoting transparency. In mid 2006, a circular was issued requiring leading cadres to report personal affairs. "Provisions Regarding Reporting Relevant Personal Matters by Leading Cadres" was issued in 2010. In early 2017, the General Office of the Central Committee of the Communist Party of China and the General Office of the State Council issued the "Regulations on the Relevant Matters Concerning the Report of Leading Cadres" (the "Regulations") and the "Measures for Handling the Results of Checking the Relevant Issues of
Leading Cadres" (the "Measures"), and at the same time also issued a notice requiring the party committees (party groups) at all levels for strict implementation. The latest issuance is the most recent revision and has been implemented rigorously since its promulgation.

The scope of the contents to be reported falls roughly into two categories, one of family matters and one of property matters. Of the “family matters”, there are eight sub-categories: the marital status of the cadre, whether owning an ordinary passport to travel abroad or a travel document in case of traveling to Hong Kong, Macao and Taiwan; children’s intermarriage with foreigners or stateless persons, or with Hong Kong, Macao and Taiwan residents; immigration status of spouses or children, or their status if working or living continuously for more than one year abroad without immigration; employment of spouses, children and their spouses, including senior positions in private enterprises, or as a representative or holding a senior position if working for foreign-owned enterprises, Sino-foreign joint ventures, and overseas NGOs established in China and employment status and duties outside the country; whether spouses, children and their spouses are investigated for criminal responsibility by the judicial authorities.

Of the “property matters”, they are the salary, various bonuses, allowances, subsidies, etc. of the cadre; engaging in remunerative activities in lectures, consultation, review and other services; the cadre, spouse and children living together as the owner or co-owners of realties; the cadre, spouses and children living together, or other means, holding stocks, funds, investment-type insurance, etc.; spouses, children and their spouses running businesses; deposits and investments of the cadre, spouse and children living together in foreign countries.

Discussed above is position-related approach to identify public official. Supervision Law of the People's Republic of China has further expanded the scope to “[O]thers personnel who perform public duties in accordance with the law”. Or, in other words, by agency law principle, it will suffice whoever acts as an authorized agent with delegated power in the exercise of public functions. This naturally has shifted to another approach, the duty-related approach, such as in the case of an arbitrator in an arbitration panel. S/he might not be (“ranked”) as high as a leading cadre, not required to file the annual report, yet so long as it is a delegated duty with the power derived from a public authority the criterion arising from public duty-relatedness will be met.

In order to ensure a full compliance of the “Regulations”, the companion “Measures” have been meted out to clarify the basic principles, and specify circumstances and treatments for underreporting, non-reporting, or concealing. Actions taken to dispose the non-compliance or inadequate compliance are based on the nature and degree of severity of the non-compliance or offence. They range from education, correction within a time limit, submission for inspections, warnings, notification of criticism, to suspensions (for promotion), demerits, demotions, dismissals, or worse where disciplinary action would be taken in accordance to CPC Disciplinary Regulations if it constitutes a disciplinary violation. During this process of checking, if the family property is found obviously exceeding the normal income, the leading cadres should be required to explain the source within 15 working days, and if needed, the organization (personnel) department and the relevant department shall verify the legality of the source of the property. Where there is a refusal, the legitimacy unexplainable, or the verification proven to be false, the disciplinary authority and the law enforcement agency shall handle the matter jointly under relevant regulations.

The above cited two cases of Bo and Zhou could help to illustrate how the mechanism works: after the investigation was initiated, both were first brought under the Party discipline authority,
going through the CPC internal procedure by following the discipline and supervision line, expelled from the Party with their Party membership stripped, and afterwards transferred to the country’s prosecution authority for prosecuting their criminal offenses in accordance with the Chinese laws both procedurally and in substance. All corrupted public officials substantially follow the same trajectory.

The practical implication of the afore-going discussion is that, as noticed previously, and probably still going on, there has been much debate over the definition of “foreign public official” (or the “officialdom” for short) as the term is used in the Convention together with its subsequent instruments. I believe the Regulations have given an answer to it. In the case of China and in case on the “demand side”, the line is clear-cut and self-evident according to the Regulations------once the threshold qualification is met, one is qualified as a “public official” and has got to file his or her report, or vice versa. It is worth pointing out that the definition on qualification might have been formulated by taking into consideration of the country as a whole. PRC has a vast territory and the development is not even across regions, with the south, particularly the coastal regions more advanced. Therefore, the original intent of the Regulations might have seemed to aim at the average level, and by doing so it might be practically under-inclusive as for those developed areas, such as Guangdong Province neighboring Hong Kong. But the operation of the Supervision Law of PRC seems to have picked up where the Regulations left off regarding the scope of application as stated above.

In addition, the Regulations have also clarified two more conceptual uncertainties. First, the Regulations have answered the questions regarding the bifurcated analysis of political parties and political party officials as it was raised in the Commentaries to Article 1 Re paragraph 4 No. 16. In other words, the situation described on the Commentaries is entirely inapplicable in the case of PRC. Hence, further fine-tuning or re-defining of this concept is necessary for OECD in order to have a meaningful engagement with other non-Member countries with different political structures. Second, the traditionally blurred boundaries between the public and private sectors, particularly with privately owned companies now performing what were formerly public functions in corruption prone sectors, such as utilities, are no longer a hindrance by introducing the concept of SOEs (state-owned enterprises). More than that, even business organizations for profit with an SOE as an investor, as in the mixed ownership enterprises incorporated under Chinese company law, where those employees being staffed to the enterprises as directors and/or officers, those directors or officers could still be qualified as public official categorically. The test is whether or not to file the required annual report.

Kudo should be given to the Regulations by taking into account the high standard, detail-oriented focus and low threshold approach with sweeping effect. A discussion with Tania de la Paz, Undersecretary of Mexican Ministry of Public Administration, was both enjoyable and informative while at the OECD Global Anti-Corruption & Integrity Forum. According to Mexican federal law, high-level officials above the ministerial level are under an obligation to file their annual financial declarations, published online, sharing all of their monetary relation under the sun with everyone on the planet. In PRC, the Regulations basically adopt the similar practice, i.e., public position holders, such as from my level on upwards, are required to file an annual report declaring all personal financial interests whatever involved. Clearly my ranking is not high enough according to Tania de la Paz and as by the Mexican standard, but one thing is certain and critical: the threshold is significantly low in the campaign against corruption and bribery in PRC.
The above discussed Chinese experiences could be viewed both ways. As from the viewpoint of “demand side”, the filing of report is a test stone for being pinpointed as a public official, and by doing so the qualification of being a “public official” is met literally as used by the Convention and its instruments. As from the “supply side”, the initiation, implementation, subsequent upgrading and perfecting of the reporting system itself have exactly mirror-imaged the OECD requirement of raising awareness, internal controls, ethics and compliance; if anyone does not observe the formality strictly, putting aside the substance for the moment, he or she will certainly face consequences, and if any falsification in the content is later on discovered, there will be no doubt that even darer consequences sure to follow behind. Thus, I hope this brief discussion would shed light on a better understanding of the concept of “with the Chinese characteristics”.

Special attention should be paid to the term “raising awareness”. It has a unique sense in Chinese culture and tradition with its multiple meanings, from educating, admonishing, and warning, all the way to serve as a means of outright deterrence: “Dare you?” A piece of good Chinese experience goes like this: “To counter bribery and corruption it is imperative to start from the young children of pre-school age”. How could it be “right” at the supply side since it is considered wrong at the demand side? Regarding offering bribes, the Criminal Law of PRC has spelled out the offences and corresponding punishment, there are also interpretations based on case law from the PRC Supreme Court and case reports of prosecution as well. The importance of education and the value of raising awareness can never be overestimated as a preventing strategy. Doubtlessly, it is yet up to the level and precision that Convention and its instruments have prescribed, and specific programs and targeted measures need to be developed based upon the common-sensical understanding. I believe OECD could play a pro-active role in the process of its interaction with PRC with this solid “first step of the 10,000 miles long march”.

Regardless of the external environment, the CPC is determined to carry forward its political will to combat corruption and bribery by taking it as a matter of life-or-death for the Party and the nation. There is a clear understanding and consensus regarding the nature of corruption, the severity of its consequences, and mostly, the sense of imminence. These worries, compounded with the gravity and scale, have lifted the CPC’s mission to a height that has surpassed the mere concerns of business, good governance and sustainable economic development. In addition, corruption in PRC is no longer viewed as a simple ethical concern or an ordinary economic phenomenon. Therefore, any methodological approach is justified as means to serve the end: no stake is higher than survival. This is the deep level rationale underlying any law-making and policy-making.

In conclusion, “reform and opening up” is what I would like to recommend to the WGB because the past four decades have testified its truthfulness in PRC. First, conceptually it is necessary to broaden the alliance and forge a “united front” with whomever with stake on hand for a joint effort in a diversified world; second, it is to take into consideration of the diversity and put forward explicit efforts by working out a realistic and pragmatic strategy to ensure the enforcement on multiple dimensions in order to achieve the optimal effect of the Convention. Better policies connote to embrace diversity for better lives of us all.

Once more, thank you for the opportunity to contribute to this important paper. I hope that these comments prove useful to WGB and I appreciate any effort for contacting me for any likely clarification.
Dear Patrick Moulette,

Thank you for the invitation to submit comments as part of the Review of the 2009 OECD Anti-Bribery Recommendation. We would like to extend our thanks and support to the Working Group on Bribery for initiating the review of the 2009 Recommendation. This is a timely and useful exercise, and we appreciate the invitation to contribute our views.

An overarching observation is to note that in the 20 years since the OECD Convention came into force, the private sector’s efforts to implement internal compliance systems and measures have developed rapidly, and arguably as a direct response to the OECD Convention’s requirements relating to corporate liability.

The acknowledgement and appreciation that tackling corruption requires multi-pronged and multi-stakeholder approaches, with the public and private sectors working cooperatively to ensure effective and sustainable change, now needs to be recognised more explicitly in the revisions to the 2009 Recommendation and in Annex II.

In the Public Consultation Document there are two general questions to which we offer the following remarks:

**GQ1: What are your general impressions concerning the effectiveness and implementation of the 2009 Anti-Bribery Recommendation?**

In responding to this general question our remarks are confined to Annex II: Good practice guidance on internal controls, ethics, and compliance, and Recommendation X.C.

Our work with private sector organisations includes advisory services on anti-corruption compliance. In this context we note that the GPG in Annex II - even 10 years since it was first issued, continues to be used as a key international standard to benchmark corporate anti-corruption compliance programmes and measures, alongside other international instruments and government guidance.

Annex II is also still highly relevant to companies that are in the early stages of putting in place anti-corruption compliance programmes and measures: The succinct, straightforward and clear language is helpful and provides an accessible starting point that enables many companies to take their first steps towards developing effective preventive measures within their business operations.

For these reasons we support the retention of Annex II, and look forward to it including more recent developments that are informing the private sector’s new approaches to compliance. Some suggestions for such inclusions are set out below.
GQ2: Is there a need to increase the impact of the OECD anti-bribery monitoring work and, if so, how?

We are of the opinion that the impact of monitoring efforts needs to be increased because the monitoring system is unique among international instruments addressing corruption and it makes the OECD Convention the most effective anti-corruption convention currently in existence. To keep the momentum on governments and the private sector, and to stave off member state apathy or complacency, the monitoring mechanism needs to develop in terms of its scope. It also needs to respond to changing conditions arising from the WGB members’ development of their legal and regulatory regimes to address bribery, in particular government efforts to engage with the private sector.

Monitoring the development and implementation of national strategies

With this in mind, we suggest that monitoring should examine governments’ efforts to develop and implement national anti-corruption strategies and in particular as they relate to the government’s efforts to:

(i) foster, initiate and engage in anti-corruption Collective Action\(^1\), including efforts to address corruption and unfair business practices in public procurement through tools such as High Level Reporting Mechanisms\(^2\); and

(ii) incentivize and require the private sector’s internal and external compliance obligations to address the risks of foreign bribery. By external compliance obligations we are referring to an organisation’s efforts to engage in Collective Action initiatives to address the systemic bribery risks with which it is confronted, or the behaviours of its peers, competitors, third parties or others.

The focus on national anti-corruption strategies and the inclusion of multi-stakeholder approaches would create a greater responsibility on member states to engage actively to support and become involved in such measures\(^3\).

Monitoring the active involvement of preventive measures that involve the public and private sectors working together to tackle corruption should spur more take-up of and support for Collective Action. It would complement and strengthen the current OECD anti-bribery monitoring work as well as its outreach efforts to non-members of the OECD Convention.


Monitoring the public disclosure of private and public sector compliance programmes

At present the 2009 Recommendation X.C (iii) states that member countries should encourage company management to ‘publicly disclose their internal controls, ethics and compliance programmes or measures, including those which contribute to preventing and detecting bribery.’ To date there is still widespread reluctance among private-sector companies (particularly SMEs) to publish more than the bare minimum about their internal compliance programmes. In practice, publication is often limited to the inclusion of the company Code of Conduct on their website.

Given the private sector’s concerns about the cost of compliance, including for example in relation to the duplication of due diligence efforts on third parties, the sharing and publishing of compliance programmes and measures could alleviate this situation. It would also help to level the playing field, increase understanding of what measures need to be implemented by companies of varying sizes, and strengthen the identification of best practices in compliance and thus spread them more efficiently around the world and throughout the private sector.

Strengthening a culture of openness in relation to compliance systems and measures through more widespread publishing of policies and measures would also generate opportunities for Collective Action, including between state-owned enterprises and the private sector. Companies that have robust and mature compliance systems to counter corruption can serve as examples to other organisations, offer training opportunities and engage in mentoring, thereby actively supporting the dissemination of good practices. Such companies could be more easily identified through increased levels of transparency regarding their standards, controls and other measures⁴.

Monitoring harmonisation of international anti-corruption guidance standards

The effectiveness of measures to prevent foreign bribery, particularly by the private sector, could benefit from harmonisation of the international standards that have proliferated over recent years. More clarity on the relationship between compliance efforts that provide a defence to an allegation of bribery and the international standards would be useful.

The trend towards certification under regimes provided by ISO standards, for example, risks having a paradoxical effect: Some organisations commit to the certification process and thus become more engaged in compliance measures, but apply a ‘tick-box’ mentality that solely focuses on certification as the ultimate goal, rather than addressing bribery risks relevant to the organisation in a meaningful way. There is also a tendency by some organisations to expect some level of immunity from investigation through certification of compliance systems that is not reflected in investigation authorities’ statements. The OECD monitoring approach could address this issue to provide greater clarity and guidance.

Our response to section 1.2.3. in the Review relating to Enhancing Compliance Rec. X.C and Annex II, is set out below, and addresses question 7: **How could the Good Practice Guidance be revised to reflect evolving global standards?**

As noted above, joint approaches to tackling corruption are becoming more prevalent. This includes companies in the same sector engaging in initiatives as well as those that involve both the public and private sectors. It must, however, also be noted that although Collective Action has been endorsed by the World Bank and the B20 – the business arm of the G20 – incentives to engage in and commit to multi-stakeholder initiatives are uneven; not every OECD member country encourages Collective Action, and this approach is not explicitly set out in all international standards. The OECD could become a game-changer through the adoption of requirements relating to multi-stakeholder efforts such as Collective Action and underscore other efforts that have developed in the last 10 years in this area.

We offer the following suggestions as to where references to Collective Action could be included in the existing provisions in the Recommendation and Annex II.

New text is underlined:

**2009 Recommendation - X.C.**

Member countries should encourage:

(ii) business organisations and professional associations, where appropriate, in their efforts to encourage and assist companies, in particular small and medium size enterprises, in developing internal controls, ethics and compliance programmes or measures, such as anti-corruption Collective Action for the purpose of preventing and detecting foreign bribery….

(iii) company management to make statements in their annual reports or otherwise publicly disclose their internal controls, ethics and compliance programmes or measures and involvement in Collective Action, including those which contribute to preventing and detecting bribery;

(iv) foster, initiate, support and engage in multi-stakeholder approaches to address bribery through Collective Action initiatives, including tools specifically addressing corruption risks in public procurement such as Integrity Pacts and High Level Reporting Mechanisms, as appropriate;

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6 The World Bank’s Integrity Vice Presidency has been actively promoting anti-corruption Collective Action, in particular through its Integrity Compliance Guidelines developed in 2010 addressed to sanctioned parties. The B20 has also frequently expressed support for promoting anti-corruption Collective Action since Mexico’s G20 Presidency in 2012.

(vi) their government agencies to consider, where international business transactions are concerned, and as appropriate, internal controls, ethics, and compliance programmes or measures including involvement in Collective Action in their decisions to grant public advantages…’

Annex II

Introduction

‘…It recognises that to be effective, such programmes or measures should be interconnected with a company’s overall compliance framework and approach to risk. It is intended to serve …’

Section 5:
(i)...(vii) as currently drafted.
New: (viii) Conflicts of interest (ix)
(x) Lobbying

A) Good Practice Guidance for Companies

New text to be inserted after §6 to add a new section:

7. a system to assess the opportunities and suitability to address bribery risks through Collective Action and to engage in such initiatives where appropriate.

If any clarifications are needed on the above, please do not hesitate to get in touch with the undersigned. We look forward to seeing the revised Recommendation in due course.
Corruption Watch

GQ1. What are your general impressions concerning the effectiveness and implementation of the 2009 Anti-Bribery Recommendation?

The Recommendation is an essential means of updating and complementing the Convention and generating political will to tackle issues that arise in implementation of the Convention. We welcome the revision of the Recommendation and the potential to include new emerging issues and improve recommendations for existing issues covered by the Recommendation. We note with regret however the patchy implementation of the Recommendation and the potential inconsistency with which measures within it have been reviewed in OECD reports. Rigorous monitoring is crucial to raise standards across the board.

GQ2. Is there a need to increase impact of the OECD anti-bribery monitoring work and, if so, how?

We strongly support the need for ongoing rounds of anti-bribery monitoring to maintain the effectiveness of the Convention and the Recommendation. The OECD’s anti-bribery monitoring work could additionally be made more visible, inclusive and effective by:

- Greater involvement of civil society and media groups in follow-up reports and broader and more regular consultation with civil society and media alongside meetings of the Working Group (for instance, with invitations to specific groups to present evidence to the Group on relevant themes or cases);
- Consideration of establishing a confidential reporting facility at the OECD for bribery allegations;
- A public database held by the OECD of concluded foreign bribery cases, documenting outcomes and bringing together key court documents relating to foreign bribery convictions in the public domain;
- Development of a graded sanctions regime against state parties that fail to comply with key provisions of the Convention and the Recommendation.

Response to detailed questions

1. What recommendation could be envisaged to provide greater clarity with respect to certain elements of the foreign bribery offence?

We believe that it would be useful to ensure that the Recommendation is revised to make clear that bribes paid to relatives and business associates of foreign public officials with the intention to win business and influence contracting decisions of foreign public officials must be clearly covered in foreign bribery laws.

2. How could foreign bribery awareness-raising and training actions be further addressed?

We note that in the UK the issue of whether government officials are effectively detecting and reporting signs of foreign bribery was raised in a recent intelligence exercise (Operation Primus Bucksheet) which found serious weaknesses. We imagine that the UK is not unique in this regard. The Recommendation could require state parties to ensure that specific training is provided to officials working in international trade, export promotion
and diplomatic roles and that reporting of suspicions by such government officials should be mandatory. It may also be useful for the Recommendation to address how support from larger companies (including by publication of their compliance programmes) to SMEs can be encouraged to ensure that SMEs are able to access best practice.

3. **What recommendation could be envisaged to address other defences applicable to the foreign bribery offence?**

Corruption Watch believes that all defences should be closely monitored by the OECD Working Group on Bribery.

4. **What recommendation(s) could be envisaged to address issues related to foreign bribery, concerning, for instance the demand side of bribery or the bribery of officials from sports organisations, bearing also in mind the specific focus of the Anti-Bribery Convention and the work carried out in other fora on these issues?**

Corruption Watch believes that it would strongly desirable for parties to the Convention to ensure that the receipt of bribes by foreign officials is criminalised. Additionally, in order to ensure that the demand side of bribery is more effectively addressed, the Recommendation could include provisions that require state parties to

- Inform law enforcement bodies in the state where bribes were demanded at the earliest possible opportunity of their criminal investigation, and ensure that all necessary information and support is provided to those bodies to enable their own criminal investigation;
- Ensure that all measures are taken to identify, track and where possible confiscate the proceeds of bribery that have passed through their jurisdiction;
- Ensure that the names of those against whom there is credible evidence of receipt of foreign bribes are eligible for financial sanctions, and ensure that their names are passed by law enforcement to relevant decision-making bodies with regards to sanctions.

Corruption Watch believes that publicity and transparency are key to reducing the demand side of bribery, and that the names of those who receive bribes should be made public when companies or individuals are convicted or reach settlements, whether civil, administrative or criminal, for foreign bribery offences.

5. **What further Guidance on liability of legal persons could be envisaged?**

Corruption Watch believes that criminal liability for legal persons is essential. Administrative and civil liability is an important additional component of any regime for liability of legal persons particularly to address regulatory offending and contexts where evidence cannot be proved to a criminal standard. State Parties should be encouraged to make maximum use of civil and administrative sanctions additional to criminal sanctions to increase the deterrence effect of enforcement.

We believe that further guidance could make clear that liability of legal persons should be introduced not just for a stand-alone bribery offence but for the broader range of offences which relate to foreign bribery, including money laundering, false accounting, and fraud. The creation of liability for stand-alone bribery offences without broader liability for
related offences has, in our experience, the potential to distort and undermine effective enforcement.

8. What recommendation could be envisaged to address the issue of incentivising anti-bribery compliance?

Corruption Watch does not believe that having an anti-bribery compliance programme should be a defence against prosecution and would be very concerned to see any language to this effect in the recommendation. An effective and properly implemented compliance programme, adequately resourced and independently verified can be a potential mitigating factor. Any recommendation in this regard should also provide that:

- State parties require companies receiving government export support (not just finance), engaging in official development assistance contracts, and participating in official government trade missions to have effective compliance programmes in place;
- State parties ensure that compliance programs and independent monitorships can be imposed as a result of convictions as well as non-trial resolutions.

9. What recommendation(s) could be envisaged to further enhance the effectiveness of foreign bribery enforcement?

Corruption Watch urges the Working Group to compile a horizontal study on the reasons behind acquittals, the dropping of investigations and declining to open investigations in foreign bribery cases, to look at the key impediments to effective implementation of the Convention. The Recommendation could include that state parties are required to submit to the Working Group a full written rationale behind investigations being dropped or not being initiated, and a full analysis where there are acquittals of the underlying reasons for the acquittals. Greater transparency over the reasons behind declining to investigate is essential to understand impediments to the full implementation of foreign bribery laws.

10. What recommendation could be envisaged to usefully address investigative means in foreign bribery investigations?

Corruption Watch believes that a recommendation that covers best practice on the use of wire-tap and surveillance in bribery cases, including on admissibility of such material as evidence, and the use of informants and cooperating witnesses would be useful. Additionally, a recommendation that requires State Parties to ensure that law enforcement bodies responsible for investigating corruption can gain access to documents held by government departments readily and easily would be useful.

11. What recommendation could be envisaged on the issue of transparency of beneficial ownership information, given this issue is currently already addressed in other fora?

Corruption Watch strongly supports the inclusion of a recommendation on beneficial ownership transparency, including a recommendation to ensure that companies registries are properly verified with an effective, properly resourced sanction regime that penalises companies that make false statements.
12. What recommendation could be envisaged to further support the enforcement of Article 5 of the Convention?

Corruption Watch remains deeply concerned, from the UK experience, about the potential for breaches of Article 5 where it is not clearly legally binding upon a country. We believe that a recommendation could be developed that requires state parties to ensure that Article 5 is legally binding. We are also concerned about the increasing reference to ‘impact on employees’ in prosecutorial decisions in non-trial resolutions, and the potential for this factor, when considered in the context of large strategically important companies, to amount to a prohibited Article 5 consideration i.e. national economic interest. We are particularly concerned about the potential for exaggerated and unsubstantiated claims about the impact on employees of a prosecution to be made. A recommendation could make clear that any evidence to be considered by a court or prosecutor as to the impact on employees of a prosecution should be based on independent expert assessment and not rely solely on statements from the company under investigation.

14. What recommendation could be envisaged to address non-trial resolutions in the enforcement of the foreign bribery offence?

Corruption Watch believes that a recommendation to ensure greater consistency in the application of settlements (non-trial resolutions) would be useful. The key principles that such a recommendation should include are as follows:

1) Use of settlements (excluding guilty pleas) should only be one tool and not the sole means of dealing with foreign bribery offences. Repeat offending and egregious, widespread offending should not be eligible for the use of such settlements.

2) Transparency in both the underlying criteria on which such settlements will be given, and the settlements themselves is crucial. The terms of settlements, including a detailed outline of the wrongdoing for which the settlement has been granted, should be made public.

3) Settlements should provide for dissuasive and effective sanctions. The use of non-criminal settlements or declining to prosecute represents a potential decriminalisation of foreign bribery as an offence and should in our view be avoided.

4) Individual liability of senior level executives is critical to deterrence and settlements should only be given where companies commit to providing evidence of senior level responsibility for wrongdoing. Settlements should also be structured to address the ‘responsibility gap’ in relation to senior individuals, including requiring companies to claw back the bonuses, pensions and executive pay-outs of those running the company at the time of the wrongdoing to contribute to penalties paid by the company.

5) Compensation for affected countries and communities should be a fundamental feature of settlements, and affected countries should be informed at an early stage of the decision to offer a settlement, and offered the opportunity to provide information that may prove useful for calculating compensation.
6) Judicial oversight is the gold standard of accountability for settlements and should be encouraged. The ability to appeal the judicial decision by third parties should also be encouraged.

15. What recommendation could be envisaged to further address the effective, proportionate and dissuasive nature of sanctions for foreign bribery?

Discrepancy in the level of fines across State Parties presents a high risk for forum shopping and needs to be firmly addressed. Several State Parties have now effectively set high benchmarks for potential penalty levels and all State Parties should be encouraged to meet these benchmarks, and to adopt similar sentencing standards.

17. What recommendation could be envisaged to address issues such as effective enforcement and publicity of sanctions?

Court transparency and effective reporting of trials is essential to monitoring implementation of legislation and providing sufficient reputational risk to deter future offending. Ensuring that court documents are easily and publically available including documents that lay out the full case against the company or individual would be an extremely useful recommendation to help raise standards across the State Parties in this area.

18. Which other enforcement challenges (e.g. the interaction of remedies in cross-border corruption cases) could be addressed as part of the review of the Anti-Bribery Recommendation?

Corruption Watch is concerned that the policy of ‘not piling on’ instigated by the US Department of Justice may exert a downward pressure on global enforcement against foreign bribery. There is a risk that other jurisdictions could use the trend, driven by private sector complaints about facing multiple fines, and the doctrine of double jeopardy to avoid instigating their own independent investigations of offending that has taken place in their jurisdiction. Additionally, there is a significant risk that the doctrine of double jeopardy could exacerbate forum-shopping, with companies ‘self-reporting’ in jurisdictions where they think they may be less likely to face investigation or sanction or more likely to face a reduced sanction. The review of the Recommendation should look closely at how multi-jurisdictional investigations can be more effectively encouraged where cross-border corruption occurs, and whether there are measures than can reduce the risk of forum shopping, including encouraging State Parties to liaise at the earliest possible opportunity with another jurisdiction where a significant part of the offending might have occurred in that jurisdiction.

19. What recommendation could be envisaged to address the issue of mitigating circumstances in foreign bribery cases?

It is right to allow mitigation for companies that self-report but Corruption Watch is concerned that self-reporting should never be grounds for a company to avoid criminal punishment altogether. We remain concerned at trends to decline to prosecute or use civil penalties where companies self-report - measures which should in our view should be reserved for situations where a criminal standard of evidence cannot be established. It is questionable in our view whether disgorgement on its own, without a penalty, and the lack
of transparency in the use of declination or civil penalties provide dissuasive, effective and proportionate sanctions as required by the Convention.

21. What recommendation could be envisaged to address the issue of judicial specialisation and training?

Corruption Watch notes that judicial specialisation, matched with adequate resources for the judicial system, could significantly improve enforcement outcomes in the court and ensure greater consistency of sentencing and judicial direction of juries. A recommendation that urges State Parties to give serious consideration to ensuring judicial specialisation and training would in our view be very welcome.

22. What step could the Working Group take to further address small facilitation payments?

Corruption Watch believes that the Working Group should recognise and support the growing trend of countries to remove any exception for facilitation payments in their legislation, and make clear the evidence of the harm caused by small facilitation payments both to the broader governance and economic system and to corporate ethics.

28. What recommendation could be envisaged to enhance detection and reporting by public officials to law enforcement authorities?

Please see answer to question 2. Additionally, we think it is important (as per our answer in question 10) that law enforcement authorities should be able to gain easy and ready access to documents held by government departments that may provide useful evidence and State Parties should be required to ensure that this is the case.

29. What recommendation(s) could be envisaged to further strengthen whistleblower protection?

Corruption Watch strongly supports a recommendation that sets out emerging best practice on whistleblower protection with benchmarks emerging from the EU, US and other jurisdictions. A recommendation that requires State Parties to ensure a legislative framework that allows whistleblowers to approach law enforcement in the first instance and that ensures those who seek to penalise or uncover whistleblowers face serious sanctions and potential disqualification from senior manager roles would be a significant step forward.

31. What recommendation could be envisaged to address the issue of voluntary disclosure?

Please see response to Question 19.

32. What recommendation could be envisaged to enhance detection and reporting of foreign bribery by external auditors and accountants?

The role of external auditors and accountants in detecting foreign bribery is crucial and existing recommendations in the 2009 Recommendation on this aspect have not in our view, been examined sufficiently in the Working Group on Bribery’s evaluations. Bribery
poses a serious material risk to companies’ shareholders and stakeholders. We encourage the Working Group to propose a recommendation that specifically requires State Parties to ensure that there is no conflict of interest in the role of the external audit, including by requiring that audits are not carried out by those who sell other services to the same company, and requiring auditors to declare all hospitality and contracts provided to them by the company under audit and all staff that have moved to the company or come from the company within a set time frame. The recommendation should also require State Parties to ensure that auditors are specifically required to look for signs of potential bribery particularly when looking at accounts relating to high risk transactions such as contracts with countries where there is high risk of corruption, and that auditors who fail to spot significant wrongdoing face a proper regime of sanction, including significant penalties.

33. Should the recommendation address the issue of reporting of foreign bribery by other professional advisers, and if so, how?

Arbitration courts and tribunals have long been a source of litigation over corruption allegations, and as such provide a key potential source of information and evidence about these allegations. However, it is not clear whether this evidence is properly available to and reported to law enforcement authorities. The Recommendation should specifically address the role of arbitration courts and ensure that these courts are regulated by State Parties in such a way that:

7) Tribunals and arbitration courts are required immediately to refer suspicion or evidence of corruption arising from arbitral proceedings to relevant enforcement authorities in the form of a Suspicious Activity Report.

8) Due diligence should be required about source of arbitral fees, and these fees should be disclosed.

9) Where corruption issues are raised but not explored by parties, courts and tribunals should be required to adopt an inquisitorial role, requiring disclosure and testimony about the evidence relating to corruption.

10) Arbitral courts and tribunals should ultimately be required to decline the arbitral role if corruption is clearly established so that corruption allegations can be fully ventilated in the open commercial courts.

11) Where corruption is established on the balance of probabilities, confidentiality and privacy should no longer extend to tainted party.

34. What recommendation could be envisaged to enhance detection and reporting of foreign bribery by the media?

35. To what extent and how would it be useful for the WGB to turn its attention to legal frameworks protecting freedom, plurality and independence of the press, as well as laws allowing journalists to access information from public administrations?

Corruption Watch believes that the WGB should focus on access to information and protection of independent journalism to enhance detection and reporting of foreign bribery cases. Journalists have often been key sources of detection of allegations of foreign bribery and have faced unprecedented threats to their life in recent years when exposing corruption.
Access to information should not just however be for journalists but should be treated as a public good, with public interest organisations playing a strong role in acting as a ‘watchdog’ for society. As per our answer in question 17, we believe that access to court documents and the ability to report court trials effectively is crucial. We also believe that law enforcement agencies should be subject to access to information laws to ensure their accountability and that law enforcement agencies should be strongly encouraged to make available to the public greater information about their investigations and cases.

36. What recommendation could be envisaged to enhance the enforcement of false accounting offences and accounting requirements in foreign bribery cases?

37. What recommendation could be envisaged to clarify that both natural and legal persons can be held liable in application of Article 8 of the Convention?

As noted in question 5, it is essential that legal persons can be held liable for false accounting offences, and additionally for company regulations that require companies to make truthful statements to auditors.

38. What recommendation could be envisaged to strengthen the independence of external auditors in practice so that they can provide an objective assessment of company accounts, financial statements and internal controls?

Please see our answer to question 32.

39. What recommendation could be envisaged to further address the enforcement challenges of suspension from public advantages?

40. Should automatic suspension from public advantages be considered, and if so how, including as concerns notice and appeal mechanisms, and procedures for imposing or lifting suspension measures?

The use of suspension from public advantages remains significantly underused by State Parties. Corruption Watch strongly recommends greater harmonisation of standards for the use of suspension from public advantages and that a recommendation be developed which requires State Parties to hold central databases which contain both non-public intelligence data about contractors and public data on contractors that have been convicted of relevant offences as well as contractors that have been suspended. Such databases should include identifiers and be integrated with other procurement systems to enable ease of identification by procurement authorities.

We believe that the use of administrative suspension of contractors, with full due process safeguards (including appeal mechanisms), where there is a balance of probabilities that corruption has occurred is an important tool that is not fully used by most State Parties. Additionally, we note that a functioning suspension and debarment system with specific time-limited debarment for companies convicted of corruption is an essential component of any regime which seeks to encourage companies to self-report in order to be eligible for a settlement. Incentivising companies to self-report is most effective where the penalties of not doing so are self-evidently greater than self-reporting, and the risk of suspension from public advantages is consistently raised as one of the sanctions that companies fear most.
We urge the Working Group on Bribery to consider how a public database on concluded foreign bribery convictions held by the WGB could be used to help enhance suspensions from public advantages.

42. What step could the Working Group take to further support the efforts to promote transparency in public procurement, including in collaboration with the OECD Public Governance Committee for the implementation of the principles contained in the 2008 Council Recommendation on Enhancing Integrity in Public Procurement?

The Working Group could promote open contracting standards, particularly in sensitive sectors which are prone to foreign bribery and invite evidence on whether open contracting has helped identify or reduce instances of foreign bribery.

43. What step could the Working Group take to further support the implementation of the Council Recommendation on Bribery and Officially Supported Export Credits, adopted by the OECD Working Party on Export Credit and Credit Guarantees?

Corruption Watch remains concerned at the high risk of export finance being used for projects where bribery is high risk and at the low level of detection by export credit and finance agencies. We welcome the revised Recommendation from the OECD Working Party on Export Credit and Credit Guarantees (ECG) in March 2019, but note that the issue of sanctions where companies are found to have breached warranties, or misrepresented information to the export credit agency remains weak, both in the Recommendation and in practice. We strongly recommend that the Working Group on Bribery continue its role in evaluating export credit agency practice on fighting foreign bribery in their monitoring reviews, particularly to provide greater scrutiny of implementation beyond the reporting done by export credit agencies themselves.

47. What recommendation could be envisaged to address the issue of international asset recovery and related challenges, given work already undertaken in this area in other fora?

The Working Group should and could promote greater transparency and accountability in the return of assets such as the proceeds of bribery that State Parties are returning to affected states, in line with the principles developed at the Global Forum on Asset Recovery. Additionally, a recommendation should encourage State Parties to give consideration to the developing compensation principles to ensure that affected states and communities are compensated by companies that have engaged in foreign bribery.
49. What steps could the WGB take to further ensure and enhance implementation by Parties of the Anti-Bribery Convention and related OECD anti-bribery instruments?

50. What steps could the WGB take to further increase enforcement by Parties of the Anti-Bribery Convention and Anti-Bribery Recommendation?

53. What further steps could the Working Group take to enhance cooperation with international organisations (including international financial institutions and other fora such as the G20), non-governmental associations and the business community?

Please see our answer to GQ2 and 9.
Centre for International Private Enterprise (CCEP-I)

With that in mind, on behalf of the Center for International Private Enterprise’s Anti-Corruption & Governance Center, we would like to make the following comment.

There doesn’t seem to be an explicit provision for avoiding conflicts of interest at any level. This is the only potentially fundamental element missing.
International Bar Association and International Association of Women Judges

Public Consultation: Review of the 2009 OECD Anti-Bribery Recommendation

Dear Colleagues,

1. This is a joint submission to the OECD Working Group on Bribery’s public consultation, by the International Bar Association (IBA) Legal Policy & Research Unit (LPRU) in London and the International Association of Women Judges (IAWJ) in Washington, DC.

2. In mid-2017, the IBA LPRU established a Working Group to consider the concept of sextortion, identify legal and practical barriers to addressing such conduct and, where necessary, develop recommendations for possible changes necessary to enhance the efficacy of existing laws and frameworks. In light of the IAWJ’s role pioneering the concept of sextortion, the IBA sought to partner with the IAWJ in this task; IAWJ senior advisor Nancy Hendry subsequently became an advisory member of the Working Group.

Sextortion

3. The work of the IBA and IAWJ on sextortion highlights the importance of bringing a gender lens to the anti-corruption discussion and considering the ways in which corruption may affect women differently from men. The IAWJ has defined sextortion in the following terms:

   [A] form of sexual exploitation and corruption that occurs when people in positions of authority whether government officials, judges, educators, law enforcement personnel, or employers seek to extort sexual favours in exchange for something within their power to grant or withhold. In effect, sextortion is a form of corruption in which sex, rather than money, is the currency of the bribe.

4. It is important to distinguish this conceptualisation of sextortion, as a form of corruption, from technology-aided sexual blackmail, a form of conduct that has been given the same label in some contexts.

5. The IAWJ’s concept of sextortion is best illustrated with two parallel scenarios. In the first, ‘Mr Smith’ attends a government office to seek a permit. After reviewing the paperwork, the relevant official demands a $100 bribe to process the permit. In the second, ‘Ms Smith’ attends the same government office for the same permit. This time, the government official tells Ms Smith that her permit will only be granted if she engages in a sexual act. The gender choice of the protagonists is deliberate: while sextortion is not exclusively a gendered issue and there are cases of male victims, it has a disproportionate impact on women.

6. Mr Smith’s case is an archetypal example of bribery. As a result of the efforts of the OECD and many other stakeholders, most jurisdictions have anti-bribery laws that prohibit the official’s demand. If Mr Smith reported the bribe, the official might face prosecution. While the strength of anti-corruption laws varies by jurisdiction, and the enforcement of such prohibitions depends on political will and prosecutorial resources, the law is largely settled. There are few countries in the world where the government official’s demand for a bribe is not illegal, at least on paper.
7. From a governance standpoint, the conduct of the government official in Ms Smith’s case is as reprehensible as in Mr Smith’s case and, from a human rights standpoint, arguably more so. Money can be replaced; human dignity cannot. Yet the legal and policy framework for addressing sextortion is far less settled than for addressing financial bribes. The IBA’s consideration of how to address inadequacies in the legislative framework remains, at this stage, a work-in-progress. However, the preliminary findings confirm that most jurisdictions do not have legislation specifically prohibiting sextortion. Last year, Jammu and Kashmir became the first Indian state to explicitly criminalise sextortion. The IBA’s draft research, which presently covers eight jurisdictions,1 indicates that some bribery provisions could be interpreted to include sextortion but have not/have only rarely been used for this purpose. Another challenge is that most bribery legislation penalises both the bribe-taker and the bribe-giver (i.e. the sextortion target). This is likely to have a chilling effect on reporting sextortion. While sexual assault or sexual harassment legislation may reach some cases of sextortion, they generally afford more limited coverage and less severe penalties than anti-corruption laws.

Mainstreaming Gender

8. A broader point emerges from the above discussion of sextortion: gender has hitherto been largely ignored in the anti-corruption context. As much is evident from the fact that the word ‘gender’ is not found once in the OECD Anti-Bribery Convention, the 2009 OECD Recommendation for Further Combating Bribery of Foreign Public Officials in International Business Transactions nor the public consultation document for the present review.

9. This is problematic for multiple reasons. Two are particularly concerning. First, we cannot fully understand the nature, extent and impact of something that is not measured. As such, when organisations such as the OECD or the World Bank continue to define and gather data against the background of a gender-ignorant anti-corruption framework, the marginalisation of gender concerns – and conduct such as sextortion – persist. When research highlights that corruption costs the global economy $X per year, what is really being said is that financial corruption has that cost. Until we disaggregate the concept and adopt a broader understanding of the manifold forms of corruption, we will fail to appreciate other, equally or more harmful forms of corruption.

10. Second, this prevailing conceptualisation entrenches the status of corruption as an economic phenomenon, which makes efforts to address sextortion even harder. As highlighted above, some anti-corruption frameworks are sufficiently broadly drafted to encompass sextortion. Despite this, discussions with prosecutors and judges and the dearth of case law in this context indicates that relevant decision-makers retain an economic mindset in assessing corruption.

11. We appreciate that, at first blush, sextortion may not appear to be part of the paradigmatic foreign public official bribery case. However, unless and until that inquiry is undertaken, we cannot know whether or to what extent sextortion might play a role. Foreign bribery may involve major construction contracts, resource extraction rights, procurements, or other agreements, the performance of which involves people at many levels. It is not

1 India, South Korea, Nigeria, Brazil, South Africa, the United Kingdom, the United States and Romania.
enough to address the corrupt foreign payment if corruption also affects the operation of
the business and implementation of the agreement. At the level where people are hired,
work assignments are made, materials are purchased, or benefits are conferred, it is
important to know whether additional corruption, including sextortion, is occurring and to
take steps to prevent and correct it. Those steps might include policies, training, and other
efforts to raise awareness that prohibited corruption encompasses sextortion, as well as
mechanisms for detecting such corruption and holding those who engage in it accountable.

12. The stereotypes and attitudes that view demands for sexual favours as different
from demands for cash are deeply entrenched and shape the way corruption is defined and
interpreted in laws, national action plans, anti-corruption policies, public information
materials, and research efforts. When gender is not part of the discussion, we do not ask
the right questions, gather the correct information, or even see the true nature and scope of
the impact corruption has on everyday lives. Nor can we develop effective strategies for
combating corruption when we are operating with flawed or incomplete information.

13. Lest it be thought these are merely theoretical concerns, last month Human Rights
Watch identified at least 12 cases of sexual exploitation in return for food from United
Nations aid works in Mozambique, following the recent cyclone. In Britain, the police
service has identified a rise in the number of instances of sextortion committed by officers
against witnesses, victims or suspects. Sextortion is thought to be rife in informal
migrant/asylum seeker routes in North Africa and the Middle East. Even the IBA LPRU’s
recent survey on sexual harassment in the legal profession indicated the prevalence of
employment-related sextortion – quid pro quo sexual harassment in exchange for work
employment or promotion.

14. We appreciate that some of the above commentary goes beyond the immediate
context, being the 2009 OECD Anti-Bribery Recommendation. The broader scope of our
submission is deliberate. Gender has not been a major consideration in efforts to combat
foreign bribery, just as it has not been a major consideration in efforts to combat bribery
more broadly. Unless the OECD and other leading organisations at least pose the right
questions, it cannot be known whether and how gender considerations should affect those
efforts.

15. Disproportionate gender impact is a key consideration for many global policy
initiatives, with a notable focus on violence against women and girls. This should be
extended to cover all areas which disproportionately impact women, including corruption
(both domestic and foreign), and seen as part of that wider agenda.

If you have any questions please do not hesitate to contact us.
NRGI appreciates this opportunity to comment on the Working Group on Bribery’s (WGB’s) review of the 2009 Anti-Bribery Recommendation. We are an international, independent non-profit organization that promotes the transparent, accountable and effective management of oil, gas and mineral resources for the public good. To that end, we offer technical assistance and capacity building on request to a range of stakeholders in and outside of resource-rich governments.

Our recommendations focus on two key issues: (1) the disclosure of non-trial resolutions and (2) engagement with the extractive industries.

1. Recommendation for Further Disclosure of Non-Trial Resolutions
Response to Suggested Question 14

We commend the Working Group on Bribery’s demonstrated commitment to strengthening the disclosure of information about non-trial resolutions. Whether in its country evaluations, published reports, or OECD-convened panels the WGB has consistently stated that such resolutions “must be accompanied by adequate measures to ensure their transparency and accountability.” In support of this point, the WGB has noted, among other things, that broadening access to information about pre-trial resolutions “contributes to raising awareness, provides guidance to Practitioners,” and “increase[s] confidence in enforcement of the foreign bribery offence.” Moreover, in its reports and sponsored blog posts, the WGB has taken regular notice of civil society research on the topic, which has argued for instance that lack of transparency in pre-trial resolutions can decrease the deterrent value of enforcement and undermine efforts to compensate victims.

As part of our broader anti-corruption programming, NRGI has been researching how the mere publication of information about foreign corruption cases by courts and law enforcement bodies can support efforts by other oversight actors, such as regulators, lawyers, risk management professionals, the media, and civil society. Thus far, we have found examples of how disclosure can (a) provide evidence and incentive for related investigations and sanctions in the same or other jurisdictions; (b) help businesses avoid

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2 See e.g., Belgium Phase 3 Report, Recommendation 5

3 Most recently, in OECD (2019), Resolving Foreign Bribery Cases with Non-Trial Resolutions: Settlements and Non-Trial Agreements by Parties to the Anti-Bribery Convention

4 See e.g., OECD (2018), Settling Foreign Bribery Cases with Non-Trial Resolutions


6 OECD (2019), 152.

certain types of corruption risks; (c) assist oversight actors in identifying bribe recipients and enablers of corruption schemes; and (d) help impacted parties intervene and seek compensation.

Given these benefits of robust disclosure, we respectfully recommend that the WGB consider a recommendation that state members should publish the following minimum pieces of information:

- The identities of any legal and natural persons sanctioned in the case (with the acknowledgement that, where a defendant’s identity is protected by law, anonymization may be required);
- The identity of the bribe taker, including the country, sector, and government body in which he/she was an official at the time of the bribery (again, unless anonymization is required by law);
- The identities of any enablers or other third parties involved in the case, such as banks, brokers, agents (unless anonymization is required by law);
- The nature of the deal for which the bribe was paid, together with any transactions or mechanisms used to move or conceal the bribe proceeds—for example, cash payments, fraudulent consultancy contracts, subcontracts or partnership arrangements with local firms; and
- Other jurisdictions involved in the bribery scheme—for example, the locations of bank accounts, companies used to move or conceal bribe proceeds, or assets acquired with the proceeds.

2. Recommendation for Engagement on the Extractive Industries

Response to Suggested Question 24

Past OECD analyses have found high and varied bribery risks across the extractives sector value chain. We recommend that the WGB continue its engagement on extractives, for instance by taking the following two actions:

- **Focus on certain high-risk actors:** Recent trends in anti-bribery enforcement and our own analysis of over 100 extractives sector corruption cases suggests the WGB could fruitfully analyze bribery risks, patterns, and prevention strategies associated with the following types of entities:

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8 We submitted a summary of this research during the December 2018 Consultation on Fighting Foreign Bribery, and the WGB generously took notice of it in OECD (2019). An updated copy of our December submission is attached for ease of reference.

9 A WGB analysis found this information was already provided in 73% of published resolutions concluded with legal persons, and 63% of published resolutions concluded with natural person. OECD (2019), 157.

10 The WGB has already found that disclosing such info “can provide valuable insight to businesses in the context of their risk assessment efforts.” OECD (2019), 158.


12 NRGI (2017), *Twelve Red Flags: Corruption Risks in the Award of Extractive Sector Licenses and Contracts*. 
• **Oilfield service companies:** These companies figure disproportionately in extractives-related foreign bribery cases. NRGI will soon publish research on corruption risks associated with this part of the sector that we would be happy to share with the WGB.

• **Commodity trading companies:** Law enforcement is taking increased notice of the high corruption incentives these middlemen face, as are other OECD divisions. For example, the Development Assistance Committee is supporting research on illicit financial flows in oil and gas trading, and the Development Centre has been running a Policy Dialogue on commodity trading transparency.

• **State-owned enterprises (SOEs):** National oil and mining company officials are frequent bribe recipients, as recent high-profile scandals in a range of countries and OECD research have shown. As with trading, the WGB could consider how to leverage ongoing OECD efforts on this challenge—for example, the interventions led by the working group on SOEs. Moreover, the companies that partner with, contract from, or provide professional services to SOEs need to adopt adequate preventative measures to avoid participating in or enabling corruption. NRGI is running a project on this topic and would welcome the chance to collaborate and discuss.

**Share lessons learned:** OECD WGB members have concluded dozens of cases involving the extractive industries. The WGB should leverage this experience to provide more guidance to the industry. For example, the sector could benefit from more information on (i) how to deal with risks unique to natural resource extraction and (ii) what kinds of safeguards and compliance systems have proven most effective. This guidance would not only help companies themselves, but would also inform other stakeholders, such as the law enforcement agencies that must decide how to take notice of company prevention efforts when crafting non-trial resolutions.

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13 For an overview, see NRGI (2016), *Initial Evidence of Corruption Risks in Government Oil and Gas Sales*.

Open Contracting Partnership

24. What step could the Working Group envisage to address the particular foreign bribery risks in certain sensitive sectors?

The WGB should recommend the adoption of an open contracting approach, and in particular the Open Contracting Data Standard (OCDS) in order to open up the entire public procurement process to scrutiny (external as well as internal), which is especially relevant as the review notes that public procurement is particularly susceptible. At the Open Contracting Partnership we recognize that public procurement is government’s number one corruption risk, and as a result we have developed a range of sector-specific guidance packages based on the OCDS which include recommendations for the extractives and infrastructure/construction sectors (including our new Open Contracting for Infrastructure Data Standard) - two of those specifically mentioned in the Review. This also includes trainings for and engagement of media, related also to point 3.7 Detection by the media.

39. What recommendation could be envisaged to further address the enforcement challenges of suspension from public advantages?

The Open Contracting Data Standard allows for linking different stages of the procurement process, including vendor registries and debarment lists. This guidance could be useful in addressing some of the challenges raised in the narrative, and the Working Group should recommend implementation of the OCDS.

42. What step could the Working Group take to further support the efforts to promote transparency in public procurement, including in collaboration with the OECD Public Governance Committee for the implementation of the principles contained in the 2008 Council Recommendation on Enhancing Integrity in Public Procurement?

The Working Group should recommend an open contracting approach, and in particular the Open Contracting Data Standard (OCDS) in order to ensure not only transparency but also more effective disclosure and use of contracting information. We know that public procurement poses the most significant risk to governments in terms of bribery and corruption generally, and we have done a lot of work especially around red flags to help identify potential instances before they happen (tangible results from the Prozorro/Dozorro reforms in Ukraine include a halving of perceptions of corruption; automated red flags and mass civic monitoring and feedback are also embedded in the system, with over 50% of problems flagged being fixed.)

Related to the Convention’s recommendation that "countries should support... international governmental organisations such as the United Nations, the World Trade Organisation (WTO), and the European Union, and are encouraged to adhere to relevant international standards such as the WTO Agreement on Government Procurement,” the OCP has also worked with many of these organizations to ensure that the OCDS supports these efforts. We have written about why this is important, and have also developed guidance specific to both the WTO GPA and the European Union.
Society of Corporate Compliance and Ethics

The Society of Corporate Compliance and Ethics (the “SCCE”)1 is a global non-profit organization comprised of more than 7,500 compliance and ethics professionals who are dedicated to improving the quality of corporate governance, compliance and ethics. The SCCE champions ethical practice and compliance standards in all organizations, and seeks to provide the necessary resources for compliance professionals and others who share these principles.

SCCE supports the mission of the Organization for Economic Cooperation and Development (“OECD”) Working Group on Bribery in International Business Transactions (the “WGB”), and believes that corporate and other organizations’ effective compliance and ethics programs, including anti-corruption programs, are essential to the success of this mission. We also believe that governments play an indispensable role in promoting the types of programs that can truly prevent and detect corrupt practices in all corners of the world.

These comments are submitted by SCCE in response to the OECD’s Review of the 2009 OECD Anti-Bribery Recommendation, and the specific questions raised in that Review. The questions are set forth below in italics.

2. How could foreign bribery awareness-raising and training actions be further addressed?

It should be recognized that company2 internal education and training efforts help raise the general societal awareness of the risks and evils of bribery. When this educational process is well done its impact extends well beyond the four walls of any organization. Employees have families and other areas of activity where this awareness can matter. One company’s employees may move on to other companies or start their own businesses. In all such cases, if the educational effort was impactful then the value extends far beyond the original place of training.

However, it is important that the training be well done and effective. This is why a core element of any real compliance program, and an element set out in item 12 of the Good Practice Guidance (“GPGs”)3, is that the program be evaluated for effectiveness. By giving companies an incentive not just to have training but to make it effective, we create a powerful tool for promoting the fight against bribery.

Another factor that may play a role in providing effective training is the use of testing of attendees, yet there have been concerns that even as mundane a step as testing may implicate newly enhanced privacy rights. Companies may be subject to unnecessary risks and impediments if the legal system does not recognize and encourage effective educational efforts. For training to be most effective, employers should be able to assess whether employees know and understand the laws dealing with bribery, and also know which individual employees need additional attention. Compliance and ethics programs serve a

1 www.corporatecompliance.org
2 “Company” as used in these comments includes all forms of organizations.
variety of important social purposes and need the freedom and protection to achieve these ends.

Thus the active and meaningful promotion of compliance and ethics programs, including the points made throughout this commentary, can go far toward raising awareness of the evils of bribery in society.

4. What recommendation(s) could be envisaged to address issues related to foreign bribery, concerning, for instance the demand side of bribery or the bribery of officials from sports organizations, bearing in mind the specific focus of the Anti-Bribery Convention and the work carried out in other fora on these issues?

Compliance and ethics programs exist to address misconduct in all forms of organizations; this includes those in the public sector. Employees in government have the same human weaknesses that all humans have; the management tools used in organizations in the private sector are also applicable for those in the public sector as well. In order to reach those in the public sector who may solicit or accept bribes, the compliance and ethics program elements used in companies can also apply in government. This is especially so for those agencies and personnel dealing with such sensitive areas as procurement and licensing. Consequently, we recommend that the OECD promote compliance programs in the public sector, just as it has done in the private sector. Such compliance programs should reflect the risks and needs of the public sector. While that means public sector programs need not be identical in every way to private sector compliance efforts, they should be broadly similar in structure and approach.

7. How could the Good Practice Guidance on Internal Controls, Ethics, and Compliance (the GPG) annexed to the 2009 Anti-Bribery Recommendation be revised to reflect global standards?

The existing GPGs contain many excellent elements, and compliance programs globally would benefit from faithfully implementing the GPG standards. While various countries have also issued guidance materials with respect to compliance and ethics programs, there is nevertheless remarkable consistency among these standards. Each may suggest additional enhancements, but they generally follow similar approaches and do not conflict. This is so because effective compliance and ethics programs actually rely on basic management steps which have universal applicability.

There are areas where the GPGs could be improved; the most salient is the area of compliance auditing and monitoring. This is core aspect of compliance programs that should feature prominently in the GPGs, but is absent. A starting point is to recognize an important distinction in the ways the word “audit” is used. It can refer to the type of distinct audits conducted by auditors of an organization’s financial statements, with specific rules and procedures, and a narrow focus on controls over financial reporting.

But separately, within the field of compliance and ethics, there is another concept of monitoring and auditing to detect violations or breakdowns in controls over compliance. This is not the same as traditional financial statement auditing, which involves reporting only those control weaknesses deemed to be “material.” Rather, compliance auditing and monitoring looks to see what is happening in a company, whether the compliance steps are being implemented, and what those acting for the company are actually doing. Part of the

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4 See Rutgers Center for Government Compliance and Ethics, “Compliance And Ethics Programs For Government Organizations: Lessons From the Private Sector” (December 2010) [http://rcgce.camlaw.rutgers.edu/](http://rcgce.camlaw.rutgers.edu/)
purpose is to root out all forms of illegal and unethical misconduct. A compliance program without this type of monitoring and auditing runs the risk of being toothless.

The GPGs do not specifically refer to monitoring and auditing. This would be a fairly straightforward addition.

A second item is the coverage of incentives. Item 9 of the GPGs calls for:

- 9. appropriate measures to encourage and provide positive support for the observance of ethics and compliance programmes or measures against foreign bribery, at all levels of the company;

In other standards this is referred to as “incentives.” While organizations routinely depend on various forms of incentives to drive behavior for other business purposes, companies have generally been slow to use incentives for compliance and ethics efforts. To the extent that the GPGs can give more direction on this point that could be a meaningful contribution to the field.

The Public Consultation Document also refers to ISO 37001 as a factor to consider in the review of the GPGs. It should be noted that this standard is far from being universally recognized and is not yet tested in the market. Embracing it at this early stage would be premature and could create confusion about what is the appropriate standard for programs. Moreover, unlike the GPGs and other readily available standards, ISO 37001 is not freely available to the public and must be purchased by any company seeking to use it. Certification can also be an expensive proposition, all of which raises the costs, potentially significantly, especially for small and medium-sized entities. We recommend that consideration of ISO 37001 be approached carefully; there are certainly strengths in this ISO standard, but there are also some very substantial flaws and a number of important questions relating to this development that need to be addressed. See Joseph E. Murphy, “The ISO 37001 anti-corruption compliance program standard: What’s good, what’s bad, and why it matters” (2019) http://tinyurl.com/y6yf8mye.

A third point is that while the language used in item 4 of the GPGs to describe the person responsible for the compliance and ethics program is excellent, it could be reinforced by specifying that this person is responsible to, and can only be removed by, the highest governing authority in the organization.

Fourth on the list of possible improvements deals with item 10 of the GPGs which addresses discipline, including for violations of the “company’s ethics and compliance programme”. The intent of this provision could be made clearer by including language used in the US Sentencing Guidelines. Item 6 of the Guidelines call for imposing discipline for “failing to take reasonable steps to prevent or detect” violations. This is important in helping to prevent scapegoating and to remind managers of their duty to take steps to prevent violations.

Finally, the provision of the GPGs dealing with internal reports of violations protects those made “in good faith” and “on reasonable grounds.” Good faith is a commonly used standard to address malicious misuse of reporting systems. There is a question, however, about the intent of the additional element of “reasonable grounds.” This may have reflected concern

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5 Examples of how this could be done are set out in Murphy, “Using Incentives in Your Compliance and Ethics Program” (SCCE; 2012), https://assets.hcca-info.org/Portals/0/PDFs/Resources/library/814_0_IncentivesCEProgram-Murphy.pdf

about false accusations. The good faith standard is a broad and somewhat subjective standard to protect those who raise issues; as long as the reporter can demonstrate that he or she believed something there is protection. “Reasonable grounds” introduces an objective element; in effect, the claim of good faith must also be credible. This is not a best practice standard. Often, those not familiar with reporting systems are haunted by the specter of false denunciations. But in the real world the few instances of misuse pale in comparison to the prevalence of retaliation for honest reporting. The best protection from unfounded claims is for companies to take a professional approach to conducting investigations, which includes protecting the reputation of the accused unless and until allegations are factually validated.

There is a danger that a “reasonable grounds” caveat could be used as a pretext to retaliate against all types of whistleblowers, and even to dismiss reports without ever investigating them. There is grave risk particularly that allegations involving senior managers will be interpreted as ipso facto not being “reasonable,” thus providing cover to sabotage the entire reporting system.

In addition, “reasonable grounds” may seem reasonable to one person and not to another. Because many laws are complex, lawful behavior may seem, from the perspective of an employee not deeply steeped in this area, as improper. Requiring there be reasonable grounds sets too high a bar, because it requires whistleblowers to have a greater knowledge than may fairly be expected.

It would be better to delete the “reasonable grounds” element and require only that the caller believe the report was true.

8. What recommendations could be envisaged to address the issue of incentivizing anti-bribery compliance?

Government plays a key role in incentivizing companies to institute effective compliance and ethics programs. If these programs are to progress beyond shallow policies and lectures, governments must send a message that real programs count. As a threshold matter, however, governments cannot promote something they do not understand. Those in government need to have the expertise to approach this subject intelligently. Enforcers and regulators need to know, for example, that mere codes of conduct do not constitute compliance programs. They need to understand how essential it is that programs be run by senior compliance and ethics officers with the necessary power, independence, position and professionalism to be effective. They need to know that tough steps like audits, discipline and controls are essential, and that senior managers represent one of any company’s core risk elements. They need to understand the central role incentives play in motivating compliance. In short, they need to know the field of compliance and ethics.

One useful contribution the WGB could make in this area is to work with an organization like SCCE to provide training and guidance for government officials on this important area of compliance and ethics. These officials need to know exactly what is involved in conducting an effective assessment of company compliance and ethics programs.

It should be noted, however, that failure by governments to take into consideration the existence of effective compliance and ethics programs has a distinctly negative impact on the development of effective programs. Once government signals that it does not consider such programs it completely forfeits its ability to influence the development of these programs. Even if a government purports to promote the GPGs, if it refuses to consider any
program this failure signals to companies that it does not really care. Given that no program can completely stop all employee wrongdoing, this default approach by government can lead to companies that have made substantial efforts to prevent wrongdoing being treated exactly the same as those who have made no efforts and even those that willfully violated the law as a matter of strategy. In effect this penalizes those who have made the effort. When this happens enforcement comes across to managers as being unfair, and undermines the legitimacy of the enforcement effort. Compliance efforts are thereby weakened and deterred.

14. **What recommendations could be envisaged to address non-trial resolutions in the enforcement of the foreign bribery offence?**

One of the techniques used in non-trial resolutions is to require companies to institute compliance and ethics programs. Certainly enforcement authorities should require that these programs meet an appropriate level of diligence. But given the quality and general applicability of the GPGs, countries should be expected to incorporate the GPG standards by reference in such settlements, while adding in such details as may be appropriate for each particular circumstance. This would lead to stronger programs globally, along with the development of a more broadly accepted standard for such programs.

This would also address a gap in adoption of some of the innovative and valuable elements in the GPGs. For example, while there is certainly a broad focus on compliance programs in the US, we have not seen an effort to protect employees from retaliation for following professional ethics codes, although this is called for in item 11(ii) of the GPGs. There generally appears not to be coverage in company codes of conduct on this point. Yet this is an excellent innovation that was included in the GPGs. When enforcers require companies to clean up and enhance their compliance and ethics programs, they should incorporate the GPGs by reference. This is simple and effective to ensure program efforts are serious. Then the enforcers can add details as appropriate for each individual case. But there is no reason company programs should omit any of these key points.

27. **What recommendation could be envisaged to enhance awareness and effective use of reporting channels for foreign bribery?**

29. **What recommendation(s) could be envisaged to further strengthen whistleblower protection?**

Response to questions 27 and 29:

The decision for an employee to speak up against misconduct is one of the most difficult any person can make. It can take enormous courage to cross this line. This is one of the reasons it is important to protect confidentiality for those who take this step. Of course, investigations of such calls must be conducted carefully so as not to harm those who are investigated but ultimately are exonerated. In order for companies to receive such reports it is essential to protect those who speak up.

But here we confront an unfortunate conflict in the law. In the push to protect privacy some legal systems have undercut and even attacked company speak up systems. Currently in the area of privacy there is great focus on the European Union’s General Data Protection Regulation (“GDPR”). This new legal system does not, however, appear to have been created with due consideration for company compliance and self-policing programs.

To encourage and protect speak-up programs and thus to protect whistleblowers, privacy laws must be re-examined. Currently they tend to circumscribe speak-up systems by emphasizing restrictions that can shield the organizational elites, so that workers are
intimidated not to report senior level misconduct. Some of these laws have purported to bar any anonymous reporting. This step deters action by those who are not empowered in the corporate structure. Plus, it is fraught with ambiguity, since if someone wants to report a violation anonymously there is no way a company’s management can actually stop it, other than to ignore it. Any person can send, mail or otherwise convey a message about misconduct. But if privacy authorities are saying any reports of crime – anonymous or otherwise – need to be ignored then those privacy regulators would appear to be violating the intent of the Anti-Bribery Convention, and providing artificial protection for corruption.

This is not to say that privacy is unimportant, but only to emphasize that this value should not supersede other important policies. The importance of organizational compliance and ethics, including the fight against corruption, should have a clear, strong position in matters of public policy and should not be treated as an unimportant afterthought. Anyone who has dealt with whistleblowers knows how difficult it is for those who witness wrongdoing to break the silence and speak up. Unthinking imposition of aggressive but ambiguous privacy rules, backed up by enormous fines, can severely undercut speak up systems and choke off at its origin the ability to flush out and fight corrupt practices.

This is covered in more detail in Joseph E. Murphy, “Policies in conflict: Undermining corporate self-policing,” 69 Rutgers U.L. Rev. 421 (2017), http://www.rutgerslawreview.com/wp-content/uploads/2017/07/Joseph-Murphy-Policies-in-Conflict-69-Rutgers-U.-L.-Rev.-421-2017.pdf. In addition to sweeping privacy laws there are a number of other aspects of various legal systems that have undercut compliance and ethics efforts, and thus worked against prevention of wrongdoing. The adoption of broad-based public policies, promoting, strengthening and protecting company compliance and ethics programs, is an essential element if we are to maximize the ability to prevent corruption and other organizational crimes.

There is a second key element in promoting company speak-up programs and protecting whistleblowers. When a vulnerable person speaks up against any company misconduct, including bribery, they expose themselves to retaliation by powerful forces. Executives, managers and even peers can seek revenge against the whistleblower and try to prevent action to address the wrongdoing. Those who speak up should have a source of safety and strength: an effective compliance and ethics program. The strength of a program, in turn, depends on the position of its leader: The chief ethics and compliance officer (“CECO”). The GPGs wisely call for the program to be run by “one or more senior corporate officers, with an adequate level of autonomy from management, resources, and authority”.

This is notable for the force of its language. A “senior corporate officer” is not a mid-level manager, or a staff lawyer, or a human resources specialist, all of whom could be simply ignored. A senior corporate officer would not even be a junior officer who reported to another officer, such as the general counsel. Someone who fit the GPG description would be at a level beholden to and reporting to the highest governing authority in the company. This would be someone with independence, power, access and the resources to get things done. While this level of authority is essential for the program to work in general, it is crucial when it comes to dealing with whistleblowers. Only someone at that level in a company would have the position to champion the cause of the whistleblower and ensure the person is heard and protected. (It would also be helpful, as noted previously, to provide that the CECO can only be removed by the highest governing authority in the organization, such as the board of directors in corporations.)

Thus it should be understood that simply having a communication system and calling it a speak-up system is not enough. There must be a true, safe harbor for those who step
forward, and this can only happen when the CECO has independence, authority (i.e.,
power), position, and reporting to the highest governing authority.

49. What steps could the WGB take to further ensure and enhance implementation by
Parties of the Anti-Bribery Convention and related OECD anti-bribery instruments?

A key step in implementing these initiatives is to focus on them during the in-country
reviews. Of course the reviews need to cover issues of enforcement; without enforcement
other steps may be more form over substance. But we should not forget that our focus is
prevention, and not merely tallying up totals of fines. For this purpose, compliance and
ethics programs need serious attention.

In the future the reviews need to include more focus on compliance and ethics programs.
What are countries doing to promote them? Are they distinguishing paper programs from
real ones? There remain areas where compliance and ethics programs need to improve:
weaknesses such as failure to focus on the risk of high-level executive and manager
misconduct; CECOs who are poorly positioned, not independent or not empowered; and
incentive systems not aligned with the compliance and ethics program. Merely counting
how many companies say they have compliance and ethics programs is not enough to
ensure these programs are actually effective. The reviews should also ask the
uncomfortable but as yet overlooked question: what has that country’s government done
that harms and undercuts compliance and ethics programs? Review should also ask
specifically about what effort has there been taken to promote the GPGs.

Here is one possible set of questions for the country reviews, and for each signatory to ask
itself regarding its commitment to preventing corruption:

1. What has the government done to ensure there is an appropriate level of expertise
   on compliance and ethics in the government/enforcement units?
2. In what ways does its legal system undercut/work against compliance and ethics
   programs? Will this be addressed?
3. In what ways does its government undercut/work against compliance and ethics?
   Will this be addressed?
4. What, if anything, has it done to promote GPG-level compliance and ethics
   programs?
5. What, if any, government agencies have a compliance and ethics program modeled
   after the GPGs, especially in the procurement area?
6. Have there been any studies of compliance and ethics programs to determine what
   weaknesses there may be?
7. Has the government taken any steps to address key areas of weaknesses in
   compliance programs?

For more detail on the types of weaknesses that undercut compliance and ethics program
effectiveness, see Murphy, “Policies in conflict: Undermining corporate self-policing,” 69 Rutgers
There are also more opportunities to promote the GPGs throughout the compliance and ethics profession. SCCE and other organizations have conferences and institutes on compliance throughout the world. OECD could actively seek speaking opportunities, instead of waiting to be invited, and use more such opportunities to promote the GPGs, discuss what they mean, and explore what companies can do to meet this standard.

Additional question:

_How can the compliance and ethics message be extended to small and medium-sized entities?_

One common question not specifically asked in the Review but recognized as a challenge generally is how to reach small and medium-sized entities (“SMEs”). In the past SCCE has addressed the point that expense is not the barrier it is often perceived to be, and thus not the reason this is a challenge.

One key strategy for reaching smaller companies is through the supply chains. If companies see a commercial need to have effective compliance and ethics programs because company and government buyers require or prefer companies that have them, then the market can help drive this result. The WGB could consider working with the private sector on how best to promote this approach. This is also an area where ISO 37001, with its emphasis on third party compliance, could be considered an important experiment. If, in order to get the ISO certification, companies have to push compliance programs down their supply chains, this can serve a positive purpose by creating an economic incentive for smaller companies.

Unfortunately, as currently drafted and under the traditional ISO approach to certification, ISO 37001 has enormous potential for mischief. OECD should study this development. The Standard has some substantial flaws (e.g., it allows companies to outsource their entire compliance effort), and the certification process is subject to serious misuse. But there may be elements in the model that can be useful, and especially reformed so that they work better. ISO 37001 should not be ignored, but neither should it be blindly accepted until the flaws and issues are addressed. This is an area where ISO’s internal dynamics and inherent political process may have been misapplied, but still points to a route that could have value.

SCCE remains committed to the WGB’s work to fight corruption and to use company compliance and ethics programs as an essential preventive tool in this mission. We stand prepared to assist the WGB in this mission.

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8 Murphy, “A Compliance & Ethics Program on a Dollar a Day: How Small Companies Can Have Effective Programs” (SCCE; 2010) http://www.corporatecompliance.org/Portals/0/PDFs/Resources/ResourceOverview/CEProgramDollarADay-Murphy.pdf
Swedish Anti-Corruption Institute

Introduction

The Swedish Anti-Corruption Institute (the Institute) is a non-profit business organization with the mission to work against corruption and to promote ethical decision processes within business as well as within the rest of the community. The Institute puts great emphasis on information to businesses and trade confederations, media and authorities on ethical business behaviour including laws and court cases on corruptive marketing and bribery. The Institute has since its inception worked for self-regulation as a means to combat corruption in society. In this manner, private business has been a driving force in the struggle against bribery and corruption and in convincing the government about the importance of forceful legislation on this topic. The Institute administers the Code on Gifts, Rewards and other Benefits (the Business Code).

The Institute has three principals; (i) Confederation of Swedish Enterprises, Sweden’s largest and most influential business federation representing 49 member organizations and 60,000 member companies with over 1.6 million employees, (ii) the Stockholm Chamber of Commerce, the leading business organisation for the Stockholm and Uppsala Capital Region and (iii) the Swedish Association of Local Authorities and Regions (SALAR), an employers' organisation and an organisation that represents and advocates for local government in Sweden. All of Sweden's municipalities and regions are members of SALAR.

In addition to the three principals, the Institute has four partner organisations (the Swedish Trade Federation, the trade association for the research-based pharmaceutical industry in Sweden, the Swedish Banker's Association and the Swedish Construction Federation), as well as several supporting members comprising of both industry organisations and individual companies.

The Institute wants to take the opportunity to comment selectively on one of the cross-cutting issues identified by the OECD Working Group on Bribery in its Public Consultation document. The background for our comments is the new challenges posed by the implementation of Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (GDPR).

Comments from the Institute.

Question 7: How could the Good Practice Guidance on Internal Controls, Ethics, and Compliance (the GPG) annexed to the 2009 Anti-Bribery Recommendation be revised to reflect evolving global standards?

Summary of the issue

The implementation of the GDPR has led to several challenges for companies in their efforts to make certain that the processing of individual’s personal data is in accordance with the provisions in the regulation. The costs of failing to comply with the GDPR is high, up to 4% of annual global turnover or €20 Million (whichever is greater).
Enforcement of a robust anti-corruption program involves processing of personal data in several cases, e.g. when conducting due diligence, when collecting information on potential corrupt practices through a whistle blower system or when conducting investigations. For all these cases, the implementation of the GDPR has led to new challenges and companies are struggling with how to act without risk breaching the GDPR. The companies are often faced with two conflicting interests: the protection of individual’s right to personal data and the interest to counter corruption. When weighing these two interests, companies are for the most part lacking clear guidance and even specialists within the field of data protection have different views on how personal data is to be processed in e.g. investigation situations in order to be compliant with the GDPR. From our discussions with company representatives and industry organisations, it is apparent that the confusion in this regard poses a real obstacle for companies in their efforts to counter corruption. In worst case, the insecurity related to GDPR may cause companies to not conduct enough anti-corruption work.

As also recognized in the Good Practice Guidance on Internal Controls, Ethics, and Compliance properly documented risk-based due diligence on i.a. third-parties is an essential part of an anti-corruption program and a requirement according to most anti-corruption legislations. A due diligence process typically involves the processing of different forms of personal data, ranging from rather insensitive information such as name and contact details to very sensitive information such as political affiliations (to reduce the corruption risks connected with politically exposed persons) and history of bribery offences. In case of high-risk situations, a control that does not include such sensitive information would most likely be considered inadequate.

Article 10 of the GDPR prohibits the processing of personal criminal background information unless it is conducted for official purposes, or it is authorized by the EU, or by a member state law providing for appropriate safeguards for the rights and freedoms of data subject. Accordingly, member states can pass laws that permits companies to process Article 10 data. However, for the processing of Article 10 data for the performance of anti-corruption due diligence, such legislation has not been passed in any EU country. Austria, Denmark, the Netherlands, and the UK have passed legislation that under varying circumstances allows for the processing of criminal history collection. In Ireland, the Irish data protection act allows for the Irish government to issue regulations to allow for data

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9 The Austrian data protection act permits processing of Article 10 data, if it results from statutory duty of care or when it is necessary to safeguard the legitimate interests of the controller or a third party under Art 6(1)(f) GDPR – and the manner in which such data are processed protects the interests of the data subject in accordance with the GDPR and the data protection act (§4(3)2).

10 The Danish data protection act allows for processing of Article 10 data if it is necessary for the purpose of safeguarding a legitimate interest and this interest clearly overrides the interests of the data subject (§8(3)).

11 The Dutch data protection act provides for a few opportunities to process Article 10 data, including if it is for the purpose to protect a controller’s interests in cases of criminal offences committed against it or which, based on facts and circumstances, can be expected to be committed against it or persons employed by it (§33).

12 The UK data protection act allows for processing of Article 10 information if it is necessary to protect the public from dishonesty, malpractice or other seriously improper conduct, unfitness or incompetence, mismanagement in the administration of a body or association, or failures in services provided by a body or association (Sec. 10(5) and Sch. 1, Part 2, para. 11).
processors to process Article 10 information for the purpose of assessing risk of bribery or corruption, or both. Such regulation has however not yet been issued. In France there is legal uncertainty as to the legality of processing Article 10 information. According to the French anti-corruption law Sapin II, companies of a certain size are obliged to implement anti-corruption compliance programs. One component of such a program is conducting due diligence of third parties. In the guidelines to the law issued by the French anti-corruption compliance agency, the Agence Française Anticorruption (AFA), researching into previous corruption offences forms part of a due diligence. Since the guidelines do not have the status of legislation, it is uncertain whether the content of those guidelines could be deemed a legal basis to process Article 10 information in France. Accordingly, even though some countries open up for the possibility to process Article 10 data for due diligence purposes under certain circumstances, most countries do not. Further, there is legal uncertainty as to what extent such processing is allowed even in the countries mentioned above.

In Sweden, the Institute has alerted the Swedish Data Protection Agency of the clash between companies’ obligations to comply with GDPR and the obligations to conduct anti-corruption due diligence. This has however not yet led to any actions from the Swedish Data Protection Agency, such as the issuing of a regulation permitting the processing of Article 10 information for anti-corruption due diligence purposes.

The fact that most of the EU countries does not provide for an exemption to process Article 10 information for the purposes of conducting anti-corruption due diligence hinders companies from fulfilling their obligations to counter corruption.

Apart from the clash with Article 10, several other issues have arisen due to the rules in GDPR. The prohibition to process information revealing political opinions of data subject in Article 9 unless certain circumstances are at hand also poses a problem for companies when conducting due diligence. Even though the prohibition in Article 9 is less rigid than in Article 10, clear guidance lacks as to when it is permitted to process such information for the purposes of conducting anti-corruption due diligence. Gathering of information revealing political opinions can sometimes be necessary to make certain that persons involved in a transaction are not politically exposed persons (and thus higher-risk) or that donations are not being given to a political party/candidate for a political office.

Further, even when exemptions have been made from the Article 10 prohibition for anti-corruption purposes (this is the case for processing such information in whistle-blower systems) these exemptions are not consistently formulated in the different EU countries. In Sweden, the Swedish Data Protection Agency has issued a regulation permitting the processing of Article 10 information in a whistle blower system, however only if the information pertains to certain positions in the company (and thus not for employees of a third party such as an agent\(^\text{13}\)). This restriction is not in accordance with global best practice for the setting up of a whistle blower system, nor is it in accordance with how exemptions are formulated in other EU countries. For all those many Swedish companies with multinational presence such differences cause great administrative burden. In addition, such restrictions hinder the effectiveness of the whistle blower system, and thus companies’ possibility to effectively counter corruption. In a recently published study on Nordic employees views on ethics at work, around 15 percent of the Swedish respondents reported having observed the giving, receiving or asking for bribes yet none of the Swedish employees

\(^{13}\) Persons holding a key or leading position in the own company or company group (§ 2, para 4, DIFS 2018:2).
respondents had used the opportunity to report through the whistle blower hotline (this was not the case in the other Nordic countries included in the study\textsuperscript{14}). One explanation might be the restrictiveness imposed on whistle blower system in Sweden that makes them less attractive to use for employees, although no certain conclusions in this regard can be drawn based only on the study.

The description above is not comprehensive but intended to give an overview of some of the major challenges posed by the GDPR in companies anti-corruption efforts and to emphasize the need for clear and coherent guidance on how to be GDPR-compliant in the anti-corruption work.

\textit{Suggestion for revision}

The Institute suggests that the Good Practice Guidance on Internal Controls, Ethics and Compliance are updated with information on how GDPR aspects should be handled in the anti-corruption work, and that such update is performed in dialogue with and with input from relevant data protection agencies. There is as pointed out above considerable need for guidance on best practice in this regard.

Further, the Institute suggests that the OECD recommends countries to make certain that their data protection legislation allows for efficient anti-corruption work and that the legislations are harmonized in this regard.

\textsuperscript{14} Study conducted by Nordic Business Ethics Network, launched in April 2019. The study included 1 500 respondents from Finland, Norway and Sweden. Link to the report: https://docs.wixstatic.com/ugd/7b729f_faf452631ddb465698774b6027ac5e14.pdf
TRACE International

Introduction

TRACE is a globally recognized anti-bribery business association and leading provider of cost-effective third-party risk management solutions. TRACE members and clients include over 500 multinational companies headquartered worldwide. A more detailed description of TRACE is provided in the Appendix.

TRACE fully supports the goals of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 2009 Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions. TRACE members and clients have embraced and incorporated into their compliance programs the elements of anti-bribery compliance programs set forth in OECD’s Good Practice Guidance on Internal Controls, Ethics, and Compliance (the “Guidance”) in order to effectively prevent and detect bribery in their business operations. In particular, in order to address the high risk of bribery when using third parties and intermediaries, many of these companies have made it their priority to implement the good practice No. 6 from the Guidance by conducting “properly documented risk-based due diligence of” third parties. As envisaged by Section B of the Guidance, TRACE plays an essential role in assisting companies in this regard.

We welcome the opportunity to comment selectively on two of the cross-cutting issues identified by the OECD Working Group on Bribery (“WGB”) in its Public Consultation document. However, as a necessary background to our answers to the specific questions in the Public Consultation document, we will first describe in detail new issues in the fight against foreign bribery that have recently emerged as a result of the implementation of the General Data Protection Regulation (“GDPR”) by the European Union (“EU”) and three other countries in the European Economic Area (“EEA”).

GDPR’s Challenges to Corporate Anti-Bribery Compliance Programs

At the outset, we want to acknowledge that 232 out of the 36 OECD members are EU member states. Two additional OECD members are part of the EEA. Moreover, the EU itself enjoys a special and unique full participant status in the OECD. Therefore, it is undeniable that the EU is demonstrably committed to the international fight against cross-border bribery. However, in the several years we have worked on implementing the GDPR-compliant processes at TRACE, we have come to realize that many GDPR

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1 The EU data protection regime is not new: the GDPR is the result of the progression from the European Convention on Human Rights of 1950 (which guaranteed the right to privacy), to the OECD Guidelines on the Protection of Privacy and Transborder Flows of Personal Data of 1980, to the EU Data Privacy Directive of 1995, and the EU Charter of Fundamental Rights of 2000. However, the GDPR exhibits all the signs of a major practical change for companies worldwide. The GDPR may even rival the U.S. Foreign Corrupt Practices Act in the onerousness and the complexity of its many requirements, the worldwide reach, the potential rigor of enforcement and the size of potential penalties

2 There will be 22 such countries after Brexit.
provisions do not facilitate—and are even in direct conflict with—the essential elements of anti-bribery compliance programs such as due diligence of third parties and compliance procedures for monitoring, internal investigations, and reporting. Given that the GDPR is being considered by many countries as a model for implementing similar data protection laws in their jurisdictions, it is important that the EU and the international community as a whole find ways to address these issues before they multiply.3

We recognize that some tension between the anti-bribery compliance regime and the personal data protection regime is unavoidable due to the contradictory goals they seek to accomplish. The first seeks to bring transparency to international transactions, expose and punish corrupt actors, and reveal bribes camouflaged as commissions or service fees. To do so, it needs to reveal what some may wish to hide. The personal data protection regime conversely seeks to regulate, minimize, restrict, and at times outright prohibit the processing of personal data, and to facilitate individuals’ rights to delete, object to, or restrict the processing of information about them. This is especially true if such personal data is sensitive or damaging, notably information about one’s criminal convictions or criminal offenses.

If the EU and other countries with similar data protection legislation do not provide a clear way for companies to reconcile these two important regimes, especially the points we highlight below, both may suffer. TRACE has already witnessed a number of large EU companies refusing to participate in anti-bribery due diligence “due to the GDPR”, even at the risk of losing business. Other companies may choose to reduce the rigor of their anti-bribery due diligence on third parties by avoiding processing of personal data, or ignore GDPR requirements in their anti-bribery due diligence processes until these uncertainties are resolved.

Due diligence of high-risk relationships with third parties typically necessarily involves processing a large volume of personal data about individuals who own, control or act on behalf of a third party, or their relatives who are government officials. This data may include the following:

- basic identification and contact information; year or date of birth;
- citizenship;
- position, job duties and qualifications;
- work history;
- company ownerships and directorships;
- indication whether individuals are—or are related to—government officials, public servants, political party officials or candidates for political office; and

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3 We limit our discussion to the practical issues posed by the GDPR to anti-bribery compliance programs. For a more fundamental critique of this law, see W. Veil, The GDPR: The Emperor’s New Clothes—On the Structural Shortcomings of Both the Old and the New Data Protection Law (21 December 2018), Neue Zeitschrift für Verwaltungsrecht 10/2018: 686-696, available at ssrn.com/abstract=3305056.
any negative background information regarding bankruptcy filings, presence on government denied parties or sanctions lists, negative media reports, history of bribery violations or violation of other laws and international standards, etc.

Due diligence of high-risk relationships that fails to thoroughly vet individuals who control, direct, or act on behalf of the third party is inadequate. Given such extensive processing of personal data as part of anti-bribery due diligence reviews of third parties, we have identified the following challenges that the GDPR presents.

**a. Significantly Increased Cost and Burden of Compliance**

The GDPR leads to a significantly increased cost of compliance for international business transactions, which becomes a particularly heavy burden for SMEs. This burden can be illustrated by the following hypothetical scenario. If a non-EU SME decides to enter the EU market with its non-consumer products or services, it would typically choose to establish relationships with local distribution partners or intermediaries as a cost-effective route to market. This would lead to the need to conduct anti-bribery due diligence on the potential partners in the EU. According to our data protection counsel, there is a great risk that a detailed review of the background and conduct of individuals and their periodic reputational screening would trigger the GDPR under its extra-territorial scope principle of “monitoring [EU data subjects’] behaviour” set forth in Article 3(2)(b)4.

So, the mere fact of complying with the best practices of anti-bribery compliance programs would force a non-EU SME (and its EU-based partners) to comply with complex EU legislation made up of 99 articles on 88 pages and to risk exposure to potentially large penalties of up to €20 million or 4 percent of its total annual turnover; actions for material and non-material damages by individual data subjects and not-for-profit privacy organizations; and in some EU member states such as Ireland, even a prison term of up to five years for certain violations (e.g., a violation of Article 10, discussed below, in Ireland). The GDPR could also be triggered even if both companies—the one conducting the due diligence review and the third-party company under review—are outside the EU but the third-party company has EU individuals among its owners, directors, managers or key employees (e.g., Algerian companies owned by French nationals). Furthermore, as a company without an EU establishment, the non-EU SME would not be able to avail itself of the one-stop-shop mechanism under the GDPR5, which would therefore require it to submit to the jurisdiction and the national data protection laws of each EU member state where individuals identified by the due diligence review reside.

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4 An EU-based company subject to the due diligence review would of course be covered by the GDPR pursuant to Article 3(1).

5 As demonstrated by a recent GDPR enforcement action against Google in France, even companies that have significant presence in the EU may find that the one-stop-shop enforcement is not available to them. See Lokke Moerel, What happened to the one-stop shop? (21 February 2019) at iapp.org/news/a/what-happened-to-the-one-stop-shop/
b. GDPR’s Prohibition on Processing Personal Criminal Background Information

Under Article 10 of the GDPR, the processing of personal data relating to criminal convictions and offenses, for any purpose, is prohibited unless “carried out only under the control of official authority or when the processing is authorised by [European] Union or [EU] Member State law providing for appropriate safeguards for the rights and freedoms of data subjects.” Yet determining whether principals of third parties have a criminal background—especially related to bribery, economic crimes, etc.—and addressing any uncovered red flags are essential components of anti-bribery due diligence. Such inquiries are carried out by companies or their compliance service providers without supervision, direction or control of any official authority. Furthermore, none of the anti-corruption laws in the EU6 expressly authorizes or requires processing of any personal data, let alone criminal convictions and offenses data, as part of anti-bribery due diligence review of third parties, nor do they provide for appropriate safeguards for the rights and freedoms of data subjects. This creates a conflict between the GDPR’s language quoted above and anti-bribery due diligence requirements.

After TRACE raised the alarm about Article 10’s obstacle to anti-bribery due diligence, the Irish legislature added section 55(3)(b) to the Irish Data Protection Act 2018, which authorizes the Irish government to issue regulations pursuant to which controllers may process Article 10 data to “assess the risk of bribery or corruption, or both, or to prevent bribery or corruption, or both.” However, to this day, no such regulations have been issued. In several other EU countries, there is no specific authorization for processing Article 10 data as part of anti-bribery due diligence; however, there is a possibility that such processing may be done under a more general authorization in local data protection laws8. In Norway, which is part of the EEA, companies may petition the Norwegian data protection authority on a case-by-case basis for a special permit to process Article 10 data and to transfer such data outside the EEA. A similar licensing regime is envisaged by the Dutch GDPR Implementation Act, but it has not yet been implemented by the Dutch data protection authority. However, even these few examples are inconsistent in their requirements, not fully implemented, and some of them would appear to be so

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6 This is also true of anti-corruption laws outside of the EU such as the U.S. Foreign Corrupt Practices Act; however, even if non-EU laws contained such an authorization or requirement, they would not be sufficient for purposes of the GDPR in general or Article 10 in particular.

7 The French law Sapin II comes closest to this by making third-party due diligence a mandatory component of corporate compliance programs in Article 17, II. 4°. The guidelines issued by the French Anti-Corruption Agency (“AFA”) under this law specifically require that anti-bribery due diligence determine whether third parties’ “managers, main shareholders and beneficial owners have been the subject of adverse information, allegations, prosecution or convictions for any offenses and, more particularly, corruption offenses.” However, the Sapin II law does not provide for “appropriate safeguards” as required by the GDPR and does not specifically indicate that it serves as an authorization for the processing of criminal conviction or offense data for the purposes of Article 10 of the GDPR. Furthermore, Sapin II cannot be relied upon by companies that are not subject to it. Finally, AFA’s guidelines do not have the force of law.

8 See Section 4(3)2 of the Austrian Data Protection Act, Section 8(3) of the Danish Data Protection Act and Section 33 of the Dutch GDPR Implementation Act.
time-consuming, cumbersome and costly as to be impractical in the context of anti-bribery due diligence reviews.

Aside from the few examples listed above, we know of no other EU-wide or EU/EEA member state law that authorizes, even arguably, the processing of personal criminal convictions and offenses data as part of anti-bribery due diligence. As a result, the general prohibition against such processing in Article 10 stands in most EU/EEA countries. In confirmation of our analysis, we were advised by one German data protection counsel that the German law indeed does not contain any authorization for processing Article 10 data of German data subjects for anti-bribery due diligence purposes, and therefore, such processing would be a violation under German law.

c. Uncertain Legal Basis for Processing Any Personal Data as Part of Due Diligence

As explained below, there is currently no clear reliable legal basis under the GDPR that could unquestionably legitimize the processing of any—even of non-criminal nature—personal data as part of anti-bribery due diligence.

Pursuant to Article 6 of the GDPR, the processing of any personal data can only be lawful if one of the six bases enumerated in that article applies. After lengthy legal analysis and on advice of outside EU data protection counsel, TRACE determined that the most appropriate basis for its processing of personal data as part of due diligence is “legitimate interests” of the companies seeking to enter or maintain a business relationship. However, this basis must survive a high bar of not being “overridden by the interests or fundamental rights and freedoms of the data subject” after the balancing of the legitimate interests of companies in conducting due diligence and the interests and fundamental rights and freedoms of data subjects. Moreover, this basis is open to a challenge from data subjects pursuant to their right to object under the GDPR’s Article 21, which triggers the requirement for the controller to show “compelling legitimate grounds” for processing.

TRACE is aware of several EU-based companies that have reached a different conclusion: that legitimate interests in due diligence are indeed overridden by the interests and fundamental rights of data subjects for a number of reasons. In one example, an EU counsel advising an EU-based company took the position that the legitimate interests in conducting due diligence—and therefore in the processing of relevant personal data—is limited to the ability by companies to defend themselves in rare instances of government enforcement actions, which counsel did not consider important enough when compared to data subjects’ interests and fundamental data protection rights, which he viewed as more significant and always operative.

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9 For details of the complexity of such an analysis, see Article 29, Data Protection Working Party, Opinion 06/2014 on the notion of legitimate interests of the data controller under Article 7 of Directive 95/46/EC

10 Although we disagree with this narrow view of the need for due diligence and the resulting balancing of the interests, rights and freedoms, this example demonstrates the uncertainty in finding the appropriate Article 6 basis for anti-bribery due diligence’s processing of personal data.
Other Article 6 bases are even less helpful. There are numerous reasons why express consent by a data subject is an inappropriate basis in the context of anti-bribery due diligence. Furthermore, given that anti-bribery due diligence is the result of anti-bribery legal requirements, one would suppose that the “legal obligation” basis for processing personal data may apply. However, it is not so. First, this basis recognizes only legal obligations under EU or EU member state laws. Second, as stated above, none of the anti-corruption laws in the EU expressly requires companies to process personal data as part of anti-bribery due diligence review of third parties. The remaining four bases are even less likely to apply to anti-bribery due diligence, or they suffer from similar weaknesses described above.

**d. GDPR’s Prohibition on Processing Special Categories of Personal Data**

Article 9 of the GDPR prohibits the processing of certain more sensitive categories of personal data unless one of the exceptions listed in the article applies. Among other things, the article prohibits the processing of “personal data revealing ... political opinions” of data subjects. According to our EU data protection counsel, the mere fact that a person is a member or an official of a particular political party is sufficiently “revealing political opinions” of that individual to trigger the Article 9 prohibition. In contrast, anti-bribery laws of some countries, such as the U.S. Foreign Corrupt Practices Act and the OECD Guidelines for Multinational Enterprises, prohibit corrupt contributions to political parties and candidates for political office. This in effect requires companies to use due diligence processes to ensure that any payments they make to third parties are not disguised improper political contributions. Consequently, due diligence processes typically incorporate a so-called politically exposed person (PEP) screening, which discloses, among other things, political party affiliations and political party positions of the screened subjects. As a result, unless companies can find

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11 Some of these reasons include: (i) any such consent would unlikely be deemed “freely given” by EU data protection authorities, given that a failure to give consent would prevent due diligence and the business relationship from proceeding and would therefore adversely affect the third party and the associated data subjects giving consent; (ii) each of the potentially large number of relevant data subjects could in effect disrupt or significantly delay business relationships and business operations of at least two companies by withholding their consent through outright refusal, inaction or oversight, or by withdrawing their consent at any time as they are permitted to do under the GDPR; and (iii) if a data subject indeed engages in corrupt conduct, allowing them to preclude or stop the due diligence review prejudices the purposes of prevention or detection of corruption.

12 Most such laws do not even expressly require due diligence of third parties, making it an implicit exigency for companies in order to comply with the law or to defend themselves in case of an enforcement action. The French Sapin II law (discussed in footnote 7 above) may arguably be used as the basis for the “legal obligation” basis but only by a subset of French companies that are subject to this law.

13 We note that the “performance of a contract” basis may apply in rare instances when due diligence is conducted on a sole proprietor and does not reveal personal data of any other data subject.
and document an applicable exception from Article 14, they risk violating the GDPR’s Article 9 prohibition by conducting best-practices anti-bribery due diligence.

**e. Other GDPR Obligations Requiring Changes to Due Diligence Processes**

The GDPR contains numerous other requirements that have not been part of best practices for anti-bribery due diligence processes, including, among others: (i) data minimization and purpose limitation principles, which would require companies to justify the scope of personal data collected as part of anti-bribery due diligence and narrow this scope to what is necessary and proportionate to the clearly articulated anti-bribery due diligence purpose; (ii) a time limitation principle that would require implementation of strict retention schedules so that the personal data—including personal data contained in due diligence reports or legal opinions — is not kept for longer than is necessary for that purpose; (iii) data processing notification to each data subject whose data is processed as part of anti-bribery due diligence; (iv) maintenance of personal data processing activity records; (v) implementation of processes to facilitate data subjects’ exercise of their data protection rights listed in the GDPR; (vi) requirement to ensure that IT systems used for data processing and communication channels are secure, to implement appropriate technical and organizational measures, access controls and other safeguards; (vii) data breach notification requirements; (viii) the need to vet and put in place GDPR Article 28 controller-processor contracts with any outside service providers that process or have access to the data (e.g., cloud hosting providers, outside IT support, etc.); and (ix) third country (i.e.: outside the EU) data transfer requirements; and others. All these obligations would require significant changes to the anti-bribery compliance programs and best practices guidance documents.

**f. The Positives of Data Protection Regime**

Although we are focusing on the challenges posed by the GDPR to corporate anti-bribery compliance programs, we recognize that protecting the privacy rights of people who are subject to anti-bribery due diligence is necessary and has clear societal benefits. However, for pro-privacy anti-bribery due diligence to succeed, steps must be taken to provide a sound basis for the processing of personal data that is truly necessary for such due diligence and to resolve other issues that have been identified.

**TRACE’s Comments in Response to Certain Specific Suggested Questions**

*Question 7. How could the Good Practice Guidance on Internal Controls, Ethics, and Compliance (the GPG) annexed to the 2009 Anti-Bribery Recommendation be revised to reflect evolving global standards?*

**TRACE’s Answer:** As indicated above, the GDPR has presented new challenges to anti-bribery compliance programs. Although we have focused on anti-bribery due diligence issues in our comments above, similar data protection issues arise in regard to compliance procedures for monitoring, internal investigations and reporting. Presently,

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14 As we indicated above, express consent of data subjects does not appear to be appropriate in the context of due diligence. In some instances, companies may rely on Article 9’s exception for data “manifestly made public by the data subject”; however, its applicability would likely require a case-by-case analysis.
companies are alone in their uncoordinated attempts to address these challenges without any guidance from governments or international institutions. The GPG should be revised with input from data protection authorities in the EU and other countries to provide companies with detailed guidance on how these challenges may be resolved in practice.

**Question 8. What recommendation could be envisaged to address the issue of incentivizing anti-bribery compliance?**

**TRACE’s Answer:** As demonstrated above, the GDPR and other similar personal data protection laws create new significant liability risks for companies and add costly and time-consuming obligations when they carry out best-practices anti-bribery compliance processes. This creates considerable disincentives to conducting robust risk-based anti-bribery due diligence on third parties and potentially to cross-border economic activity. TRACE believes that a recommendation should be made for countries to subject their existing and pending personal data protection legislation to review and consultation by relevant government departments and other stakeholders regarding the impact of such legislation on anti-bribery compliance, incentivizing good corporate behavior, and on the countries’ international anti-bribery commitments. Countries should seek ways to harmonize their approaches to how they address the equally important goals of fighting corruption and protecting personal data rights of individuals.

**Appendix: Details about TRACE**

**About TRACE**

TRACE is a U.S.-based 501c(6) non-profit business association founded in 2001 to provide multinational companies and their commercial intermediaries with anti-bribery compliance support.

TRACE is funded by its members and does not accept any funding from any government. It leverages a shared-cost model whereby membership dues are pooled to develop anti-bribery compliance tools, services and resources.

**TRACE Membership and Clients**

Hundreds of multinational corporations, many of which are in the Fortune 500, are members of TRACE and leverage our shared-cost model to reduce the time and labor associated with anti-bribery compliance. Our members come from diverse industries, including aerospace, defense and security; agriculture; chemicals; consumer products; energy and utilities; engineering and construction; extractives; financial services; logistics and freight forwarding; manufacturing; pharmaceuticals and medical devices; technology; travel services; and telecommunications. They face increasing compliance expectations, despite limited resources. TRACE offers shared-cost solutions for due diligence, training and compliance program support and helps companies more effectively allocate their compliance dollars and resources.

TRACE members form the TRACE Compliance Community™, a global network of companies that are committed to advancing commercial transparency worldwide, and willing to share and establish best practices. All TRACE members commit to a high level
of transparency in their commercial transactions. TRACE due diligence services are available to both members and non-members.
Transparency International welcomes the opportunity to provide input to the OECD Working Group on Bribery’s (OECD WGB) consultation process on the OECD’s 2009 Revised Anti-Bribery Recommendations. We note that as explained by the OECD, the Recommendation was adopted by the OECD in order to enhance the ability of the States Parties to the Anti-Bribery Convention to prevent, detect and investigate allegations of foreign bribery. We believe that ten years on the Recommendation could be significantly enhanced and strengthened with an extended framework.

One major improvement to the existing framework would be to encourage transparency of the beneficial ownership of companies and trusts, a key prevention, detection and investigation measure. Accountability for foreign bribery should also be increased through encouraging States Parties to (1) provide for victim states’ participation and remedies in foreign bribery enforcement; (2) provide for measures to address grand corruption including through standing for non-state victims’ representatives and criminalizing the demand side of foreign bribery; (3) guidelines on non-trial resolutions and (4) increased transparency regarding enforcement through publication of statistics and detailed information on case dispositions.

This submission elaborates on these and other proposals below, referencing some of the questions suggested for submissions to the consultation. The paper’s structure is as follows:

I. Introductory section: Exporting Corruption Report (GQ2)

II. Proposed new recommendations (page 4)
   1) beneficial ownership transparency
   2) victims’ remedies
   3) grand corruption cases
   4) non-trial resolutions
   5) transparency of enforcement data and case dispositions; as well as short texts on
   6) facilitation payments
   7) major exporters not party to the OECD Convention

III. Proposed revisions to existing recommendations (page 29)
   12) Recommendation III. Awareness raising;
   13) Recommendation IX. Reporting Foreign Bribery;
   14) Recommendation X. Accounting Requirements, External Audit, and Internal Controls, Ethics and Compliance;
   15) Recommendation XI. Public Advantages including Public Procurement; and

a. TI’s Exporting Corruption Report 2018 (GQ2)

Transparency International’s 2018 Exporting Corruption report shows, based on enforcement data, that out of 44 parties to the OECD Anti-Bribery Convention only seven countries are in the top “active enforcement” category and four are in the next “moderate enforcement” category\(^\text{16}\). Eleven countries were classified in the third "limited enforcement" category and the rest fell into the lowest “little or no enforcement” category. While there appears to have been a small increase in enforcement, the number of countries in the top two of the four levels has only increased by one and the share of world exports is approximately the same as in our last report in 2015. These enforcement levels are far from sufficient to fulfil the Convention’s fundamental goal of mobilising collective action to put a check on corruption in international business transactions and the harm it causes.

In addition, in 2018 we assessed the first time the performance of four non-OECD Convention countries/regions China, Hong Kong, India and Singapore and all fell into the lowest “Little or no enforcement” category. This is disappointing considering that China is now the world’s largest exporter with over 10 per cent of world exports in 2018 and the others account for 2 per cent or more of world exports so that together they account for 18 per cent of world exports. All of them are bound by UN Convention against Corruption (UNCAC) provisions requiring criminalisation and sanctioning of foreign bribery.

The 2018 report includes a set of general recommendations to parties to the Convention including calling for them to:

1) strengthen anti-money laundering systems to help detection of foreign bribery; this should include creation of public registers of beneficial ownership

2) ensure that settlements in bribery cases meet adequate standards of transparency, accountability and due process
   a. Settlement agreements should be made public, should be subject to meaningful review and provide for effective sanctions
   b. Settlement procedures should involve countries and groups affected by foreign bribery and as far as possible include compensation as part of the settlement agreement

3) publish up-to-date enforcement data and case information, including annual statistics for each stage of the foreign bribery enforcement process as well as on related offences and mutual legal assistance

4) increase efforts to improve mutual legal assistance

Additionally, in each of the country reports there are specific recommendations to parties based on their performance.

The report also recommends that the OECD Working Group on Bribery (OECD WGB):


https://www.transparency.org/whatwedo/publication/exporting_corruption_2018
1) make public its dissatisfaction when countries party to the Convention fail to enforce against foreign bribery, related money laundering offences and false accounting violations. In particular, the WGB should:

i. disseminate widely an annual list of countries that have failed to produce meaningful enforcement results in the last 3-4 years, and an annual summary of leading WGB recommendations that Convention parties have failed to comply with;

ii. publish an annual list of countries that have taken significant steps to improve enforcement – this should expand on what has already been done in the latest WGB paper on enforcement data\textsuperscript{17}

iii. where countries show “continued failure to adequately implement the Convention”, the WGB should publicise widely each of its steps in line with the Phase 4 Guide and should consider suspension from the WGB in case of longstanding failure to enforce.

2) increase efforts to improve mutual legal assistance in cooperation with other anti-corruption review bodies

3) increase its efforts to persuade China, Hong Kong, India and Singapore to become parties to the OECD Anti-Bribery Convention, including efforts within the G20.

4) carry out a horizontal assessment of accessibility of data and case information across all countries party to the Convention, develop guidance in this area and provide technical assistance. This should include an assessment of statistics on mutual legal assistance.

5) carry out a horizontal assessment of mutual assistance performance across all parties and work with other anti-corruption review bodies to develop guidance materials and foster exchange of experience at meetings of representatives.

6) create an open database of statistical data and case information. This should include detailed annual statistics regarding mutual legal assistance. We note that the OECD already has an internal database of cases which could be tapped\textsuperscript{18}.

All of these proposals are relevant in considering revisions to the 2009 Anti-Bribery Recommendation. In the sections below, we elaborate on some of these proposals and recommend additional topics for inclusion in the new Recommendation as well as suggesting revisions to some of the existing recommendations.


\textsuperscript{18} See eg. footnote 228 in OECD (2019), Resolving Foreign Bribery Cases with Non-Trial Resolutions: Settlements and Non-Trial Agreements by Parties to the Anti-Bribery Convention www.oecd.org/corruption/Resolving-Foreign-Bribery-Cases-with-Non-Trial-Resolutions.htm
1.1. Proposed addition of new recommendations

I. Transparency of beneficial ownership of companies and trusts (Question 11)

Secret ownership of companies and trusts is an obstacle to prevention, detection and investigation of corrupt transactions, including laundering of the proceeds of crime in foreign bribery cases. The OECD’s Phase 3 and Phase 4 reports reveal the importance of this subject for foreign bribery enforcement in light of the many cases cited where shell companies were used. Introduction of public central registers of beneficial ownership would reduce bribery and money laundering opportunities and enhance detection and investigation in foreign bribery cases. Transparency International has proposed standards and conducted monitoring on this subject over a period of years.

As indicated above, we included a proposal on this subject in the 2018 Exporting Corruption Report.

Proposal: The OECD WGB should add a new recommendation on beneficial ownership transparency to the new Anti-Bribery Recommendation and should encourage Convention parties to introduce central registers containing beneficial ownership information and make that information public. The recommendation should reference best practice and guidance available in this area. The subject should be systematically reviewed by the OECD WGB.

More specifically, in line with emerging best practice, the recommendation should provide that the registers should be made publicly available via searchable web interface as well as via structured data in machine-readable format. They should be available under open data licences. In addition, the recommendation should require State Parties to:

- ensure all beneficial owners report their holding of shares or voting rights in exact percentages;
- use unique identifiers in addition to personal data such as name and month and year of birth;
- use data validation systems such as multiple choice fields to improve data quality; and
- ensure systems are in place to identify potential non-compliance and proactively pursue and sanction companies that report non-compliant data.

In the undesirable case that the beneficial ownership registry is not accessible to the public, the WGB should recommend that the legal framework clearly defines that relevant authorities (e.g. financial intelligence unit, tax authorities, public prosecutors, anti-corruption agencies, bodies supervising the implementation of asset disclosure of

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public officials, etc.) have access to beneficial ownership information and can carry out necessary searches.

Discussion:

The issue of beneficial ownership transparency has been addressed through standards in other fora including by the FATF\footnote{In 2014 the FATF produced a Guidance Note in 2014 on “Transparency and Beneficial Ownership” to assist countries with implementation of its Recommendations 24 and 25 on transparency of ownership of legal persons and legal arrangements http://www.fatf-gafi.org/media/fatf/documents/reports/Guidance-transparency-beneficial-ownership.pdf}, the G20\footnote{The G20 adopted High Level Principles on Beneficial Ownership Transparency stating that it “considers financial transparency, in particular the transparency of beneficial ownership of legal persons and arrangements, a high priority”. See for example paragraph 8 which states: Countries should ensure that competent authorities (including law enforcement and prosecutorial authorities, supervisory authorities, tax authorities and financial intelligence units) have timely access to adequate, accurate and current information regarding the beneficial ownership of legal persons. Countries could implement this, for example, through central registries of beneficial ownership of legal persons or other appropriate mechanisms. See also the G20 Anti-Corruption Working Group’s Action Plan 2019 (December 2018): http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/WGB/RD(2018)10&docLang=En However, Transparency International’s 2018 report “Leaders or laggards” found that 15 of the G20 members had weak or average beneficial ownership legal frameworks https://www.transparency.org/whatwedo/publication/g20_leaders_or_laggards} and the EU\footnote{The EU’s 5th Money Laundering Directive of 30 May 2018, requires member states to make their registers of beneficial ownership of companies fully public by 2020. This covers half the parties to the Convention. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32018L0843}. This provides important guidance and the FATF also conducts monitoring. The value-added of addressing the issue in the work of the OECD WGB would be to (1) spotlight how concealment of beneficial ownership can hinder foreign bribery enforcement; (2) follow best practice in this area; and (3) increase momentum for improvements in this crucial area.

The OECD WGB Phase 4 report on the UK in March 2017 gave special attention to the issue\footnote{OECD WGB Phase 4 report on the United Kingdom (2017) http://www.oecd.org/corruption/anti-bribery/UK-Phase-4-Report-ENG.pdf}. It noted the UK’s role as a leading financial services sector, the risks for foreign-bribery related money laundering and the fact that the UK’s beneficial ownership initiatives should make it easier to detect and deter foreign bribery. It also noted that “UK law enforcement agencies acknowledge that the opacity of current beneficial ownership arrangements is a significant barrier to tackling money laundering, bribery and corruption, and to successfully recovering stolen assets.” It commented that the UK’s public central register of company beneficial ownership information for all companies incorporated in the UK that was launched in October 2016 was “one of the initiatives that should make it easier to investigate the complex web of financial structures commonly associated with foreign bribery cases.”

The Phase 4 report recommended maintenance of beneficial ownership registers in the Overseas Territories (OTs) accessible to UK enforcement authorities. The report also cited civil society comments pointing out that the models of registries to be developed
in the Crown Dependencies (CDs) and OTs will not meet the UK’s Persons with Significant Control (PSC) standards, including regarding their accessibility to the public. Several participants also highlighted the need to further regulate beneficial ownership of land and real estate to address the problem of offshore companies investing the proceeds of corruption in UK property.

In its follow-up report on the UK in March 2019, the OECD WGB noted as a positive development “the deployment of private central registers of company beneficial ownership or similarly effective systems in all three Crown Dependencies (CDs) and in the Overseas Territories (OTs) with major financial centres, which are now effectively sharing company beneficial ownership information with UK law enforcement agencies and tax authorities.”

The UK Phase 4 report makes clear that beneficial ownership transparency is a key issue for prevention, detection and investigation of foreign bribery cases.

Similarly, the OECD WGB Phase 4 review of the Czech Republic in June 2017 noted that since Phase 3, the Czech Republic had taken a number of initiatives to make information about business transactions more transparent and easily accessible to specified stakeholders in the form of three principal registries - beneficial ownership, bank account, and contracts. It found that these initiatives had the potential to make foreign bribery and related investigations more efficient. The evaluation team determined that the Beneficial Ownership Registry could provide significant value-added, but it was still under development, and potential problems had been identified that could undermine its use in foreign bribery investigations. The review decided to follow up on the use of the three registers in foreign bribery investigations.

These reviews highlight the importance of beneficial ownership registries and why this topic should be added to the new Recommendation and systematically covered in all the OECD’s Phase 4 and subsequent country reviews.

2. Victims’ remedies (Question 18)

Foreign bribery misdirects the affected state’s resources and often causes serious harm to the populations affected, including adverse impacts on human rights. However, neither the OECD Anti-Bribery Convention nor the 2009 Revised Recommendation reference the victims of foreign bribery. This fosters the false notion that foreign bribery is a victimless crime. In practice, state treasuries in supply-side countries are often filled with fines and disgorgement of profits, while the state and people affected by the corruption are “left out of the bargain.” International standards call for harm to victims to be remedied and national legal frameworks and practice described below show how this can be done in the context of foreign bribery cases.


26 There is now wide consensus that corruption has adverse human rights impacts. See eg. https://www.ohchr.org/EN/Issues/CorruptionAndHR/Pages/CorruptionAndHRIndex.aspx

We note that the IBA submission to this consultation on *Structured Settlements* takes the view that “There should also be a concerted effort to address the position of ‘victims of corruption’ within this emerging framework”28. The submission from the Recommendation 6 Network Members proposes that “The process of concluding Non-Trial Resolutions should where appropriate provide for consideration of potential remedies for injured parties without compromising the goals of law enforcement 29.” The Network adds in its Explanatory Note 7.3 that “Enforcement agencies that actively pursue international bribery generally resist allocating penalty payments obtained in Non-trial Resolutions to nations that have not actively pursued bribery, challenging those nations to enforce their own laws. Some countries, however, are not well equipped to investigate and prosecute international bribery: substantial cooperation might provide an adequate substitute for independently maintained investigations and prosecutions.” The reluctance of enforcement agencies should not override compensation for victims since this is a matter of justice for the people in the affected state and can also provide an important additional deterrent to foreign bribery. Moreover, there are emerging standards for the transparent and accountable return of assets and models for organising the return that make it possible to meet those standards.

**Proposal:** The OECD WGB should add a new recommendation on victims’ remedies to the new Anti-Bribery Recommendation and should encourage parties to

1. develop principles or guidelines with respect to granting compensation to victims in foreign bribery cases
2. provide for timely notice to enforcement authorities in affected states about opportunities to participate in foreign bribery cases at different stages, from investigation (where feasible) to final disposition
3. provide for notification, if possible, of other potential affected parties, such as competitors, shareholders, consumers and others who may have been harmed as a result of foreign bribery – this is especially relevant in very large cases
4. allow the authorities in victim states to submit claims for reparations or compensation, including social and collective damages, and to present victim impact statements; also allow claims and impact statements by other victims
5. follow the Global Forum on Asset Recovery (GFAR) Principles in case of return of funds to affected states or into the hands of representatives of a class of victims
6. report to the OECD Working Group on Bribery about their arrangements in this regard

The Working Group on Bribery should systematically review the status of country arrangements for inclusion, representation and standing of victims in foreign bribery cases.

**Discussion:**


International standards regarding victims’ remedies include the 1985 UN General Assembly Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power which provides some guidance in terms of general principles covering the topics of access to justice and fair treatment, restitution, compensation, assistance and victims of abuse of power.\(^{30}\)

UNCAC Article 32 calls on States Parties to protect and enable victims to have their views and concerns presented and considered during criminal proceedings against offenders. UNCAC Article 35 provides for States Parties to introduce measures ensuring that those who have suffered damage from corruption “have the right to initiate legal proceedings against those responsible for that damage in order to obtain compensation.”

The Council of Europe Civil Law Convention against Corruption contains similar language. Other provisions in UNCAC also address victims’ remedies, including Articles 53 and 57 in the chapter on asset recovery.\(^{31}\)

Furthermore, there is growing international recognition of the interlinkages between corruption and human rights violations and of the need for states and multinational companies to remedy adverse impacts on human rights.\(^{32}\) The revised *OECD Guidelines for Multinational Enterprises* adopted in 2011 includes a new human rights chapter consistent with the *UN Guiding Principles on Business and Human Rights* adopted earlier in the same year. It states that multinational enterprises should “Provide for or co-operate through legitimate processes in the remediation of adverse human rights impacts where they identify that they have caused or contributed to these impacts.”

\(^{30}\) It includes paragraph 10 which says “In cases of substantial harm to the environment, restitution, if ordered, should include, as far as possible, restoration of the environment, reconstruction of the infrastructure, replacement of community facilities and reimbursement of the expenses of relocation, whenever such harm results in the dislocation of a community” Paragraph 21 says “States should …enact and enforce, if necessary, legislation proscribing acts that constitute serious abuses of political or economic power, as well as promoting policies and mechanisms for the prevention of such acts, and should develop and make readily available appropriate rights and remedies for victims of such acts.”

http://www.un.org/documents/ga/res/40/a40r034.htm

\(^{31}\) UNCAC Article 34 addresses consequences of corruption and encourages States Parties to consider corruption a relevant factor in legal proceedings to annul or rescind a contract. Article 42 explicitly encourages States to increase the means of establishing jurisdiction over corruption offences, such as those committed against a State Party or its national(s), thus removing potential obstacles to the initiation of legal proceedings against alleged criminals. Article 53(b) also requires States Parties to permit their courts to order corruption offenders to pay compensation or damages to foreign States that have been harmed by corruption offences. Article 57 (3)(b) refers to “when the requested State Party recognizes damage to the requesting State Party as a basis for returning the confiscated property” (c) refers to returning confiscated property, inter alia, to its prior legitimate owners or compensating the victims of the crime.

\(^{32}\) In 2011, the United Nations Human Rights Council unanimously endorsed the UN Guiding Principles on Business and Human Rights, a set of guidelines for States and companies to prevent and address human rights abuses committed in business operations. This implemented the UN’s 2008 “Protect, Respect and Remedy Framework”. See also OHCHR on Corruption and Human Rights,

https://www.ohchr.org/EN/Issues/CorruptionAndHR/Pages/CorruptionAndHRIndex.aspx
In addition, the OECD Guidelines Commentary on General Policies addresses due diligence (applicable to both human rights and bribery) and includes a requirement to address actual impacts through remediation\(^3\). With foreign bribery, the remediation mechanism is a state-based process such as prosecution and it is up to the States to ensure that the process allows for remediation in the sense of making good the adverse impact.

The general situation under national law with regard to compensation of victims is summarised in a 2016 Note by the United Nations Office on Drugs and Crime (UNODC)\(^3\). Many States accord victims the right to participate in criminal proceedings as “partie civile” and be awarded compensation as part of the judgement of conviction. In some states, the amount may be awarded out of a fine or from money in the possession of the offender. In others, the victim, his/her legal representative or the prosecutor on instructions from the victim may apply for compensation after conviction and prior to sentencing. Many States permit a victim to seek compensation through civil or administrative proceedings either in lieu of these avenues or as an additional one.

Further, various forms of settlements are also used in criminal and civil proceedings to compensate victims. Some states permit procedures similar to settlements in the context of criminal proceedings through the use of plea agreements that can include victim compensation.

It should be noted that in some jurisdictions, such as the United States, a state claimant must waive sovereign immunity to bring a civil action. Waiver could expose it to the risk of counter-suits and to having to produce material about its internal deliberations during pre-trial investigation that could be embarrassing and this may deter some states from presenting claims.

London Anti-Corruption Summit Commitments

The May 2016 London Anti-Corruption Summit final Communique of 42 participating countries stated that “Compensation payments and financial settlements, in countries whose legal systems and domestic policies accommodate, can be an important method to support those who have suffered from corruption. Those countries that accommodate

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\(^3\) Commentary on General Policies, no. 14: “For the purposes of the Guidelines, due diligence is understood as the process through which enterprises can identify, prevent, mitigate and account for how they address their actual and potential adverse impacts as an integral part of business decision-making and risk management systems. Due diligence can be included within broader enterprise risk management systems, provided that it goes beyond simply identifying and managing material risks to the enterprise itself, to include the risks of adverse impacts related to matters covered by the Guidelines. Potential impacts are to be addressed through prevention or mitigation, while actual impacts are to be addressed through remediation.”

such payments will work to develop principles to ensure that such payments are made safely, fairly and in a transparent manner to the countries affected.

In their country statements for the Summit, eight OECD Convention countries - Australia, Italy, Mexico, the Netherlands, New Zealand, Norway, Switzerland and the United Kingdom - included commitments to develop common principles governing the payment of compensation “to the countries affected.” A ninth country, Nigeria also made this commitment, specifically referencing foreign bribery.

Notification and participation of victim states

The notification and participation of authorities from countries affected by foreign bribery in investigations (where feasible), prosecutions, civil actions and the development of non-trial resolutions is desirable to ensure that those authorities can have their views and interests represented, present claims and participate in a joint resolution, where appropriate, or are better able to pursue those involved in that bribery scheme within their own jurisdictions. Additionally, victims should be provided the opportunity to present victim impact statements in sentencing proceedings or proceedings to approve a non-trial resolution.

There will be cases where participation at all stages is not feasible such as where, for example, some of those implicated in the wrongdoing are still in office and the risk is that the investigation will be compromised if the victim state notified.

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36 See the statement from Australia: “We will work with other countries to develop common principles governing the payment of compensation to the countries affected, to ensure that such payments are made safely, fairly and in a transparent manner.” https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/522699/Australia.pdf. The other similar statements can be found at this link: https://www.gov.uk/government/publications/anti-corruption-summit-country-statements

37 “We will develop common principles governing the payment of compensation to the countries affected, (including payments from foreign bribery cases) to ensure that such payments are made safely, fairly and in a transparent manner.” https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/523799/NIGERIA__FINAL_COUNTRY_STATEMENT-UK_SUMMIT.pdf

38 Prof Paul G. Cassell has provided at least four reasons for victim impact statements. Such statements provide information to the sentencing judge or jury about the true harm of the crime - information that the sentencer can use to craft an appropriate penalty. Second, they may have therapeutic aspects, helping crime victims recover from crimes committed against them. Third, they help to educate the defendant about the full consequences of his crime, perhaps leading to greater acceptance of responsibility and rehabilitation. And finally, they create a perception of fairness at sentencing, by ensuring that all relevant parties - the State, the defendant, and the victim - are heard.
Notification and participation of other victims

Other victims, where they can be identified, should be accorded rights to notice and participation in proceedings and to make claims for restitution.\(^\text{39}\)

Basis for compensation

Compensation may be sought by states on the basis of contractual restitution, tort damages or unjust enrichment.\(^\text{40}\) In the context of procurement corruption, for example, the government of an affected state may seek to recover the financial damages resulting from paying higher prices, obtaining lesser quality of goods and services or obtaining incomplete performance of the contract that was procured through bribery by the contractor – or from a completely unnecessary procurement.\(^\text{41}\) It may also seek compensation for damages resulting from corruptly obtained business authorisations, licences or permits; or due to revenues lost due to corruption, for example lost tax or customs revenues.\(^\text{42}\)

Corruption may also cause severe harms that are diffuse, indirect, and widely shared and this will pose difficulties of proof. However, the law on diffuse harm in many states is evolving as it did when environmental crimes first became actionable. OECD Convention states that already allow a compensation claim for diffuse harm from corruption include France where courts have granted reputational damages and moral damages\(^\text{43}\) and Costa Rica, which recognises social damages.\(^\text{44}\) The general rule appears


\(^\text{43}\) See the case where the town of Cannes sued for damages after their mayor had been convicted of corruption C. cass., ch. Crim 14 March 2007, no. 06-81010. The case was handled by the Cour de cassation which disallowed material damage but made an award in relation to moral damage. The facts of this case are as follows: the mayor, after receiving a bribe, had allocated a gambling licence to a company without complying with legal requirements. The judges recognised that loss of reputation qualifies as damage, accepting that the party suffering the said loss of reputation is in fact a legal person (in this case, the town of Cannes). The town alleged that they had suffered a loss of reputation worldwide, in the context of their role as host of the prestigious film festival. The mayor of the town was the main person involved but corruption resulted from the behaviour of the defendant who had paid the bribe. In this case, damages were quantified at €100,000 EUR. The Cour de cassation also reserved the possibility of compensation for the “loss of chance” in an obiter dictum. https://halshs.archives-ouvertes.fr/halshs-01469762/document

\(^\text{44}\) See 2007 French money laundering case against a former Nigerian energy minister Dan Etété which awarded Nigeria €150,000 as recompense for prejudice moral (nonpecuniary damages).

\(^\text{45}\) In Costa Rica the Attorney General is authorised to file a civil suit for compensation when the offence caused damage to society. The conference of Ministers of Justice of the Ibero-American
to be that they should not be disproportionate. Interestingly, US law recognises the possibility of “community restitution” in connection with certain drug offenses where there is no identifiable victim but the offence causes “public harm”.

Costa Rica, a pioneer with regard to social damages, defines it as “the impairment, impact, detriment or loss of social welfare (within the context of the right to live under a healthy environment) caused by an act of corruption and suffered by a plurality of individuals without any justification whereby their material or immaterial diffuse or collective interests are affected, and so giving rise to the obligation to repair.” The concept of social damage is recognised in a number of states and is associated with compensation for damages to the public interest (including damage to the environment), to the credibility of institutions, or to collective rights such as health, security, peace, education or good governance.

Claims for compensation may also potentially be made by competitors, shareholders, consumers or others adversely affected by foreign bribery. This could include, for example, people whose health or livelihood has been damaged due to the corrupt granting of a permit or licence. As Professor Matthew Stephenson points out in a paper on standing “if a building collapses because an inspector took bribes to overlook substandard construction, or a business loses a contract because a rival paid off the procurement officer…then there may be identifiable plaintiffs (tenants in the building, the business that lost the contract…) who can show a direct, personal, concrete injury.”

With respect to certain types of foreign bribery it may also be possible to identify the members of a broad class of victims that have suffered a direct, personal, concrete injury, for example where the bribery can be shown to have led to higher utility or telecoms prices for users or to the consumption of tainted food or medicine or other specific harms. In assessing damages, general or specific, consideration should be given to the gendered impact of corruption.

Compensation claims should be seen within the OECD Convention’s framework which foresees not only fines but also confiscation of the bribe and the proceeds of the bribery. (OECD Convention Article 3). The OECD WGB has opined that confiscation is not a sanction; consequently confiscated proceeds should be available for compensation purposes. In some states, fines can also be allocated for compensation.

countries held in Madrid in 2011 (COMJIB) agreed to use Costa Rica’s proposal to create a concept of social damage.

46 Additionally, some states provide for compensation “in kind”, such as the issuance of a public apology or a declaration to help restore the reputation of the victim; the publication of the judgement of conviction as a means to repairing non-proprietary damage; and the publication of the case in a newspaper.

47 18 U.S.C. § 3663 (a)(6)


49 Commentary 21 of OECD Anti-Bribery Convention

50 See OECD WGB Phase 4 report on Switzerland (March 2018), page 43: “However, it is worth emphasising that confiscation is not a sanction within the meaning of Article 3(1) of the Convention (it is covered by another provision). The aim of confiscation measures is to deprive the offender of additional pecuniary benefits resulting from the offence (the proceeds) and not to
Experience in OECD Convention countries

A new OECD report on non-trial resolutions outlines the opportunities for direct compensation to victims in the 27 jurisdictions surveyed.51 Some countries, like the UK and the US, allow compensation to affected states and such payments have been made in a limited number of cases, providing some experience to draw on. Some countries, like Switzerland, allow a restricted form of “reparations” including the possibility of a payment to a domestic charity or NGO.52 According to the new OECD report, a small number of OECD Convention countries provide for payments to a foreign charity or NGO.

**United Kingdom**

The UK has taken the lead in giving policy priority to compensation to victim countries in foreign bribery cases. The Crown Prosecution Service (CPS), the National Crime Agency (NCA) and the Serious Fraud Office (SFO) have adopted a common framework of principles, published in June 2018, with respect to providing compensation to victim countries as part of the resolution of foreign bribery cases53. Pursuant to these principles, the agencies work collaboratively with DFID, the Foreign and Commonwealth Office (FCO), Home Office and Her Majesty’s Treasury to identify potential victims overseas, assess the case for compensation, obtain evidence in support of compensation claims, ensure the process for the payment is “transparent, accountable and fair”, and identify means by which compensation can be paid to avoid the risk of further corruption.

This framework was preceded by several cases involving reparations payments, as outlined in the UK Phase 3 and 4 reviews and highlighted in a recent OECD publication on non-trial resolutions.54 These included two pre-Bribery Act cases. Under a 2009 plea agreement between the UK construction firm *Mabey & Johnson* and the Serious Fraud

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52 According to the OECD WGB Phase 4 report on Germany, when a suspended prison sentence is imposed on a natural person, the court can set conditions including payment of a sum of money to the treasury or to a charitable organisation (Section56b (2) 2, N°3 and 4 CC). Restitution to the victim is also available (Section 56b(2)1.CC). Further, an exemption or termination of proceedings under section 153a CCP provides for a conditional exemption or termination of prosecution in return for payment of a sum of money, either to the treasury or a non-profit organisation. However, none have been used in a foreign bribery case to date. Further, these avenues are not currently available with respect to liability of legal persons.


Office (SFO) the company agreed to pay reparations to Iraq, Ghana and Kenya. In 2010, BAE Systems agreed to pay Tanzania ex gratia a reparations payment of almost £30 million in settling a case of alleged bribery in the sale to Tanzania of an outdated, superfluous military air traffic control system costing about £26 million. In the UK’s first Deferred Prosecution Agreement (DPA) in November 2015, Standard Bank, agreed to pay a £16.8 million fine and about £500,000 to cover costs as well as to disgorge £8.4 million of profit, and pay £7.05 million compensation to the Tanzanian government. Compensation has also been provided to foreign countries in three other UK foreign bribery cases, Smith & Ouzman, Oxford Publishing Limited (OPL) and another case for which reporting restrictions apply.

**United States**

As noted above, in the US, the Crime Victims Rights Act (CVRA) provides crime victims with a list of rights, including the right to timely notice of any proceeding involving the accused, the right not to be excluded from these proceedings, the right to be reasonably heard at sentencing, and the right “to full and timely restitution as provided in law.” The CVRA defines a “crime victim” as “a person directly and proximately harmed as a result of the commission of a Federal offense.” The Mandatory

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55 Mabey and Johnson had been charged with inflating contract prices to fund kickbacks to Iraqi officials involved in a major contract to build bridges in Iraq, as well as paying bribes to officials in Ghana and Jamaica. The court ordered Mabey to pay reparations in the total amount of £1,415,000 consisting of £658,000 for Ghana, £139,000 for Jamaica, and £618,000 for Iraq. See StAR, *Left Out of the Bargain: Settlements in Foreign Bribery Cases and Implications for Asset Recovery* (2014) https://star.worldbank.org/sites/star/files/9781464800863.pdf

56 The Tanzanian government and UK Department for International Development (DfID) decided to use the funds for education projects. Books and classroom desks were supplied to primary schools across Tanzania.

57 UK Serious Fraud Office: https://www.sfo.gov.uk/2018/11/30/uks-first-deferred-prosecution-agreement-between-the-sfo-and-standard-bank-successfully-ends/ The UK explained that as the corporate benefit was shared between a UK and Tanzanian company, Tanzania had potential jurisdiction. The UK agreed with Tanzania that the SFO would take the lead on the basis that the SFO could sanction the conduct and obtain compensation. In providing the payment to Tanzania, the SFO was assisted by the FCO and DfID working in collaboration with the Ministry of Finance of the Government of Tanzania.

58 In Smith & Ouzman, compensation was not ordered by the court, but the SFO worked with DFID and FCO to organise GBP 395 000 compensation to Mauritania and Kenya through the exercise of executive power. In Mauritania, the UK made a payment to the World Bank to fund infrastructure projects in the country. In Kenya, the UK agreed the funds would be spent on purchasing ambulances for the country. In Oxford Publishing Limited (OPL), in addition to the GBP 1.9 million civil recovery order, OPL unilaterally offered to contribute GBP 2 million to not-for-profit organisations for teacher training and other educational purposes in sub-Saharan Africa. This benefit to the people of the affected region has been acknowledged and welcomed by the SFO, but the SFO decided that the offer should not be included in the terms of the court order, as the SFO considers it is not its function to become involved in voluntary payments such as this.

Victim Restitution Act and the Victims and Witness Protection Act also provide rights for victims, including restitution\(^{60}\).

As Richard Messick explains in a 2016 paper “in the US a foreign government that is a victim of an FCPA violation can assert the full panoply of rights accorded crime victims during an FCPA criminal enforcement action. For foreign governments, the most important right granted a crime victim is the right to compensation for losses the offense caused. Whenever a bribe-payer is found guilty of, or pleads guilty to, conspiring to violate the FCPA, then under both the Victims and Witness Protection Act and the Mandatory Victim Restitution Act\(^{61}\) a foreign government ‘directly harmed’ by the conspiracy has a claim for damages \(^{62}\),”

Messick cites five cases where a foreign government has received restitution or compensation for an FCPA violation but in none was there an explanation of why the US Department of Justice (DOJ) conditioned the plea bargain on payment of compensation nor the rationale for the amount. In the two most recent cases, the governments of Thailand and Haiti were compensated in 2009 and 2010 respectively in accordance with this provision. In both cases, the court ruled the two governments were “directly harmed” by a criminal conspiracy to bribe government officials. Thailand received $250,000 and Haiti $75,000. In neither case did the victim country file a claim. In the Thai case, the court used its discretion in determining the amount of damages, and in the Haitian Teleco case the prosecution proposed and the court accepted that the damages were equal to about the amount of the bribe, with the court referring to the Government of Haiti as the “victim” of the bribery scheme \(^{63}\).

Several other US examples of restitution have been cited by StAR that were made in connection with US enforcement actions against foreign corruption in the UN Oil-for-Food-Programme in Iraq \(^{64}\).

On the other hand, a compensation petition submitted by Costa Rica’s state-owned Instituto Costarricense de Electridad’s (ICE) in United States v. Alcatel–Lucent France, SA was denied. The DOJ opposed the petition arguing that because so many ICE

\(^{60}\) https://www.govinfo.gov/content/pkg/STATUTE-96/pdf/STATUTE-96-Pg1248.pdf

\(^{61}\) 18 U.S.C. § 3663 (a)(1)(A) The court, when sentencing a defendant convicted of an offense under this title….may order…that the defendant make restitution to any victim of such offense….The court may also order, if agreed to by the parties in a plea agreement, restitution to persons other than the victim of the offense….

(3) The court may also order restitution in any criminal case to the extent agreed to by the parties in a plea agreement.


\(^{63}\) United States v. Dia, No. 20346-CR-JEM (S.D. Fla. 2009) (plea agreement) (defendant ordered to pay $73, 824 to the government of Haiti, its fee for serving as intermediary in bribery scheme between government officials and U.S. firm); United States v. Green, No. CR 08-000059(B)-GW (C.D. Cal. 2010) (conviction) (DoJ sought compensation of $1.8 million, total bribes paid Thai officials; court reduced to $250,000 without explanation).

\(^{64}\) See StAR, Left Out of the Bargain: Settlements in Foreign Bribery Cases and Implications for Asset Recovery (2014) pages 92 -93
employees had been involved in the bribery scheme, the company was not a victim but a co-conspirator. Even if ICE were a victim, it contended, compensation should not be ordered because the Mandatory Victims Restitution Act provides an exception to compensation where determining the amount would be so complex that it would unduly delay resolution of the criminal case. The trial court agreed with both arguments, holding that ICE was a co-conspirator not a victim and that in any event the computation of damages would take too long. This decision was upheld on appeal.\textsuperscript{65} However, had the Government of Costa Rica been the one claiming compensation, the opinion suggests the result would have been different.

\textit{France and Switzerland}

As explained in STAR’s 2014 book \textit{Left Out of the Bargain}, in some civil law countries, the \textit{partie civile} route may offer countries harmed by corruption the possibility of damage awards. Under the French Criminal Procedure Code, victims who have been harmed, including states, may apply to be a \textit{partie civile} and be a full party to the criminal proceedings. Under Article 2 of the Code, victims can bring a claim and obtain civil compensation from a criminal court when they can show personal and direct damage from the crime. In 2007 Nigeria became a \textit{partie civile} in France to a money laundering case against a former Nigerian energy minister Dan Etété. He was convicted and sentenced to three years in jail, and as a civil party to the criminal action, Nigeria was awarded €150,000 as recompense for \textit{préjudice moral} (nonpecuniary damages)\textsuperscript{66}.

In Switzerland, crime victims have the right to participate as a private claimant (\textit{partie civile}) in the investigation, prosecution, and trial of a criminal defendant and to submit a claim for damages to be determined if the defendant is found guilty. This status has been granted to several states including Brazil, Nigeria and Tunisia in money laundering cases, but no damages were awarded\textsuperscript{67}.

Switzerland also has a special procedure for reparations, though not specifically intended for use in relation to countries affected by foreign bribery. According to the OECD WGB’s Phase 4 report on Switzerland in March 2018 “the method of calculation

\textsuperscript{65} The 11th Circuit ruled that the “pervasive, constant, and consistent illegal conduct” of ICE employees that the trial court had identified was enough for it to conclude that ICE “actually functioned as the offenders’ co-conspirator.”

\textsuperscript{66} Ibid. Even though Nigeria reportedly failed to pursue an appeal, and consequently did not ultimately receive the damages owed, the reasoning remains valid as a precedent for future claims by states harmed through the bribery of their officials.

\textsuperscript{67} Ibid. The cases involving Tunisia and Nigeria were settled short of a final verdict, and assets repatriated pursuant to an UNCAC Article 57(5) agreement. The case involving Brazil concerned several Brazilian tax inspectors, who had extracted bribes in exchange for ending inspections and/or reducing fines and deposited some of the proceeds in Swiss bank accounts. The court found that the laundered proceeds included funds due to the state of Brazil and that Brazil could therefore contend that it had suffered damage as a result of a crime and could thus lay legitimate claim to recompense. However, Brazil was not awarded any damages upon the facts of the case. The defendants had argued that since the crime of corruption was committed against “the collective interest,” rather than specifically against the Brazilian state, Brazil could not claim to have been immediately and directly harmed by it.
and the choice of beneficiary remain obscure. The report described two cases where this procedure was used one involving a payment of CHF 125,000 to the International Committee of the Red Cross (ICRC) and one involving a payment of CHF 31 million to the Canton of Geneva. In two other cases involving Alstom and Siemens, reparations was paid to the International Committee of the Red Cross, Transparency International Switzerland (TI), to the Geneva foundation “La maison de Tara” and to SOS Kinderdorf e.V., Munich. According to the authorities, the recipients of the reparation payment were decided in consultation with the accused and taking into account their not-for-profit activities in the countries affected.

**Greece**

Greece has also demonstrated the possibility of reparations in a domestic bribery case involving a Siemens which included novel compensation arrangements. In April 2012, Greece concluded via parliamentary action a settlement of foreign bribery allegations against Siemens by multiple public entities that had contracts with the company. Siemens agreed to waive €80 million in obligations owed to it by the Greek government and also agreed to provide €90 million to finance various entities and endeavours advancing the Greek public interest (including supporting the country’s anticorruption platform); to invest €100 million in Siemens’ activities within Greece; and to carry out a structured plan to consider and develop further investment opportunities within Greece.

These examples show that there should be no barrier in principle to introducing better procedural arrangements for compensation of victims in foreign bribery cases and that practical challenges can be addressed.

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68 OECD WGB Phase 4 Report on Switzerland (March 2018)

69 The first case involved a Swedish company (Company S) that allegedly paid illegal commissions to Gazprom executives to secure the sale of turbines for a gas pipeline. Apart from the reparation payment to the ICRC, the company had illegal assets confiscated to the value of the illicit gain (USD 10.6 million). In a case involving an oil company that had paid tens of millions into the bank account of a Nigerian law firm, the case was closed when the company paid the CHF 31 million in reparations to the Canton of Geneva.

70 In 2011, the authorities found that Alstom SA, using its Swiss subsidiary, Alstom Network Schweiz AG, had engaged in a scheme to pay bribes to obtain contracts in Latvia, Tunisia, and Malaysia. By summary punishment order, Alstom Network was fined CHF 2.5 million together with a confiscation penalty of CHF 36.4 million, calculated on the basis of the profits earned by the entire group through the contracts involving bribery, as well as procedural costs (about CHF 95,000). In the companion case concerning Alstom SA, the company agreed to pay CHF1 million in voluntary reparations to the International Committee of the Red Cross (ICRC), to be used in its projects in Latvia, Malaysia, and Tunisia for the benefit of the people of those countries. See StAR, Left Out of the Bargain: Settlements in Foreign Bribery Cases and Implications for Asset Recovery (2014) https://star.worldbank.org/sites/star/files/9781464800863.pdf

71 Ibid
Return of assets

In its UK Phase 4 report, the OECD WGB recommended that the UK should ensure that “payments of reparations and compensation to foreign countries by defendants are not lost to corruption.”

In the event that compensation is awarded to affected states, there are new international standards emerging about how the return of these assets should be made, namely the Principles agreed among Nigeria, Sri Lanka, Tunisia, Ukraine, the UK and the US at the Global Forum on Asset Recovery in December 2017. These include the principles of partnership, mutual interests, early dialogue, transparency and accountability, beneficiaries, strengthening anti-corruption and development, case-specific treatment, possible use of an UNCAC Article 57(5) agreement, preclusion of benefit to offenders and inclusion of non-governmental stakeholders.

The GFAR principles include the following key items:

- **Principle 4: Transparency and accountability:** “Transferring and receiving countries will guarantee transparency and accountability in the return and disposition of recovered assets. Information on the transfer and administration of returned assets should be made public and be available to the people in both the transferring and receiving country…”

- **Principle 5: Beneficiaries:** “Where possible, and without prejudice to identified victims, stolen assets recovered from corrupt officials should benefit the people of the nations harmed by the underlying corrupt conduct.”

- **Principle 6: Strengthening anti-corruption and development:** “Where possible, in the end use of confiscated proceeds, consideration should also be given to encouraging actions which fulfil UNCAC principles of combating corruption, repairing the damage done by corruption, and achieving development goals.”

- **Principle 10: Inclusion of non-government stakeholders:** “To the extent appropriate and permitted by law, individuals and groups outside the public sector, such as civil society, non-governmental organizations and community-based organizations, should be encouraged to participate in the asset return process, including by helping to identify how harm can be remedied, contributing to decisions on return and disposition, and fostering transparency and accountability in the transfer, disposition and administration of recovered assets.”

Further, as discussed below, in cases of grand corruption courts should have the option to grant standing to representatives of victims other than the state and to make special arrangements for a victims’ fund.

Several models for return of assets have been used to date to achieve accountability. One oft-cited example is the not-for foundation used in the Mercator/James Giffen case, where $115 million in assets ($84 million plus accrued interest) were returned to Kazakhstan. The funds had been frozen and seized in Switzerland at the request of the United States in a forfeiture action related to alleged foreign bribery in Kazakhstan. Based on an MOU in 2007 between Kazakhstan, Switzerland and the US, the funds were

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used to establish the BOTA Foundation, which had the purpose of improving the lives of Kazakh children and youths living in poverty. The foundation’s financial management was overseen by a board of trustees and by the World Bank and the funds were disbursed through three programmes: conditional cash transfers, scholarships to attend Kazakhstan higher education institutions, and grants to support innovative social service provision. At the 2014 close of the programme an external evaluation gave the foundation high marks for seeing that all monies reached the intended recipients.\textsuperscript{73}

\section*{3. Grand corruption issues, including standing and demand side of foreign bribery (Question 4)}

There is a growing recognition in the international community of the need for special measures to counter grand corruption, as evidenced by Lima Statement on Corruption Involving Vast Quantities of Assets agreed by an Expert Meeting in December 2018.\textsuperscript{74} The experts at that meeting encouraged the development of innovative ways to adequately investigate, prosecute and sanction those individuals involved in acts of corruption involving vast quantities of assets. This approach is consistent with national legal frameworks that already provide for aggravated corruption offences (bribery, embezzlement, money laundering etc) or aggravating circumstances and associated special measures.

\textbf{Proposal: The OECD WGB should add a new recommendation on grand corruption to the new Anti-Bribery Recommendation} that encourages parties to introduce special measures in grand corruption cases including:

1. provide for non-state actors, including CSOs, to replace representatives of the affected state in representing victims and allow them to make claims and present victim statements
2. make special arrangements for a victims’ fund, where appropriate
3. criminalise the demand side of foreign bribery in grand corruption cases

The recommendation should also include an instruction to the Working Group on Bribery to include implementation and enforcement of these corruption offences in its systematic follow-up and monitoring, as it does with other recommendations.

\textbf{Discussion:}

Transparency International defines grand corruption as the abuse of high-level power that benefits the few at the expense of the many, and causes serious and widespread


\textsuperscript{74} “The experts were concerned about the staggering amounts of assets stolen by PEPs, often using those assets for financing political campaigns and acquiring luxury goods such as yachts, private jets, premium real estate and jewellery. The experts highlighted such large-scale corruption as depriving States of the resources required to provide vital public services such as health care, education, housing, food or basic infrastructure. Preventing and combatting large-scale corruption would thus contribute to domestic resource mobilization for the achievement of the sustainable development goals.”

harm to individuals and society. It often goes unpunished because domestic authorities are unable or unwilling to act.

In 2016 Transparency International also proposed a legal definition of grand corruption and is currently working on a revised version that includes three main elements:

- Any corruption offence under UNCAC Articles 15 -25
- Involvement of a high-level official
- Causing serious harm

We propose that countries introduce a grand corruption offence with associated special measures such as more extensive jurisdiction, longer statutes of limitation, trial in absentia, higher sanctions and standing for victims’ representatives. Both the opprobrium and the consequences should be greater in relation to grand corruption.

This approach follows the logic of national legislation that provides for aggravated bribery offences or that takes into account aggravating circumstances in determining sanctions. Under that legislation, factors that are considered include the large scale of corruption, whether it is continuous or systematic or multiple or committed by an organized group of persons, the amount of the benefit and the amount of the loss or harm. The criminal law of many countries includes aggravated bribery offences or provides for consideration to be given to aggravating circumstances in determining sanctions, including in foreign bribery cases. The factors considered include the scale of the corruption, the extent of the loss and the extent of the gain. Likewise, because of the gravity of grand corruption and the associated problem of impunity in the home country, it warrants additional special measures.

In 2016 the US Congress enacted the “Global Magnitsky Human Rights Accountability Act”. (Global Magnitsky Act for short) which allows the executive branch to impose...
visa bans and targeted sanctions on individuals anywhere in the world responsible for committing human rights violations or acts of significant corruption\textsuperscript{77}. Sec (3)(a)(3) includes among the foreign persons subject to sanctions “a government official, or a senior associate of such an official, that is responsible for, or complicit in, ordering, controlling, or otherwise directing, acts of significant corruption, including the expropriation of private or public assets for personal gain, corruption related to government contracts or the extraction of natural resources, bribery, or the facilitation or transfer of the proceeds of corruption to foreign jurisdictions”. Sanctions deny individuals entry into the US, allow the seizure of any of their property held in the country, and effectively prevent them from entering into transactions with large numbers of banks and companies.\textsuperscript{78} Other countries have also passed similar legislation.

More recently, the June 2018 US Financial Crimes Enforcement Network (FinCEN) issued an Advisory on Human Rights Abuses Enabled by Corrupt Senior Foreign Political Figures and their Financial Facilitators which says:

“High-level political corruption undermines democratic institutions and public trust, damages economic growth, and fosters a climate where financial crime and other forms of lawlessness can thrive. Corrupt senior foreign political figures, their subordinates and facilitators, through their corrupt actions, often contribute directly or indirectly to human rights abuses, which have a devastating impact on individual citizens and societies, undermining markets and economic development and creating instability in a region.

Therefore the US is using tools that include the ability to sanction corrupt actors and human rights abusers around the world under an Executive Order implementing the Global Magnitsky Act of 2016, enforcement action against financial facilitators of corrupt senior foreign political figures, as well as issuing advisories to financial institutions to help them identify, mitigate, and report on these risks\textsuperscript{79}.”.

Combined with the Lima Statement, these statements and measures show a developing consensus in favour of individual countries assuming responsibility for addressing high-level political corruption outside their jurisdictions in light of its serious adverse consequences and the associated impunity. We argue that it should also be possible to bring criminal charges for corruption offences in other jurisdictions and for a range of special measures to be introduced.

- **Standing for non-state representatives and creation of a victims’ fund**

One special measure that supply side states should consider in foreign bribery cases involving grand corruption is recognising standing for non-state representatives of victims to bring compensation claims on behalf of a victim population. The affected state is often unable or unwilling to intervene to pursue a claim precisely because of

\textsuperscript{77}https://www.congress.gov/bill/114th-congress/senate-bill/284/text

\textsuperscript{78}For example, in 2017 the Canadian Parliament passed into law The Justice for Victims of Corrupt Foreign Officials Bill (Sergei Magnitsky Law)

serious corruption of state institutions. Moreover, as in cases in the US involving Costa Rica and Iraq cited above, in some jurisdictions national courts may not allow compensation based on claims by the state in which the demand side offence occurred. Consideration might also be given as to whether the demand-side state has held the demand side perpetrators to account and this may not have occurred.

In grand corruption cases, the injured population is denied recourse at home by a flawed justice system where public prosecutors or judges fail carry out their duties faithfully. That population should not be deprived of legal remedies for its injury. This means recognising standing for non-state representatives to initiate cases on behalf of the injured population, including making claims for damages. Any damages awarded will need to be administered carefully, potentially through use of a victims fund or arrangements such as the BOTA Foundation in Kazakhstan, described above.

– Demand side of foreign bribery

In foreign bribery cases that are at the level of grand corruption, there is invariably impunity on the demand side. This is also often true in less egregious cases. The OECD Working Group on Bribery’s “flip side” paper published in December 2018 asked whether in 55 concluded foreign bribery cases that ended with sanctions on the supply side the public officials involved in the scheme were also sanctioned or otherwise disciplined. They found that while there were investigations (30) and some enforcement actions (20) targeting demand side officials the rate of sanctioning was not very high, namely in only one-fifth of the cases. In an additional one-fifth of the cases enforcement action was pending. The study also found that the media plays a major role in the international flow of information and that international cooperation is not a major source of detection in demand side cases.

One avenue to pursue to address impunity on the demand side is to increase international cooperation and technical assistance efforts to help demand side countries sanction demand side officials., where they are willing.

However, in cases where demand side countries are unwilling to sanction their high level officials, this could be addressed if OECD Convention countries criminalised demand side offences. While there are examples of countries charging foreign public officials with money laundering or conspiracy charges or pursuing civil asset forfeiture or issuing Unexplained Wealth Orders (France, UK, US) in grand corruption cases there is a strong justification for supply side countries to create a broader legal basis for pursuing the corrupt officials outside their home jurisdiction.

80 Beyond that, the successor government in an affected state may in some cases be excluded from pursuing a claim on grounds of complicity or “in pari delictu” See for example THE REPUBLIC OF IRAQ, including as PARENS PATRIAE on behalf of the 08 Civ. 5951 (SHS) CITIZENS of the REPUBLIC OF IRAQ, Plaintiff, -against- ABB AG, et al., OPINION & ORDER (SDNY 6 February 2013) Affirmed on appeal by Second Circuit Court of Appeals, 18 Sept. 2014 https://www.courtlistener.com/opinion/2734038/republic-of-iraq-v-abb-ag/

The UN Convention against Corruption (UNCAC) Article 16 (2) requires each State Party to consider criminalising passive foreign bribery and has been ratified by all 44 OECD Convention Parties. The Council of Europe Criminal Law Convention against Corruption Article 5 requires 29 of 44 OECD Convention parties to criminalise “passive bribery” of foreign public officials i.e. “the request or receipt by any of its public officials, directly or indirectly, of any undue advantage, for himself or herself or for anyone else, or the acceptance of an offer or a promise of such an advantage, to act or refrain from acting in the exercise of his or her functions.”

The Explanatory Report to the Criminal Law Convention (paragraph 49) clarifies that Article 5 “provides for the criminalisation of bribery of foreign public officials of any foreign country [...] "the inclusion of passive corruption of foreign officials in Article 5 seeks to demonstrate the solidarity of the community of States against corruption, wherever it occurs. The message is clear: corruption is a serious criminal offence that could be prosecuted by all Contracting Parties and not only by the corrupt official’s own State”.

Some countries already hold foreign public officials to account in foreign bribery cases via conspiracy and money laundering charges. For example, in January 2019 the US Department of Justice (DOJ) announced the prison sentence handed to Colombia’s former National Director of Anti-Corruption in federal court in Miami for his participation in a conspiracy to launder money with the intent to promote foreign bribery.

In March 2019 the DOJ brought charges of conspiracy to commit money laundering against Gulnara Karimova, described as “a former Uzbek official who allegedly had influence over the Uzbek governmental body that regulated the telecom industry... Gulnara Karimova stands accused of exploiting her official position to solicit and accept more than $865 million in bribes from three publicly traded telecom companies, and then laundering those bribes through the U.S. financial system.” In announcing the charges, Assistant Attorney General Benczkowski referred to “the Department’s comprehensive approach to foreign corruption: we will aggressively pursue both corrupt foreign officials and the companies and individuals who bribe them in order to gain unfair business advantages, and we will do everything we can to keep the proceeds of that corruption out of the U.S. financial system.”

In the UK and France foreign public officials have been held to account in a number of money laundering cases. Most recently, in December 2018, UK authorities were reportedly investigating a former Nigerian oil minister but Nigeria has now made an extradition request.

The passive bribery offence has already been introduced in countries party to the Council of Europe Criminal Law Convention, though it is apparently seldom used. All those countries are reviewed. The case for its introduction in the US was made in a December 2018 article by two lawyers from the prominent law firm Baker &

82 See also UNCAC Article 18(b)
McKenzie\textsuperscript{85}. One of the points they make is that the Global Magnitsky Act is not an adequate substitute for an appropriate criminal statute. “The GMA does not carry criminal penalties and therefore does not create a risk of arrest or extradition to the United States, which means that it does not have the same deterrent effect as criminal charges. In addition, sanctions under the GMA are imposed by the State Department and the Treasury Department without being vetted by a grand jury and are not subject to the same kind of judicial review as a criminal indictment. They therefore tend to be perceived as more political than legal, and for that reason have less credibility in world public opinion than criminal charges.”

In grand corruption cases, assumption of jurisdiction over the demand side should be an option since the chances of accountability at home is small, at least until a transition takes place. However, in general, assumption of jurisdiction over the demand-side foreign bribery cases is not the preferred option. The first preference is for the demand side official’s state to handle the case. If they are willing and need technical assistance, this should be offered by OECD countries and by the OECD itself.

4. Non-trial resolutions, including settlements (Question 14)

As we noted in our Exporting Corruption Report 2018, there is an increasing trend towards companies and governments settling foreign bribery cases out-of-court, with recent legal changes in this area having come or about to come into force in several countries. While non-trial resolutions are cost-saving and incentivise companies to self-report, they should meet adequate standards of transparency, accountability and due process and should not be used in a way that undermines the justice system or public confidence in it. Transparency International welcomes the OECD’s excellent recent report on non-trial resolutions.

Proposal: The OECD WGB should add a new recommendation on non-trial resolutions to the new Anti-Bribery Recommendation that encourages parties to the Convention to ensure that settlements and other non-trial resolutions meet adequate standards and include detailed provisions establishing that they should:

1) publish information including:
   I. the terms of the agreement
   II. a detailed justification as to why a non-trial resolution is suitable for the case
   III. an agreed statement of facts which reflects a recognition of responsibility for wrongdoing and provides a significant level of detail; an admission of guilt is often appropriate
   IV. In addition, details of performance of the non-trial resolution should also be published.

7) provide for effective, proportionate and dissuasive sanctions and should not preclude further sanctions subject to non bis idem;

\textsuperscript{85} Two to Tango: Attacking the Demand Side of Bribery (Thomas Firestone and Maria Piontkovska (December 2018): https://www.the-american-interest.com/2018/12/17/two-to-tango-attacking-the-demand-side-of-bribery/
8) be subject to meaningful judicial review, including an opportunity for affected stakeholders to be heard;
9) provide for senior level accountability;
10) enable inclusion and reparation of affected country authorities and victims;
11) arrange for multi-jurisdictional settlements, where appropriate.

Discussion:
Non-trial resolutions can take various forms depending on the country, including plea bargains, non-prosecution agreements (NPAs), deferred-prosecution agreements (DPAs), leniency agreements and conduct-adjustment agreements. While they differ in form, they often require an admission of wrongdoing on the part of the company, cooperation with authorities, the imposition of a compliance programme and/or an external monitor, and a return of the undue benefit.

The OECD WGB has gently criticised a number of countries for weaknesses in their arrangements for non-trial resolutions. For example, in the Phase 4 report on Germany, it states that “With over two thirds of the sanctions imposed in foreign bribery cases decided through conditional exemptions and terminations of prosecution, it has also become urgent that Germany add accountability, raise awareness, and enhance public confidence in these resolution tools.” The Phase 4 report on Switzerland in March 2018 says: “The examiners understand the need of prosecution authorities for a simple and effective procedure for resolving foreign bribery cases. They recommend that Switzerland consider, where necessary taking existing procedures as a basis, the introduction of an alternative procedure to prosecution which has a strict framework, allows for the application of effective, proportionate and dissuasive sanctions and respects the necessary rules of predictability and transparency that are essential in this type of procedure. Such a procedure could be used in relation to economic crime, including cases of foreign bribery.

Parties should ensure that non-trial resolutions meet adequate standards, as outlined in Transparency International’s 2015 policy paper on settlements and in the December 2018 CSO letter sent to the OECD Secretary General by Transparency International, Corruption Watch, Global Witness and the UNCAC Coalition with suggestions regarding non-trial resolutions focused on seven key areas.

Public access to information about non-trial resolutions is key, especially in view of the increasing use of such case dispositions. The OECD WGB made this point in the Czech Republic Phase 4 review where it commented, as it had in Phase 3, that Agreements on Guilt and Punishment should be published including the rationale for using AGPs, the identities of the convicted persons involved and the sanctions and terms imposed. In the Phase 4 review of Switzerland they called for Switzerland to publish “promptly and

in conformity with the applicable procedural rules, certain elements of these summary
punishment orders including the legal basis for the choice of procedure, the facts of the
case, the natural and legal persons sanctioned (anonymised if necessary), and the
sanctions imposed88.

In the Phase 3 review of the UK in 2012, the examiners went much further saying “The
lead examiners are extremely concerned that many key details about the SFO’s civil
settlements of foreign bribery cases remain private. SFO press releases about these
settlements contain skeletal information. The lead examiners therefore recommend that
the UK authorities, where appropriate and in conformity with the applicable procedural
rules, make public in a more detailed manner sufficient information for determining
whether civil settlements of foreign bribery cases are consistent with the Convention.
This should include all of the key facts, court documents, and the settlement agreement
in each case. The UK authorities should also avoid confidentiality agreements with
defendants that prevent the disclosure of such information. Confidentiality agreements
undoubtedly encourage companies to resolve investigations. However, they minimise
the settlements’ deterrent impact.”89

The WGB has emphasized that transparency is necessary to increase impact, foster
consistency, provide guidance, increase awareness and ensure educational value. In the
Phase 4 review of Switzerland the report stated:

“The evaluation team has reviewed the summary punishment orders handed
down by the OAG in foreign bribery cases and recognises that they have
unquestionable qualities: they set out in detail the facts, the evidence and the
methods and principles on which calculation of the fines and confiscation
measures are based. However, the failure to publish orders (anonymously where
necessary) is regrettable, and could minimise their impact, undermine the
transparency of enforcement actions and deprive the public, including
companies and commentators, of their educational value. They consider that the
availability of orders for consultation at the OAG for 30 days after their adoption
is useful but does not allow sufficient dissemination of these decisions, in
particular over time. Much wider publicity of these procedures, which do not
call for the intervention of a judge (unless contested), is essential in order to
guarantee their predictability and transparency. The fact that they are equivalent
to a judgment should encourage the OAG to insure the widest possible
publicity."90

The Phase 3 evaluation of Brazil the OECD WGB states that a “lack of guidance,
coupled with the lack of publication of cooperation agreements, creates a risk that
cooperation agreements may be applied in an inconsistent manner, including in foreign
bribery cases91.” By bringing visibility to a country’s enforcement practices,
publication of concluded resolutions also contributes to raising awareness and provides

88 OECD WGB Phase 4 Report on Switzerland (March 2018)
http://www.oecd.org/corruption/anti-bribery/Switzerland-Phase-4-Report-ENG.pdf
89 OECD WGB Phase 3 report on the UK (March 2012) https://www.oecd.org/daf/anti-
bribery/UnitedKingdomphase3reportEN.pdf
90 OECD WGB Phase 4 Report on Switzerland (March 2018), page 39,
hhttps://www.oecd.org/corruption/anti-bribery/Switzerland-Phase-4-Report-ENG.pdf
91 OECD WGB Phase 3 Report on Brazil,
guidance to practitioners.” The WGB has also stated that the most important elements of the resolution should be disclosed, to ensure greater transparency, raise awareness and increase confidence in enforcement of the foreign bribery offence.

The valuable guidance on transparency offered in all these examples should be combined into one set of guidelines to be included in the new Anti-Bribery Recommendation.

5. Transparency of enforcement data and case dispositions (Question 17)

Transparency International’s 2018 Exporting Corruption report found that OECD Convention countries are failing in relation to transparency of foreign bribery enforcement data and case dispositions. This is despite the fact that the OECD WGB has explicitly recognised the importance of making this information publicly available. In the absence of such information it is difficult to assess a country’s performance. It has also opined that publication of judgments is necessary to ensure that sanctions for foreign bribery are effective, proportionate and dissuasive and also for raising public awareness of the risks of foreign bribery and how companies can manage those risks and for enhancing public discussion and debate. And likewise for non-trial resolutions, as discussed above and succinctly stated in the OECD’s recent publication on non-trial resolutions: “The WGB has always considered that publishing information on concluded resolutions helps ensuring transparency and consistency in enforcement practices.”

Proposal: The OECD WGB should add a new recommendation on transparency of data and case dispositions to the new Anti-Bribery Recommendation calling for parties to the Convention to

7. publish annual statistics on foreign bribery enforcement which cover each stage of the foreign bribery enforcement process, in line with the data required in the OECD WGB Phase 4 review questionnaire. They should include not only the foreign bribery offence, but also related money laundering, tax and accounting violations, and handling of mutual legal assistance requests

8. publish court judgments including names of the defendants (especially legal persons); the facts; the legal basis; the sanctions; and the reasoning.

9. publish non-trial resolutions including the elements indicated in the section above on non-trial resolutions

10. The recommendation should also include instructions to the OECD Working Group on Bribery to

10.1. carry out a horizontal assessment of accessibility of data and case information across all countries party to the Convention, develop guidance and provide technical assistance.

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10.2. create a public database of statistical data and detailed case information. This could include publically available information about investigations as well as the complete text of judgments or other dispositions of cases, both interim and final.

10.3. publish an annual report which should include updated year-on-year data on foreign bribery enforcement, as well as new developments and challenges.

**Discussion:**

In 37 of the 42 OECD Convention countries surveyed in Transparency International’s 2018 Exporting Corruption report, there are no published statistics on foreign bribery enforcement or only partial information is published and access to court judgments and non-trial resolutions is limited.

- Statistics

To enable informed debate and decision-making on a country’s enforcement system, it is essential that the state regularly publish updated statistics on criminal, civil and administrative investigations, charges, proceedings, outcomes and mutual legal assistance activity. These statistics should be disaggregated by offence, including a separate category for foreign bribery. While there are legitimate reasons to ensure confidentiality with regard to ongoing investigations, there is no reason why general, anonymised data on the number of investigations cannot be published.

The OECD WGB has called for improved statistics in a variety of areas in numerous country reviews. For example, the Phase 4 report on Germany in 2018 noted that the lack of statistics collected at Federal and Länderelevation has been an obstacle in assessing Germany’s enforcement efforts and recommended that Germany compile at the Federal level, or ensure consistent compilation at Länderelevation of information and statistics relevant to the monitoring and follow-up of the enforcement of the German legislation implementing the Convention. More specifically, it noted that the lack of complete statistics and data was a challenge for assessing Germany’s performance in seeking and providing MLA. The Phase 4 report on Switzerland in 2018 recommended that Switzerland collect exhaustive statistics on the number of concluded cases at cantonal and federal levels and more detailed statistics on MLA requests received, sent and rejected that relate to money laundering where foreign bribery is the predicate offence.

The Phase 3 review of Brazil in 2014 recommended that it maintain data and statistics at the federal level regarding the confiscation of the proceeds of foreign bribery and other corruption and serious economic crimes as well as statistics on investigations, prosecutions and sanctions for money laundering, including data on whether foreign

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94 While all countries provide some information on some court decisions, many publish only partial information on those decisions and offer only limited access to lower court decisions and out-of-court dispositions such as settlements. In some countries no access is provided at all to those decisions, and some offer practically no available written justification for outcomes and sanctions determined via out-of-court dispositions. To the extent decisions are published, most courts within the EU render them anonymous beforehand.

95 The OECD WGB Phase 4 report on Germany noted that the following Phase 3 recommendation was one of those that had not been implemented: Strengthen its efforts to compile at the federal level, for future assessment, information and statistics relevant to monitoring and follow-up of the enforcement of the German legislation implementing the Convention [Convention, Article 12; 2009 Recommendation III.(ii) and V];
bribery is the predicate offence. The Phase 3 and 4 reviews of Czech Republic in 2017 recommended statistics on the number of formal mutual legal assistance requests sent and received, including on the offence underlying the requests, and the outcome and time required for responding. The Phase 3 follow-up report on Portugal in 2015 recommended detailed statistics on investigations, prosecutions and sanctions for false accounting and money laundering; confiscation in foreign bribery cases; pre-trial seizures; and expiry of the statute of limitations.

These examples indicate that the new Recommendation should emphasize the importance of a wide range of country data on enforcement and the need for improvement in this area.

- Judgments and non-trial resolutions

As the OECD WGB has pointed out, publication of judgments is necessary to ensure that sanctions for foreign bribery are effective, proportionate and dissuasive; for raising public awareness of the risks of foreign bribery and how companies can manage those risks; and for enhancing public discussion and debate. Published case dispositions also serve to make possible debarment and other non-criminal sanctions, civil actions, pursuits of foreign public officials as well as research and scrutiny by journalists, academics and civil society groups. In most cases, the public interest in knowing details of case dispositions outweighs the defendants’ right to privacy or the public interest in rehabilitation of offenders.

NRGI has submitted a valuable paper to this consultation outlining some of the arguments in favour of publication of case dispositions. Two recent blog posts are also important contributions to this discussion, one by Angela Reitmaier of Transparency International Germany on “Anti-bribery enforcement: The case for making court decisions freely available in Germany” and one by Rahul Rose of

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96 OECD WGB Phase 3 report on Brazil https://www.oecd.org/daf/anti-bribery/Brazil-Phase-3-Report-EN.pdf

These arguments include the following:

**One: Disclosure spurs government action**

Disclosure lays an evidentiary foundation for related investigations and sanctions in the same jurisdiction.

Disclosure provides information and impetus for legal action in other jurisdictions.

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100 https://oecdonthelevel.com/2017/12/05/anti-bribery-enforcement-the-case-for-making-court-decisions-freely-available-in-germany/
Corruption Watch on “Closed courts: how could open data help the fight against corruption in the UK?”

- OECD horizontal assessment, public database and annual report

In view of the challenges in accessing annually updated public information on foreign bribery enforcement in OECD Convention countries, it is time for the OECD WGB to take steps to improve the situation.

As we proposed in TI’s Exporting Corruption Report 2018, the OECD WGB should carry out and publish a horizontal assessment of accessibility of data and case information across all countries party to the Convention, develop guidance and provide technical assistance.

We also proposed that the OECD create a publically accessible database with enforcement data and information on case dispositions. This would serve several purposes. It would assist other jurisdictions, including on the demand side; increase awareness among businesses and the public; aid the media, including investigative journalists; and assist researchers and policy-makers.

By way of precedent, the World Bank/UNODC Stolen Asset Recovery (StAR) “Asset Recovery Watch,” have created an Excel database that is available on the StAR website. The information there consists of international asset recovery cases initiated in 1980 or later, completed or underway, where i) there has been a public indictment alleging a corruption offense defined in UNCAC and ii) some or all the proceeds from the offense are in a second country. The data was first assembled in 2011 from State Parties’ responses to a UNODC request. StAR asked parties to furnish information on each case in which it had been involved, identifying the other jurisdictions participating in the action; the amount; whether the assets were frozen, confiscated, or repatriated; the provisions of UNCAC governing recovery proceedings; and the text of any repatriation agreement. StAR supplemented the responses with information from legal databases, media reports, and other sources and has continued to update the information as time and resources permit.

The OECD WGB should also publish an annual report with updated year-by-year data on foreign bribery enforcement, as well as new developments and challenges. This could build on the existing report on enforcement.

6. Facilitation payments (Question 22)

The UN Convention against Corruption (UNCAC) requires criminalisation of foreign bribery. It makes no exception for facilitation payments. All the parties to the OECD Anti-Bribery Convention are also parties to the UNCAC. Including a facilitation payments exception creates the risk of loopholes and minimises the harm and injustice arising from such payments.

Proposal: The OECD WGB should add a new recommendation on facilitation payments to the new Anti-Bribery Recommendation instructing countries to remove any exemption for those payments.

10.4. Proposed revisions to existing recommendations

1. Recommendation III Awareness-rais ing (Questions 53 cooperation)

Recommendation III recommends that Member countries take steps to examine “awareness-raising initiatives in the public and private sector for the purpose of preventing and detecting foreign bribery;…”

Civil society organisations have a crucial watchdog role and other members of civil society may also witness foreign bribery, want to report corruption offences or are direct victims of foreign bribery. Other parts of civil society such as academics, policy analysts and journalists carry out important research and analysis role to play. For this reason all these members of civil society should be targets of awareness-raising and cooperation. Additionally, civil society in countries frequently targeted by foreign bribery should be included in awareness-raising and collaboration efforts.

We commend the OECD WGB for its increased awareness-raising efforts and outreach towards civil society and recommend testing new approaches to involvement of civil society that we have recommended in previous reports and statements. Still more steps should be taken to bring civil society representatives closer to the review discussions and the challenges of foreign bribery enforcement, whether at national level or in the WGB meetings.

Multilateral development banks, international funds (such as the climate funds and public disaster relief funds) have their integrity frameworks that include prevention, detection, investigation and sanctioning of corruption. These frameworks have limitations as responsible entities in these international organisations can act only within their own system and at the same time often need the cooperation on national criminal justice bodies.

Proposal: The OECD WGB should revise Recommendation III on awareness-raising to provide

a. Awareness-raising and cooperation with civil society: Recommendation III. paragraph i) should be revised to also cover civil society. To enhance awareness and cooperation,

I. representatives of civil society should be invited to attend as observers parts of the meetings of the OECD WGB – the experience with the Istanbul Action Plan reviews shows that this is possible.102

II. countries party to the OECD Convention should conduct multi-stakeholder dialogues at home following WGB reviews and publish plans of action to implement the recommendations, with public reporting on steps taken

III. the OECD WGB should invite stakeholders from countries most affected by foreign bribery to OECD WGB consultations

2) Cooperation with multilateral financial institutions:

https://www.transparency.org/whatwedo/publication/transparency_participation_an_evaluation_anti_corruption_review_mechanisms
Recommendation III should include a new paragraph encouraging Member countries to examine the issue of cooperation with multilateral development banks:

I. A further recommendation should provide details on how Member countries should ensure that both normative and practical measures are in place for international cooperation.

II. Recommendation XI. paragraph ii) should be extended to multilateral financial institutions and funds.

III. Recommendation XIII. paragraphs i), ii) and v) should include multilateral financial institutions and funds.

2. Recommendation IX. Reporting Foreign Bribery (Question 29)

TI’s 2018 Exporting Corruption report found inadequacies in whistleblower protection in numerous OECD Convention countries suggesting that additional focus is needed in this area and could be aided by a revision and strengthening of the outdated guidance of Recommendation IX.

Several international and regional organisations, including the OECD, as well as CSOs such as Transparency International have developed guidance for the adoption of whistleblowing legislation, to ensure that whistleblowers are afforded proper protection and disclosure opportunities.\(^{103}\) The language of Recommendation IX in the 2009 Recommendation is not aligned with those international standards and best practice. In particular:

**Proposal: Revise and expand Recommendation IX** to encourage countries to adopt effective and comprehensive whistleblower protection legislation in line with international standards and best practice such as TI International Principles for Whistleblowing Legislation.\(^{104}\) Including with respect to Scope of application; Conditions for Protection; Protection; Confidentiality; Disclosure Procedures; Follow-Up; Relief; Enforcement; and Stakeholders Involvement as described in detail the discussion section below.

**Discussion:**

The OECD found that only 2% of foreign bribery cases resulting in sanctions was detected by whistleblowers, even though they are an important source and often provide

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pivotal evidence for successful prosecution. Indeed, reporting often come with high personal risk. Whistleblowers may be fired, sued, blacklisted, arrested, threatened or, in extreme cases, assaulted or killed. Effectively protecting whistleblowers can embolden people to report wrongdoing and thus increase the likelihood that wrongdoing is uncovered and penalised. As stressed by the OECD, “whistleblower protection is the ultimate line of defence for safeguarding the public interest.”

Recommendation IX should be revised and expanded to fit with international standards and best practice in the following ways:

- **Scope of application**: It should be as wide as possible to cover every possible whistleblowing situation and ensure that all whistleblowers are protected. A wide range of categories of wrongdoing should be covered and a wide definition of whistleblower (beyond traditional employee-employer relationship) should be provided. Both the private and public sector should be covered.

- **Conditions for protection**: The motives of a whistleblower in reporting information that they believe to be true should be unequivocally irrelevant to the granting of protection. (The reference to “good faith” should be removed as it can have the negative effect of shifting the focus from assessing the merits of the information provided to investigating the whistleblower’s motives, exposing him or her to personal attacks.)

- **Protection**: Whistleblowers should be protected against all forms of retaliation, disadvantage or discrimination, including against legal proceedings. (The current language of recommendation IX.iii) seems to limit protection to retaliation at the workplace.)

- **Confidentiality** of the identity of the whistleblower should be guaranteed and allowing anonymous disclosures should be considered. Confidentiality should apply not only to the name of the whistleblower, but also to “identifying information”. (The current recommendations fail to provide for the protection of the identity of the reporting person).

- **Penalties** should apply to persons who attempt to identify a whistleblower, hinder reporting or retaliate against whistleblowers.

- **Disclosure Procedures**: Multiple avenues for making a disclosure should be provided.
  
  a. Whistleblowers should be able to make reports internally to their organisation or directly to the competent authorities. There should be no restrictions or extra burden on whistleblowers who wish to report directly to regulators and the authorities. (The current language of recommendation IX.ii) suggests that providing only an internal reporting mechanism for public officials or only a channel to the authorities is sufficient (“directly or indirectly through an internal mechanism, to law enforcement authorities”).

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106 OECD (2016), Committing to Effective Whistleblower Protection, p.11.
b. Disclosure to the public, in certain circumstances, should be allowed.

c. There should be avenues for whistleblowers to make disclosures involving matters of national security and official secrets, including though an independent oversight body. Matters falling within that category should be narrowly and clearly defined. Special rules should apply only in view of the category of information being disclosed, without considerations to the person making the disclosure.

d. It should be mandatory for a wide range of public and private sector organisations to set up internal whistleblowing mechanisms and have procedures to protect whistleblowers. Internal whistleblower regulations and procedures should be highly visible and understandable; maintain confidentiality or anonymity (unless explicitly waived by the whistleblower); ensure thorough, timely and independent investigations of whistleblowers’ disclosures; and have transparent, enforceable and timely mechanisms to follow up on whistleblowers’ retaliation complaints (including a process for disciplining perpetrators of retaliation)\textsuperscript{107}

- **Follow-up:** There should be an obligation to follow up on reports and to keep the whistleblower informed, within a reasonable timeframe.

- **Relief:**

  e. A full range of remedies, financial and others, covering all direct, indirect, past and future consequences of unfair treatment should be provided, including interim relief. Where possible, the whistleblower should be restored to a situation that would have been his/hers had he or she not suffered unfair treatment.

  f. The *burden of the proof* should be placed on the employer to establish that any detriment suffered by the whistleblower is not linked to his/her disclosure.

  g. Providing legal and financial assistance to whistleblowers should be consider.

- **Enforcement:** An independent agency should be responsible for the oversight and enforcement of whistleblowing legislation. It should have sufficient power and resources to operate effectively. It should be competent to:

  h. receive, investigate and address complaints of unfair treatments and improper investigations of whistleblower disclosures,

  i. provide advice and support to whistleblowers,

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j. monitor and review whistleblower frameworks, collect and publish data and information regarding the functioning of whistleblowing laws and frameworks,

k. raise public awareness to encourage the use of whistleblower provisions, and enhance cultural acceptance of whistleblowing.

- **Stakeholders involvement:** the design and periodic review of whistleblowing laws, regulations and procedures must involve key stakeholders including employee organisations, business/employer associations, civil society organisations and academia.

3. **Recommendation X Accounting Requirements, External Audit, and Internal Controls, Ethics and Compliance (see question 30)**

Recent anti-foreign bribery enforcement actions exposed new forms of foreign bribery related money-laundering and accounting offences. In these cases, instead of simple off-the-book accounts and transactions foreign bribery perpetrators purchased majority shares of entire banks to circumvent anti-money laundering infrastructure and used these institutions to pay bribes without hindrance.

Furthermore, external auditors play an important role in the detection of suspicious transactions, which is why they are considered to be an important element in implementation of money laundering and terrorist financing prevention measures.

Finally, it should be noted that the Financial Action Task Force Recommendation 22 goes beyond OECD Working Group on Bribery Recommendation X. The FATF recommendation covers not only accountants and external auditors, but also designated non-financial businesses and professions (DNFBPs), including lawyers, notaries, other independent legal professionals, as well as trust and company service providers.

**Proposal: Revise Recommendation X, including part B,** to encourage parties to

3) mandate their financial supervisory authorities to pay extra attention to financial institutions in which a company with international business profile directly or indirectly exercises a dominant influence.

4) notify suspicious transactions to the country’s financial intelligence unit if they encounter any suspicious activities when performing their duties.

5) incentivize compliance officers to self-report when compliance officers identify misconduct

6) extend relevant procedures to DNFBPs in their functions of providing services for international business transactions

The recommendation should also include instruction to the OECD WGB, as a minimum, to consider in its systematic follow-up and monitoring the findings of FATF reviews and ideally to include in their own reviews the implementation of these extended recommendations.

4. **Recommendation XI on Public Advantages including Public Procurement (Question 42)**

Best practices have evolved since 2009 when the Revised Recommendation was issued and it should be updated. The new Recommendation should reflect the fact that public information would create disincentives for criminal behaviour and make it easier to
identify red flags and triangulate suspicious deals. That includes public information about sanctions for foreign bribery.

Recommendation XI (iii) references the 2008 recommendation on public procurement and will presumably be automatically updated to refer to the 2015 Recommendation on the same topic. However, the 2015 recommendations are lacking in some respects – only addressing vertical accountability mechanisms and disregarding the relevance of more horizontal accountability mechanisms. This is partly covered by the 2015 G20 Principles for promoting integrity in public procurement and these should be referenced.

Recommendation XI (i) and other sections discuss the issue of debarments. It is not clear from the recommendations how various public bodies should debar if they cannot get access to details of sanctions on foreign bribery, for example on the name of individuals or legal persons who were held liable. This issue should be addressed.

Proposal: The OECD WGB should revise and expand Recommendation XI (i) to encourage parties to

1) make sanctions decisions publicly accessible
2) require public authorities
   I. to collect, publish and regularly analyze public procurement data as structured open data, ideally through the Open Contracting Data Standard
   II. publish information about bids and implementation to strengthen the ability of public institution, private sector and civil society to spot kickbacks and bribes, establish comprehensive, independent validation processes within government to ensure that data is accurate and complete, whilst highlighting concerns for the public
   III. establish effective and constructive feedback channels, open to stakeholders across government, industry and civil society, ensuring decisions are made taking into account the needs of affected communities
3) adopt laws on the possibility of cross-debarments by national authorities.

Recommendation XI (ii) should be amended to say that in accordance with the 2015 G20 principles “… member countries should support efforts to provide opportunities for input from civil society and the general public on the public procurement processes and participation, during the pre-tendering phase, of relevant stakeholders, including representatives of suppliers, users and civil society consistent with law. “

5. Annex II: Good Practice Guidance on Internal Controls, Ethics, and Compliance (Question 7)

The OECD Guidelines for Multinational Enterprise set due diligence standards with regard to Human Rights, Employment and Industrial Relations, Environment, Combating Bribery, Bribe Solicitation and Extortion, Consumer Interests and

Disclosure. The Due Diligence Guidance for Responsible Business Conduct, adopted by the OECD Council at Ministerial Level on 30 May 2018, provides a common understanding of due diligence.

In the OECD consultation on 22 March 2019 one of the participants noted that a holistic risk assessment is increasingly done by enterprises – risk and compliance are not discrete areas and should be cross-referenced in-house.

Because of the interrelatedness of the links between risk assessment and compliance as well as the connections between human rights and corruption, Annex II should be revised to reflect the new Due Diligence Guidance for Responsible Business Conduct\(^\text{110}\) in the OECD Guidelines for Multinational Enterprises.

**Proposal: The OECD WGB should Revise Annex II Good Practice Guidance in accordance with the OECD Due Diligence Guidance** to call for enterprises to conduct foreign bribery risk assessments following the six steps outlined in the Guidelines for Multinational Enterprises consisting of

- embedding responsible business conduct into policies and management systems
- identifying and assessing adverse impacts
- ceasing, preventing, and mitigating adverse impacts
- tracking implementation and results
- communicating how impacts are addressed and
- providing for, or cooperating in remediation should be included in the Good Practice Guidance on Internal Controls, Ethics, and Compliance. In particular, communication and remediation should be added to address concerns of victims' rights and participation voiced above.

In addition, the new guidance should encourage companies and business organizations to recognize gendered forms of corruption, including sextortion, in their codes of conduct and compliance regulations.


Transparency International Australia

Public Consultation: Review of the 2009 OECD Revised Anti-Bribery Recommendation

Transparency International Australia welcomes the public consultation and review of the 2009 OECD Revised Anti-Bribery Recommendation.

We support the position and recommendations outlined in the submission by Transparency International, on behalf of the TI movement.

Transparency International’s 2018 Exporting Corruption report shows that out of 44 parties to the OECD Anti-Bribery Convention only seven countries are in the top active enforcement category and four are in the next moderate enforcement category. This report finds that while there appears to have been some improvement in enforcement, overall there has been little improvement since 2015.

The Transparency International submission to this review includes both recommendations from the Exporting Corruption report, and a number of new recommendations.

In particular, Transparency International Australia (TIA) supports the following recommendations, given they are particularly relevant to Australia:

1. Transparency of beneficial ownership of companies and trusts

Secret ownership is an obstacle to detection and investigation of corrupt transactions, including laundering of proceeds of crime in foreign bribery cases. The 2009 Anti-Bribery Recommendation does not address the issue of beneficial ownership transparency.

A new recommendation should be added encouraging States to introduce central registers containing beneficial ownership information and make that information public. This should be systematically reviewed by the OECD.

In the Australian context, Transparency International Australia updated its position on beneficial ownership in April 2019.

Transparency International Australia has long called for transparency of beneficial ownership of companies and trusts through submissions to government, and through our active participation in the Open Government Partnership.

2. Access to remedies for victims

There is now wide consensus that corruption has adverse human rights impacts. However, neither the OECD Anti-Bribery Convention nor the 2009 Revised Recommendation reference the victims of foreign bribery. This fosters the false notion that corruption is a victimless crime.

The nexus between bribery, corruption and human rights violations is clear. Too often communities, citizens and particularly women and girls, bear the brunt of bribery and

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corruption. Bribery and corruption is not gender neutral, for example, paying bribes through sexual favours – a practice known as sextortion – exists.

Bribery and corruption can rob states of much needed revenues to ensure the provision of essential services, and to alleviate poverty.

Access to remedy is recognised in the context of the international human rights frameworks, including the UN Guiding Principles on Business and Human Rights\(^2\).

Further, The OECD Guidelines for Multinational Enterprises includes a human rights chapter consistent with the UN Guiding Principles on Business and Human Rights. This includes the provision that multinational enterprises should provide for or co-operate through legitimate processes in the remediation of adverse human rights impacts where they identify that they have caused or contributed to these impacts.\(^3\)

In addition, the OECD Guidelines require due diligence with respect to human rights and bribery and include a requirement to address actual impacts through remediation.

Recommendations in the anti-bribery review should be included to provide for enforcement authorities in affected states to be given timely notice about, and an opportunity to conduct joint investigations (where this is feasible) and an opportunity to participate in foreign bribery cases at different stages. Further, authorities in victim states to be able to submit claims for reparations or compensation, including social and collective damages, and to present victim impact statements.

The recommendation should also call for the OECD Working Group on Bribery to review the status of country arrangements for inclusion, representation and standing of victims in foreign bribery cases.

Annex II (Good Practice Guidance on Internal Controls, Ethics, and Compliance) should be revised in accordance with the OECD Due Diligence Guidance, in as far as it concerns adverse impacts that are caused or contributed to by the enterprise, i.e. the enterprise’s own activities, in relation to foreign bribery. The six steps outlined in the MNE Due Diligence Guidelines should be referenced.

3. **Non-trial dispositions, including settlements**

There is an increasing trend towards companies and governments settling foreign bribery cases out-of-court. Such settlements can take various forms depending on the country, including plea bargains, non-prosecution agreements (NPAs), deferred-prosecution agreements (DPAs), leniency agreements and conduct-adjustment agreements.

While settlements are cost-saving and incentivise companies to self-report, they should not be used in a way that undermines the justice system or public confidence in it.

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\(^2\) There is growing international recognition of the interlinkages between corruption and human rights violations and of the need for states and multinational companies to remedy adverse impacts on human rights. In 2011, the United Nations Human Rights Council unanimously endorsed the UN Guiding Principles on Business and Human Rights, a set of guidelines for States and companies to prevent and address human rights abuses committed in business operations. This implemented the UN’s 2008 “Protect, Respect and Remedy Framework”.

\(^3\) [http://mneguidelines.oecd.org/guidelines/](http://mneguidelines.oecd.org/guidelines/)
Settlement agreements should be made public, including their terms and justification, the facts of the case, the offences and other relevant information. They should provide for effective, proportionate and dissuasive sanctions and be subject to meaningful judicial review, including an opportunity for affected stakeholders to be heard.

A new recommendation should be included to ensure parties to the Convention ensure that settlements and other non-trial resolutions are justified and transparent. It should include detailed provisions as outlined in the CSO letter in to OECD Secretary General Angel Gurría (December 2018)\(^4\).

Transparency International Australia holds the view that companies should be required to admit liability as a condition of entering into a DPA. This was made clear in our submission to the Australian Attorney General’s Department Consultation into Deferred Prosecution Agreement Scheme, July 2018.

4. Facilitation payments

The UN Convention against Corruption (UNCAC) requires criminalisation of foreign bribery. It makes no exception for facilitation payments. All parties to the OECD Convention are also parties to the UNCAC. Therefore, the Recommendation should include a new instruction to countries to remove any exemption for facilitation payments.

Transparency International Australia has long called for the removal of facilitation payments as a defence in the Australian Foreign Bribery legislation.

5. Enhance detection and reporting of foreign bribery by financial and non-financial professions subject to AML requirements

Recent anti-foreign bribery enforcement actions exposed new forms of foreign bribery related to money-laundering and accounting offences. External auditors play an important role in the detection of suspicious transactions and are an important element in implementation of money laundering and terrorist financing prevention measures.

The Financial Action Task Force recommends that not only accountants and external auditors, but also designated non-financial businesses and professions (DNFBPs), including lawyers, real estate agents, notaries, as well as trust and company service providers, be covered by anti-money laundering and counter terrorism finance legislation.

The existing AML recommendations should be extended to all DNFBPs in their functions of providing services for all business transactions.

Transparency International Australia updated its position on AML/CTF in Australia in April 2019.

6. Transparency in public procurement

Corruption and bribery risks in procurement are well known. Enhanced transparency and opportunities for participation from civil society and the general public will assist in mitigating risks. Further, debarment by national authorities, for those organisations held

liable for bribery and corruption, would act as a deterrent and improve public confidence, trust and integrity in procurement.

Recommendations should be amended to reflect the 2015 G20 principles, which state: “…member countries should support efforts to provide opportunities for input from civil society and the general public on the public procurement processes and participation, during the pre-tendering phase, of relevant stakeholders, including representatives of suppliers, users and civil society consistent with law.”

7. Strengthen whistleblower protection

Ensuring whistleblowers are supported, protected and compensated for the personal risks and hardship they can encounter when exposing bribery and corruption is fundamental in the detection, investigation, and prevention of bribery and corruption. ‘Blowing the whistle’ often comes at extreme personal and professional cost and detrimental impacts to the individuals and their families.

The OECD Recommendation on whistleblowers should be revised and expanded, to encourage countries to adopt effective and comprehensive whistleblower protection legislation in line with international standards and best practice such as outlined in the TI International Principles for Whistleblowing Legislation.

Transparency International Australia and the Griffith University draft report Governing for Integrity: A blueprint for Reform (April 2019), recommends that:

The (Australian) Commonwealth and each State government reform its public interest disclosure (whistleblower protection) legislation to:

- Bring legal protections at least to the standard of Part 9.4AAA of the Corporations Act, as amended,
- granting access to compensation where agencies fail to support and protect public interest whistleblowers
- Recognise collateral or ‘no fault’ damage as a basis for whistleblowers to be compensated for impacts of reporting, not simply direct reprisals
- Establish reward and legal support schemes to ensure the financial benefits to government of whistleblowing disclosures are reflected in support to whistleblowers themselves, individually and collectively; and
- Establish a properly resourced whistleblower protection authority, providing not only advice, support and referrals, but expert monitoring and oversight of responses to disclosures, and active protection including investigations into detriment, compensation and civil penalty actions. This recommendation relates to: all Australian governments, especially the Commonwealth in respect of the Public Interest Disclosure Act 2013 and other proposed whistleblowing reforms.

In conclusion, this submission supports the recommendations and submission made by our colleagues at Transparency International.

We would welcome the opportunity to discuss this further.
Transparency International Belgium

Annex 1

Question 14: implement a form of deferred prosecution agreement (settlement going beyond the mere payment of an amount of money but also including compliance and monitoring measures)

Question 15:
- Further increase criminal sentences, although this should not lead to much effect in practice due to the absence of convictions in this area and to the generalised application of mitigating circumstances. The problem is more of an effective investigation and prosecution of these conduct rather than amending penalties.
- Create a new financial penalty equivalent to up to 3 times the proceeds derived from crime (in addition to fines and confiscation – as contemplated by the proposal of new Belgian criminal code)

Question 16:
- Belgium has the necessary legal tools to pursue the confiscation route. Again, what is needed is to improve the focus on and culture of freezing/confiscation from a prosecutorial perspective and to improve the resources at the disposal of the authorities to conduct early and in-depth financial investigations leading to effective freezing of assets and ultimately to confiscation.
- Alternatively, it could be envisaged to implement a non-conviction-based form of confiscation in Belgium (but this would face important push-back)

Question 17:
- There is a general lack of enforcement of financial sanctions in Belgium (as demonstrated by the Cour des comptes in a couple reports), which it is critical to address: it is recommended that the Belgian state puts more efforts in the actual recovery of fines and confiscation orders through adequate structural process, cooperation between agencies, and actual use of legal tools available in this regard (such as post-conviction financial investigations, recovery within the hands of third parties etc).
- In addition, there is no process of publication of convictions for foreign bribery (only limited statistical data). It could be recommended that the College of General Prosecutors makes a press release when such a conviction is reached and/or creates a database relating to the issuing of foreign bribery convictions.

Question 18: this is a matter of pragmatic judicial cooperation between States.

Annex 2

29. What recommendation(s) could be envisaged to further strengthen whistleblower protection?

Besides the known and important measures to protect and guide whistleblowers during their journey (professional and independent guidance, confidentiality, sanctions for retaliation, legal protection, etc.), the need for whistleblower protection is also strongly correlated with:

1) the likelihood of cases being remedied/investigated by authorities
2) the duration of such investigations
3) the role of the whistleblower in this process (ranging from being considered a messenger to taking up the role of a key witness with a burden of proof; ….)
4) the likelihood of bribery being sanctioned

Transparency International Belgium’s recommendations:

The main priority with regards to the protection of whistleblowers should go to the adequate investigation and sanctioning of cases. Research (Brown and Wheeler (2008) and PCaW (2013)) has demonstrated that many receivers of whistleblowers’ reports, do not consider themselves appropriately trained to adequately respond to requests for support from whistleblowers. This leads to underperformance, both for the guidance offered to the whistleblower as for the investigation. Too many cases close open ended, which puts the whistleblower automatically in a vulnerable position. Subsequently, if the investigation does lead to the necessary legal grounds, those receiving authorities should also have good access to the appropriate courts.

Increased priority should also be given to adequate resources at the judicial apparatus, to effectively investigate those cases and this within a reasonable time frame. Reality teaches us that few whistles are blown. If the risk taken by whistleblowing is unlikely to bear fruit, it increases the reservation of potential whistleblowers to report. A whistleblowers' objective is/should be to have a positive impact on society. Impunity creates societies without trust and fosters inequality. Belgium could improve on discouraging engaging in all types of bribery schemes (in the public sector, the private sector, sports, not-for-profit, etc) by a more positive and committed approach to whistleblowing as a valued mechanism which enables the sanctioning of bribery.

The possibility to increase the compensation for whistleblowers based on the duration of the legal proceedings (in addition to other grounds for compensation), should be investigated. Lengthy legal procedures should not be permitted, as it intentionally or unintentionally discourages whistleblowing and it has a negative impact on the judicial process.

Furthermore, Transparency International Belgium strongly encourages the authorities to reduce the role of the whistleblower as much as possible towards one of a messenger. Well trained, independent intermediaries with expertise could create a better bulwark than today against the risk for victimization and play an important role in reducing the risk for high economic and emotional burden for whistleblowers.

Annex 3

Accounting related matters

The accounting professions in many countries are already subject to considerable regulation and faced with ever expanding reporting and quality standards with which they must comply. To enhance awareness requires working with professional bodies to develop and roll out more training and awareness material. To do so requires resources. Looking at the main Belgian professional body, IBR/IRE, size is clearly an issue, compared to the bodies of some neighbouring states. Comparing the situation with the UK, the ICAEW has over 150,000 members. Though perhaps nearer in size to the IBR/IRE the separate Institutes of Chartered Accountants of Ireland and Scotland both collaborate closely with

5 Research of independent bodies authorised for enforcement of whistleblowing legislation
the ICAEW. One reason both for their size and better business penetration is that many members are practising not as accountants in accountancy firms but working in business. They are, however, subject, in theory, to the same ethical and professional standards.

23. What recommendation could be envisaged to address the issue of awareness-raising in the public and private sectors?

Response:
Requirements through professional bodies regarding training. In the related field of audit scepticism and the detection of fraud, good material has been developed by the ICAEW in the UK. The development of good training material implies considerable cost. The risk of substantial penalties for bribery with an impact on company profits or the careers of those in the public sector is one incentive but a more positive approach might be the provision of “safe havens” (see answer to Q8 in other annex) where entities have demonstrated that real efforts have been made as regards awareness-raising through well thought out and regularly delivered training; perhaps in collaboration with relevant ONGs such as Transparency International.

32. What recommendation could be envisaged to enhance detection and reporting of foreign bribery by external auditors and accountants?

Response:
Work closely with their relevant professional bodies to develop specific standards. If relying on annual audit process, the issue of materiality may well arise regarding matters to be reported in audit reports. Hence no follow up may be reserved to a bribery case since no material impact on the accounts.

The question arises however whether the auditor’s liability may be triggered in respect of the absence of reporting foreign bribery that might not materially impact financial statements.

Both cases – (1) bribery which is not addressed in the annual audit process since not having a material impact, and (2) foreign bribery that might not materially impact the financial accounts – demonstrate the need to establish a separate mission and reporting requirements – alongside but not being part of the annual audit process- requiring qualified forensic auditors being financed by a separate budget. Incentives need hence to be created for enterprizes to take these additional audits (see for example the “safe haven” idea advocated in response to Q 23 hereinabove and in response to Q8 in other annex). Such separate mission and reporting requirement might be the answer as suggested in the response to Q7 (see answer to Q7 in other annex).

Another recommendation relates to the need to create the conditions for an appropriate training of the auditors in this field. Good training material is costly and needs to be financed out of the above referred separate budgets. The need for training is moreover clearly established for accounting professionals, who are not the auditors, but who are preparing the tax accounts. The training of these professionals would allow them to focus on corruption and related AML issues and to flag any such incidents.

33. Should the recommendation address the issue of reporting of foreign bribery by other professional advisers, and if so, how?

Response:
Yes, the recommendation should address the issue of reporting of foreign bribery by lawyers and members of the bar.

36. What recommendation could be envisaged to enhance the enforcement of false accounting offences and accounting requirements in foreign bribery cases?

Response:
This should already be covered by existing standards, subject to considerations of materiality and our response under Q8 (see response to Q8 in other annex). It is indeed our general feeling that sufficient regulation and legislation exists but that there is insufficient attention and that not enough resources are made available by government and by the judiciary to prosecute any transgression of the law and the regulations. The actual insufficient enforcement makes that the even existing laws and regulations are not effective.

Regarding the enforcement side, it should be further stressed that the supervisory authorities of the audit professions have an important role to play. Putting fraud, corruption and related AML on the top of their control agenda will exercise the necessary pressure on the audit professionals to address these matters with sufficient attention.

Finally broadening the agenda of the supervisory authorities to the control exercised by the audit professionals of the governance and the procedures of the enterprises would be of tremendous help in fighting corruption. It is indeed generally understood that weak governance fosters corruption and fraud.

37. What recommendation could be envisaged to clarify that both natural and legal persons can be held liable in application of Article 8 of the Convention?

Response:
No suggestions.

38. What recommendation could be envisaged to strengthen the independence of external auditors in practice so that they can provide an objective assessment of company accounts, financial statements and internal controls?

Response:
This is already sufficiently covered by existing standards.

What might be required in some jurisdictions is more effective interventions by professional accountancy bodies and regulatory authorities where it appears that such standards have not been respected.

On the issue of “independence”, it is our opinion that the external auditor’s mission should be limited to audit-related services, including due diligence, control, etc… but excluding any non-audit services, such as legal and tax advice.

The above exclusive audit related services can nevertheless be performed by full-service providers to the extent the above introduced principle of audit related services rendered to an enterprise at the exclusion of rendering any non-audit related services is, strictly adhered to.

Annex 4

2. How could foreign bribery awareness-raising and training actions be further addressed?
Response:

Start early with the emerging business generations by promoting training in the relevant faculties of universities and particularly business schools. This requires the sensibilisation and support of business organisations such as the Federation of Industries, Chambers of Commerce, relevant Ministries, the Universities and Business schools.

Awareness-raising and training can further be advanced by (1) making this awareness-raising and training part of a mandatory compliance program, and by (2) having this awareness-raising and training mandatorily conducted by a compliance officer.

23. What recommendation could be envisaged to address the issue of awareness-raising in the public and private sectors?

Response:

See above, regarding the role of business organisations, etc., in raising awareness but the role of government is key both in terms of providing sufficient finance to the relevant ministries: commerce, foreign trade and justice both for eventual media actions, training initiatives and the pursuit of effective investigation and prosecution of cases of foreign bribery and corruption.

27. What recommendation could be envisaged to enhance awareness and effective use of reporting channels for foreign bribery?

Response:

See above response as to raising awareness to which should be added ensuring the effective and timely treatment of information from whistle-blowers and their protection. Though related to fraud rather than foreign bribery, the relatively recent case of whistleblowing at Lloyds HBOS in the UK, shows that legislation on its own is not the solution in responding in a timely fashion. More support could be sought from advocacy groups and NGOs, such as Transparency International but that requires that they in turn be supported by businesses in the private and public sectors and governments.

Annex 5

6. What recommendation could be envisaged to further address the issues of responsibility of legal persons for foreign bribery through intermediaries?

Response:

Again, this is a question of raising awareness and training combined with effective prosecution of offenses where legislation permit them to be pursued.

7. How could the Good Practice Guidance on Internal Controls, Ethics, and Compliance (the GPG) annexed to the 2009 Anti-Bribery Recommendation be revised to reflect evolving global standards?

Response:

Might not external and internal auditors be included to be tasked by companies to periodically specifically report to Boards on the effective implementation of such internal controls. Though external auditors are required to assess the effective operation of internal controls of the entities that they audit, this assessment is largely risk based and currently the possible impact of foreign bribery on an entities financial statements are usually not assessed as being high. Changing this situation would require collaboration between relevant government bodies and professional accountancy bodies.
8. What recommendation could be envisaged to address the issue of incentivising anti-bribery compliance?

Response:

With reference to the response to the preceding question, consideration might be given to providing some element of “safe harbour” to entities that had commissioned audits of their systems and had received “clean” reports as to their implementation and effective operation. This would require looking at the possible issue of the liability of those to whom reports were made within entities (company Boards) and of the auditors when cases of undetected or un-reported foreign bribery subsequently came to light.

11. What recommendation could be envisaged on the issue of transparency of beneficial ownership information, given this issue is currently already addressed in other fora?

Response:

None other than to re-consider how UBO requirements are implemented in national legislation as applied to NGOs where these can demonstrate that they are bona fide organisations. Currently, the requirements, in Belgium at least, are unnecessarily extensive.

14. What recommendation could be envisaged to address non-trial resolutions in the enforcement of the foreign bribery offence?

Response:

Parties could be encouraged to adopt non-trial resolutions rather than to bring the cases to the courts.

An issue is that of publicity of cases. Publicity on one hand can act as a deterrent of foreign bribery but on the other hand can also deter disclosure by entities that might otherwise report cases perpetrated by their employes or officers. The solution might be to require anonymous publication, similar to that of used by some professional bodies for certain cases (ICAEW), rather than cite the name of an entity, such publication would perhaps cite whether the entity was for example an international/national company of some size or merely a SME, its industry sector and provide information as to the nature of the bribe and the settlement.

22. What step could the Working Group take to further address small facilitation payments?

Response:

Transparency International Belgium did not have time to look into how Small Facilitation Payments (SFPs) are defined in the countries that permit them. Subject to this caveat and based on Transparency International Belgium’s own experience, Transparency International Belgium would suggest, if it has not already done so, that the Working Group, consult with:

- The professional accounting bodies and lawyers in the countries, often developing economies with poorly paid or organised administrations, as to the circumstances in which SFP are paid; and,
- MNCs operating in such countries, whose collective collaboration is a means to combat such SFPs.
Unless the administration and government services in countries are reformed to be efficient, the outlawing of SFPs will not be effective. If officials delivering public services are paid a correct wage on one hand and MNC’s collaborate to stop payments, they will continue and simply not be reported.

31. What recommendation could be envisaged to address the issue of voluntary disclosure?

Response:

Harmonize best practice and the approach to prosecutions, for example, application of the suggestion of “safe harbour” provisions as discussed under the response to Q8 above.
UNCAC Coalition

The UNCAC Coalition is a global network of over 350 civil society organisations (CSOs) in over 100 countries, committed to promoting the ratification, implementation and monitoring of the UN Convention against Corruption (UNCAC).  

With this submission, we seek to highlight relevant UNCAC provisions, promote synergies between the Anti-Bribery Convention and the UNCAC, and present positions the UNCAC Coalition has taken in UNCAC fora that are also relevant to the work of the OECD Working Group on Bribery.

11. What recommendation could be envisaged on the issue of transparency of beneficial ownership information, given this issue is currently already addressed in other fora?

States should require the public disclosure of beneficial ownership information for all companies, trusts and foundations to bolster existing anti-money laundering laws. The WGB should thus recommend states to adopt beneficial ownership legislation that includes public disclosure requirements, building upon the standards established by the EU’s 5th Anti-Money Laundering directive and FATF recommendations, as well as on UNCAC Article 12 (c) and on UNCAC Resolution 6/3, among others, which encouraged UNCAC States parties to take necessary measures “to obtain and share reliable information on beneficial ownership of companies, legal structures or other complex legal mechanisms, including trusts and holdings, misused to commit or conceal crimes of corruption or to hide and transfer proceeds, thus facilitating the investigation process and execution of requests.”

The WGB should also provide guidance on the definition of beneficial ownership (BO) and applicable disclosure thresholds, including to ensure that all relevant legal forms are covered by disclosure and that the ownership disclosure cannot be easily circumvented, as well as on best practice approaches to ensure information is regularly updated and maintained.

Furthermore, the WOB should recommend that states adopt and implement publicly accessible open data BO register of companies. Similar registers with information on directors and ownership structures should also cover other legal forms, including trusts and foundations. Importantly, the registers should be easily accessible online and provide

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6 A list of the UNCAC Coalition’s members and affiliated organisations is available at https://uncaccoalition.org/en_US/about-us/members-list/


8 https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32018L0843


11 The EU Commission has found that the 25% ownership threshold set in the 4th Anti-Money Laundering directive was “fairly easy to circumvent”, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A3A52016SC0223
extensive search functions, without the need to create accounts or pay fees for access or limit reuse of the information. Similarly, the WGB could collect best practice approaches that can help to ensure that registers are kept up to date and that appropriate control mechanisms and sanctions are in place to ensure compliance.

In addition to the implementation of a publicly accessible BO register, the WBO should recommend that company registers: (i) include information on direct owners and directors (including unique identifiers), (ii) are easily accessible to the public online (free access without registration requirements) and (iii) allow the public to access relevant company filings.

As a best practice, data from both, the company registry and the BO registry – which may also be combined, as in the example of the UK registry – should be provided in technical formats (via an API) and under licenses that facilitate access and reuse of data by third actors.  

Company and beneficial ownership information have become an essential source for corruption-related investigations conducted by reporters and civil society groups. If social watchdogs cannot access this data, their ability to detect and investigate possible bribery cases is substantially weakened.

To facilitate the use, exchange and interoperability of beneficial ownership information, the WGB should promote the use of a common data standard for beneficial ownership information, building on work done by OpenOwnership and its member groups.

In the undesirable case that the BO registry is not accessible to the public, the WGB should recommend that the legal framework clearly defines that relevant authorities (e.g. financial intelligence unit, tax authorities, public prosecutors, anti-corruption agencies, bodies supervising the implementation of asset disclosure of public officials, etc.) have access to beneficial ownership information and can carry out necessary searches.

Complementing, where needed, State Parties’ UNCAC commitments and FATF recommendations, the WGB could provide guidance on situations when financial institutions should terminate a commercial relationship, if BO verification criteria are not met, on the grounds of doubts or distrust regarding the true ownership of assets.

We also note that compliance with UNCAC Article 12 is being reviewed in the ongoing second cycle of the UNCAC implementation review.

14. What recommendation could be envisaged to address non-trial resolutions in the enforcement of the foreign bribery offence?

According to recent data published by the OECD, non-trial resolutions have become the primary enforcement vehicle of anti-foreign bribery laws. The past decade has seen a steady increase in the use of coordinated multi-jurisdictional non-trial resolutions. They amount to 78% or 695 individual cases out of the total amount of 890 foreign bribery resolutions.

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12 The methodology of OpenCorporates’ Open Company Data Index, although no longer updated, can be consulted for guidance, [http://registries.opencorporates.com/methodology](http://registries.opencorporates.com/methodology).

13 See the database compiled by the Organized Crime and Corruption Reporting Project (OCCRP), [https://data.occrp.org/](https://data.occrp.org/)

since the Convention entered into force in 1999. 15 of the 44 Parties to the Convention have used a non-trial resolution mechanism at least once to resolve a foreign bribery case with either a legal or a natural person or both. However, non-trial resolutions should be one tool in a broader enforcement strategy in which prosecution also plays an important role. They should be executed on a proper legislative basis. If settlements are used, they must provide effective, proportionate and dissuasive penalties.

Circumstances in which non-trial resolutions should not be used

Experience shows that a number of companies have been granted non-trial resolutions on multiple occasions.

Non-trial resolutions should not typically be used where a company has had previous corruption-related enforcement or regulatory action taken against it, especially where the current or previous case involves grand corruption. A company’s size and, thus, its alleged importance should not become a determining factor in the prosecution against it. Rather, the gravity of current and previous offences should be a determining factor, and there should be a presumption that in a case of recidivism the “tone from the top” and compliance systems are lacking.

Although non-trial resolutions are predominantly considered as indirectly contributing to an overall increase in enforcement of the foreign bribery offence, they should not be used unless companies self-report, show full cooperation with law enforcement and have properly admitted and addressed the wrongdoing internally, including with a credible compliance programme. Non-trial resolutions must not be influenced by factors that fall outside the case such as Article 5 considerations or be used to protect companies from debarment.

Transparency

In some countries, prosecutors and other public authorities provide no information or very little public information about non-trial resolutions. Consequently, the resolutions do not adequately deter future wrongdoing and set up a barrier to accountability that undermines public confidence. This is particularly detrimental in grand corruption cases.

All non-trial resolutions should be made public, including the names of the offenders, the legal basis for the resolution, the terms of the agreement, a detailed justification for why a non-trial resolution is suitable for the case, the sanctions, and an agreed statement of facts which reflects a recognition of responsibility for wrongdoing and provides a significant level of detail. An admission of guilt is often appropriate. In addition, details of the performance of the non-trial resolution should also be published.

While settlements are cost-saving and incentivise companies to self-report, they should not be used in a way that undermines the justice system or public confidence in it. Parties and

16 Some of the principles outlined below have already been submitted to the OECD Secretary-General in late 2018 by the UNCAC Coalition, together with Transparency International, Global Witness and Corruption Watch UK, in a letter on “Principles for the use of non-trial resolutions in foreign bribery cases”, https://uncaccoalition.org/files/CSO-Letter-to-OECD.pdf
other major exporters should ensure that settlements meet adequate standards of transparency, accountability and due process. They should provide for effective, proportionate and dissuasive sanctions and be subject to meaningful judicial review, including an opportunity for affected stakeholders to be heard. Transparency is a key component of due process that cannot be abandoned in non-trial resolutions.

Companies should also be required to strengthen and monitor compliance programmes and to report publicly on how they have met the terms of the settlement. Thus, settlements should be used to leverage full disclosure of wrongdoing within a company.

In addition, the risk of being named publicly has a strong deterring value and provides a significant incentive for corporations to implement effective procedures. Non-trial resolutions should require companies to report publicly on how they have met the terms of resolution. Additionally, transparency as to the recipients and intermediaries involved in the bribery helps ensure that those who seek and take bribes or facilitate corrupt transactions are exposed, and pressure is brought for action against them in their own jurisdictions.

**Senior-level individual accountability**

The lack of senior-level individuals facing prosecution where serious corporate wrongdoing has occurred is one of the major sources of public concern about the use of non-trial resolutions. Individual accountability that involves lower level employees being prosecuted, while those at a senior level who managed or allowed wrongdoing by these employees escape any accountability, undermines confidence – not just in the justice system but in the economic and political system as a whole. Any provisions should clearly state that senior-level individuals must face a serious prospect of prosecution or disqualification, where appropriate.

**Judicial review**

In some countries, the judicial review of non-trial resolutions is inadequate or completely lacking. For example, in some countries, the only state body involved in the procedure is a prosecutor, with no oversight whatsoever.

Judicial oversight which includes proper scrutiny of the evidence should be required. Judicial review of non-trial resolutions is the gold standard and must be required to safeguard the integrity of their use. This should include a public hearing that gives an opportunity for affected stakeholders to express their views, especially in cases of alleged grand corruption. This is the only real means to ensure application of clear standards and parameters that have been established for the use of non-trial resolutions and to prevent unfettered discretion by – or possible corporate capture of – prosecutors, or other forms of undue influence.

We believe that any recommendation made by the WGB with regard to non-trial resolutions must reflect the following principles in order to be effective, which we have also underlined in a letter to José Ángel Gurría, the OECD-Secretary General, in December 2018.17

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17 See *supra* note 11.
15. What recommendation could be envisaged to further address the effective, proportionate and dissuasive nature of sanctions for foreign bribery?

In some countries, there are no sanctions or only weak sanctions imposed in non-trial resolutions, or else sanctions vary in an arbitrary way from case to case.\(^1\) In some resolutions, the defence of "effective regret" is accepted, something consistently criticised by the OECD WGB as undermining the purpose of the Convention. In others, "ability to pay" considerations are taken into account. All of these approaches are of great concern. We also have strong concerns about a trend in some countries to lower sanctions in order to incentivise self-reporting by corporations.

Non-trial resolutions must impose significant penalties and sanctions if they are to provide genuine deterrence and dissuasive value and be consistent with the Convention. These should reflect the gravity of the offence and should include disgorgement of profits. Further, we believe that non-criminal or civil sanctions cannot serve as a substitute for criminal law.

Non-trial resolutions must not preclude further legal actions in other jurisdictions that are not parties to the settlement, subject to the applicability of the non bis in idem principle (double jeopardy). Authorities should make all relevant evidence available to their counterparts in other relevant jurisdictions.

18. Which other enforcement challenges (e.g. the interaction of remedies in cross-border corruption cases) could be addressed as part of the review of the Anti-Bribery Recommendation?

**Victim reparation and inclusion of affected country authorities and victims**

Joint investigations and joint non-trial resolutions involving multiple countries are on the rise. However, non-trial resolutions still seldom involve notification of enforcement authorities or victims from affected countries to enable them to testify to the harm done and submit compensation claims within the non-trial resolution negotiations. State coffers in supply-side countries are in many cases filled with fines and disgorgement of profits, while the state and people affected by the corruption are “left out of the bargain”.

Reparation or compensation for harm and the inclusion of authorities from affected countries at an early stage in the development of non-trial resolutions are essential to the fight against corruption. Reparation of harm is crucial in the interests of justice and in recognition of the fact that corruption is not a victimless crime. The inclusion of authorities from affected countries at an early stage, meanwhile, is essential to ensure that those who seek and take bribes can be pursued within their own jurisdictions, as well as facilitators of bribery.

Further, where appropriate, such as in cases of grand corruption and state capture, classes of victims should be given the opportunity to have representation other than from the authorities in affected countries. Compensation to victims, based on the full harm caused

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\(^1\) Already in September 2014, the UNCAC Coalition addressed the need of strengthening sanctions for foreign bribery in a post written by Maud Perdriel-Vaisiere (the then UNCAC Coalition Advisor on Asset Recovery) titled: Is there an obligation under the UNCAC to share foreign bribery settlement monies with host countries? Available here: https://uncaccoalition.org/en_US/is-there-an-obligation-under-the-uncac-to-share-foreign-bribery-settlement-monies-with-host-countries/
by corruption, must be an inherent part of a settlement. Countries and, as far as possible, all persons who would be affected by the settlement should be notified of the intention to enter into a settlement, given a right to representation at settlement hearings and be informed of how to make representations about compensation.

At the same time, arrangements for reparation or compensation should exclude the possibility of those subject to non-trial resolutions, implicated in wrongdoing, having a say in how that reparation and compensation is used and administered, and of gaining reputational advantage from reparation and compensation. The process should include giving voice and representation to the victims and aim to benefit the public good.

**Admission of guilt**

Countries vary in their practice regarding admission of guilt. In some countries, it is always required; in others, it is never required; and in a third group, it is sometimes required. In most cases, at least an admission of responsibility is required.

We believe that enforcement authorities should adopt a flexible approach with regard to admissions of guilt, with decisions made on a case-by-case basis. However, this should not mean that in practice admissions of guilt are never required. In particular, country authorities should aim to obtain admissions of guilt in cases of grand corruption. Moreover, in the absence of an admission of guilt, there should always be an admission of responsibility.

**23. What recommendation could be envisaged to address the issue of awareness-raising in the public and private sectors?**

In order to enable an informed debate concerning a country’s performance in terms of combating foreign bribery, the periodic publication of statistics on criminal, civil and administrative investigations, charges, proceedings, outcomes and mutual legal assistance activity is crucial and the WGB should recommend and support the regular release of such information to the public.

Publications of case and enforcement data should clearly indicate the implications foreign bribery has. While confidentiality for ongoing investigations is legitimate, there is no reason why general, anonymised data on the number of investigations cannot be published. In most cases, the benefits for the public to learn about the details of case dispositions outweigh the negative implications on the defendant’s right to privacy.

**Statistics and data**

Experience from the first cycle of the UNCAC implementation review has shown that regularly updated data on cases and enforcement in many countries is not easily accessible to the public – or may not available at all.

Access to data and statistics is crucial in order to raise awareness of the risks of foreign bribery and to deter its use, as well as for policymakers, interested parties and the public to be able to assess enforcement results. Nevertheless, states parties to the OECD Convention are failing in transparency. In 37 of the 42 countries recently surveyed by Transparency

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International, there were no published statistics on foreign bribery enforcement, or only partial information was published.\textsuperscript{20} 57\% of the OECD countries that are party to the Convention, including China, Hong Kong, India and Singapore, provide no data on enforcement of foreign bribery, whilst only 11\% provide substantial data. Hence, in some countries, there are no up-to-date criminal law enforcement statistics at all available to the public, while others provide such statistics, but do not record foreign bribery separately.

UNCAC Article 13 requires that countries take measures to facilitate access to information about prevention and the fight against corruption. Most countries enable access to data through official requests for information, but this is much less effective than proactively publishing information, as it requires the person requesting to invest significant effort and to know precisely what they are looking for. Results need to be made accessible to the broader public – domestically and also on an OECD-wide level – e.g. through an open database of international corruption cases. Thus, parties to the Convention should publish comprehensive annual statistics on foreign bribery enforcement, court rulings and non-trial resolutions. The annual statistics should cover each stage of the foreign bribery enforcement process and should include not only the foreign bribery offence but also related money laundering, tax and accounting violations as well as information on the handling of requests for mutual legal assistance.

Readily available statistics and enforcement data would also provide synergies, supporting other monitoring efforts, including the UNCAC implementation review process as well as follow-up efforts on previous UNCAC recommendations, the monitoring of the Sustainable Development Goal 16, of Open Government Partnership Action Plans, and of the implementation of FATF recommendations.

I. 27. What recommendation could be envisaged to enhance awareness and effective use of reporting channels for foreign bribery?

Whistleblowing has broad importance in the fight against corruption by providing information about corruption, misuse of power, abuse, threats to people and the environment or are made to the correct people, including sometimes directly to the public.\textsuperscript{21}

Building on UNCAC Articles 32 and 33,\textsuperscript{22} UNCAC CoSP resolution 7/8,\textsuperscript{23} the Council of Europe’s recommendation on the protection of whistleblowers,\textsuperscript{24} the standards of the new

\textsuperscript{20} Ibid.


\textsuperscript{23} https://www.unodc.org/unodc/en/corruption/COSP/session7-resolutions.html

\textsuperscript{24} Council of Europe: Recommendation CM/REC(2014)7 of the Committee of Ministers to member States on the protection of whistleblowers, https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016805c5ea5
EU directive on whistleblower protection, as well as international best practice examples, the WGB should recommend states to adopt and implement frameworks that not only recognise the importance of whistleblowers but also provide adequate rights and protection to reporting persons. Strong protection of whistleblowers in law and practice may be the most effective approach to promote the use of reporting channels for foreign bribery.

The 2009 OECD Recommendation states that member countries should ensure that reporting channels are easily accessible. Yet, at the legislative level, the OECD should provide for further guidance on the nature of such reporting channels and as well as on their accessibility. Benchmarking studies for both public and private sectors could be of help in understanding, measuring and monitoring of the impact that different reporting channels have, generating insights and best practice approaches. Furthermore, the WGB could also specify and elaborate more on the definition of “channels”. Both internal and external reporting channels should be included and defined, including a recommended timeline on the use of different channels (i.e. use of internal reporting mechanisms before enacting external ones).

The WGB should also recommend that states regularly release statistics and report on the use of whistleblower mechanisms, cases reported through them, follow-up actions taken, and outcomes of reported cases (such as number of cases that went to court, convictions, recovered assets, etc.) to help build public awareness in reporting mechanisms, as well as public trust in their effectiveness.

The WGB should also recommend that authorities operating whistleblower mechanisms provide sufficient resources to their case officers to allow them to inform reporting persons, where appropriate, about follow-up action that has been taken, and to advice whistleblowers on how to protect themselves and defend their rights.

29. What recommendation(s) could be envisaged to further strengthen whistleblower protection?

The OECD has adopted a “restrictive” interpretation of the term “whistleblower”, limiting the recognition only to employees. We urge the WGB to expand the definition of whistleblower and the categories of individuals entitled to report to include any citizen who is in possession of information and willing to disclose, building on UNCAC Article 33, which guarantees protection to any person who reports on good faith and reasonable grounds.

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10.5. 30. What recommendation(s) could be envisaged to:

10.6. a. Enhance detection and reporting of foreign bribery by financial and non-financial professions subject to AML requirements?

10.7. b. Address the mechanisms of detection of foreign bribery by FIUs?

10.8. c. Address access by law enforcement authorities to information held by financial institutions relevant to foreign bribery enforcement?

Publicly accessible asset and interest declarations of public officials

One important source for journalists and civil society groups to identify potential conflicts of interest or corruption schemes involving public officials are publicly accessible asset and interest declarations, a panel discussion hosted by the UNCAC Coalition on the sidelines of the UNCAC IRG meeting in September 2018 highlighted.27 Such declarations made by public officials should be accessible to the public, machine-readable, be regularly (at least annually) updated, and be checked for accuracy and completeness by an independent oversight body.

The WGB should not only issue a recommendation for countries to require public interest and asset declarations of senior public officials (including senior officers of state-owned enterprises), it should also recommend countries to introduce effective, proportionate and dissuasive sanctions for non-compliance. A number of countries have criminalised severe violations of asset and interest disclosure requirements. As a result, public officials can also be prosecuted for undisclosed assets in cases where evidence may not be sufficient to prove bribery and/or money laundering.

Relevant to this section are also our answers related to transparency in public procurement and beneficial ownership registries.

34. What recommendation could be envisaged to enhance detection and reporting of foreign bribery by the media?

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35. To what extent and how would it be useful for the WGB to turn its attention to legal frameworks protecting freedom, plurality and independence of the press, as well as laws allowing journalists to access information from public administrations?

Journalists and the media play a key role in investigating and uncovering national as well as transnational corruption. The OECD WGB should, where possible, work to promote legal frameworks and practices protecting freedom, plurality and independence of the media, supporting the work of the OSCE Representative on Freedom of the Media and other advocates for freedom of the media.

Several provisions of the UNCAC, including Articles 7, 9, 10, 12 and 13, highlight the importance of public access to information to assist the fight against corruption and to ensure effective government and accountability.28

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28 For more details, see also: UNCAC Coalition: The right of access to information and the UNCAC, https://uncaccoalition.org/en_US/learn-more/access-to-information/
It is crucial for countries to establish and protect a constitutionally guaranteed right to information and adopt state-of-the-art access information legislation, in line with SDG 16.10. Some States Parties to the Convention to this date have not introduced a right to information that includes the right to access government documents (Austria being one such example).\(^{29}\)

As a best practice, an independent Information Commissioner (or similar institution) should be tasked with monitoring the implementation of the access to information framework (including provisions on the proactive release of information) and with deciding on complaints filed by journalists and other persons who see their right to information violated.

The right to access public information should not be limited to journalists. Anybody (including foreign citizens) shall enjoy the right to access information. Privileged rights may be given to social watchdogs (journalists, civil society groups, researchers and other actors that act in the public interest and shape public debates), in line with the approach taken by the European Court on Human Rights.\(^{30}\)

While the EU has comprehensive access to information rules, other multinational and international organisations, as well as some development banks, have catching up to do and establish strong access to information frameworks, as well as sound review and mechanisms, that allow journalists, civil society activists and other actors to access information and documents.

\*42. What step could the Working Group take to further support the efforts to promote transparency in public procurement, including in collaboration with the OECD Public Governance Committee for the implementation of the principles contained in the 2008 Council Recommendation on Enhancing Integrity in Public Procurement?\*

Article 9 of the UNCAC requires that countries set up appropriate systems of procurement, based on transparency, competition and objective criteria in decision-making.

Building on this standard, the WGB should recommend that countries use electronic procurement and contracting procedures and that large parts of the procurement process should become publicly accessible by default. Countries that have implemented the use of electronic means, as well as a high level of transparency, to conduct public procurement have reported efficiency gains from 10 per cent to 20 per cent of the total volume procured through electronic means, according to the World Bank.\(^{31}\) These gains likely originate from

\(^{29}\) For good standards of access to information legislation, please see the Right to Information Rating, produced by Access Info Europe and the Centre for Law and Democracy, and its methodology: [https://www.rti-rating.org/](https://www.rti-rating.org/) and [https://www.rti-rating.org/methodology/](https://www.rti-rating.org/methodology/)

\(^{30}\) In particular, see Magyar Helsinki Bizottság v. Hungary (Application no. 18030/11) [https://hudoc.echr.coe.int/eng#{%22fulltext%22:%22f%20Magyar%20Helsinki%20Bizotts%C3%A1g%20v.%20Hungary%22},%22documentcollectionid%22:%22GRANDCHAMBER%22,%22CHAMBER%22],%22itemid%22:%22001-167828%22]

reduced waste and corruption as well from efficiency gains (including from increased market transparency, benefiting the public sector) and higher levels of competition.

High levels of transparency and openness at all stages of the procurement process, as well as opportunities for the public to engage in the procurement process, should thus be recommended, building on the Open Contracting Principles developed by the Open Contracting Partnership.32

Furthermore, it is crucial that the WGB promotes access to information legislation that anybody can request access to information and documents related to public procurement that are not published online.

As a best practice approach, the WGB should consider recommending a legal framework requiring that specific types of contracts between the public sector and third parties cannot enter into force until they are published in full text online.

Slovakia has successfully pioneered this principle – it has been copied by others, including the Czech Republic and the German region of Hamburg – and not only applies it to public procurement but also to other areas, such as privatisations, licenses, or lease agreements involving public bodies. A report by Transparency International Slovakia found that within four years of the approach being first implemented, the number of average bidders per tender almost doubled (from 1.6 firms in 2010 to 3.7 in 2014), while the use of the least transparent and competitive procurement procedures by public bodies saw a sharp decline (from 21% of tenders in 2010 to 4% in 2014).33

Importantly, the WGB should recommend not only a high level of transparency to be applied to public procurement but also to public-private partnership agreements, privatisations and license agreements, among other areas.

In addition, the WGB should recommend the use of the Open Contracting Data Standard as a common data standard for public procurement.34 A common data standard would allow for the linking and cross-referencing of procurement data with other relevant data sets, such as budget data, beneficial ownership registries, asset disclosure data, campaign contributions or data from asset declarations of public officials.

The use of a common data standard would facilitate the interoperability of procurement data and could be used, for example, to compare procurement data from different countries in an effort to better identify possible indicators for irregularities or corruption (red flags).35

Another recommendation should ask countries to require bidders participating in public procurement (as well as privatisations, licensing procedures and PPPs) to disclose their corporate structure and ultimate beneficial owners. This information could be used to detect potential conflicts of interest, red flags for possible bribery or collision. The BO information should also be made accessible to the public (as is the case in Slovakia) – in

32 https://www.open-contracting.org/implement/global-principles/
particular, if the country has not implemented a publicly accessible BO registry, or if the company is registered in or controlled through a different jurisdiction. Furthermore, the WGB should consider recommending to ban (or at least regulate) the use of agents and other intermediaries as well as of offset-deals in public procurement.

44. What recommendation could be envisaged to further clarify the existing legal requirements that serve as a basis for mutual legal assistance and extradition?

Upon recommendation of the WGB, countries should ensure adequate organisation, resourcing and training of enforcement authorities, so they can competently make requests for mutual legal assistance and handle requests received without undue delay. Joint investigation teams and other forms of cooperation in cross-border investigations can be powerful approaches.\(^{36}\) This should also include the exchange of experience and expertise among law enforcement practitioners, whilst constantly improving cooperation and intelligence on the matter. Crucial are designated points of contact for foreign states to make their claims, and that efforts are made to improve the capacity to respond to those requests.

45. What recommendation(s) could be envisaged to facilitate MLA and extradition in foreign bribery cases?

One of the challenges faced by oversight bodies monitoring and verifying asset and interest declarations filed by public officials, as well as sanctioning cases of non-compliance, is a lack of access to the necessary data sources to check the information, in particular bank account registries or beneficial ownership registries. Often, there is no access to data from countries in the region, where public officials may be involved in companies or may have set up bank accounts.

The WGB should take note of a regional effort to set up a *Treaty on Exchange of Data for the Verification of Asset Declaration* in the Western Balkans, which – if successful – could serve as a role model for other regions. The OECD could take a leading role in encouraging and facilitating international agreements to facilitate such data exchange, thus improving authorities’ ability to detect foreign bribery cases.\(^{37}\)

If beneficial ownership registries and company registries, procurement portals and asset declaration platforms were all open to the public and used a common data standard, as we recommend in this document, there may be no need for such data exchange agreements.


47. What recommendation could be envisaged to address the issue of international asset recovery and related challenges, given work already undertaken in this area in other fora?

When high-level officials are involved in large-scale bribery or the embezzlement of state assets, the effect is widespread harm to both individuals and society, whilst often providing impunity to the perpetrators. Thus, practical steps to counter grand corruption should include the fostering of international cooperation in asset recovery. States should enact and implement comprehensive laws providing for the confiscation of any asset obtained through or derived from the commission of any proceeds of bribery. Gathering knowledge and data in regard to the link between bribery and asset recovery should be crucial to the WGB in order to assess the impact of current tools and to move forward in future activities on that matter.

The WGB should work to promote asset recovery, complementing the work done in UNCAC fora, since depriving proceeds of crime is the most effective way of combating corruption. In regard to proactive cooperation, the establishment of Financial Intelligence Units can considerably endorse international assistance in this regard. Strongly linked with this provision, the WGB should also endorse the provisions under article 56 of the UNCAC, which foresee Special Cooperation amongst states. This refers to actively, i.e. without a specific request, forwarding information about an investigation or on proceeds of offences under the UNCAC, which could help another state in initiating or carrying out an investigation or judicial proceedings.

Besides recommending that states establish a designated domestic asset recovery team or unit that should be equipped with sufficient resources, the WGB should also endorse international cooperation networks focusing on asset recovery (such as the StAR initiative) which constitute valuable support in international cooperation for recovering assets, and promote principles on the transparent return of assets, building on the GFAR principles.

Furthermore, it is crucial to include civil society groups in the asset recovery process to ensure that assets are returned in a transparent manner and benefit the victims of corruption.

When it comes to the return and disposal of assets, debates have focused on whether, when and to what extent victim states can claim ownership of such property. In cases of bribery under the OECD-Convention, the WGB can assist in establishing claims and facilitating clarifications of ownership by developing guidelines and providing assistance to the concerned states to overcome obstacles in asset recovery.

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UK Bond Anti-Corruption Group

Who we are

The Bond Anti-Corruption Group is a network of UK based non-governmental organisations (some of which have international scope) which work on a range of anti-corruption issues. The Group consists of: Global Witness, Open Contracting Partnership, Transparency International UK, Global Financial Integrity, Publish What You Pay, Natural Resource Governance Institute, Oxfam, Christian Aid, CAFOD, Corruption Watch, Rights and Accountability in Development (RAID), ARTICLE 19, The Corner House, and Protect.

General feedback

We welcome the revision of the Recommendation and the potential to include new emerging issues and improve recommendations for existing issues covered by the Recommendation. Rigorous monitoring is crucial to the effectiveness of the Convention and the Recommendation and we believe further rounds of monitoring will be essential to maintain momentum for implementation.

We urge the OECD Working Group to ensure consistency across its reviews in how they cover the Recommendation and to consider greater use of sanctions against State Parties that fail to comply with the Convention and the Recommendation.

Specific recommendations

1. Beneficial Ownership Transparency (question 11)

We strongly recommend that a revised Recommendation should require State Parties to create public registers of beneficial ownership. The registers should be made freely available to the public via searchable web interface as well as via structured data in machine-readable format. They should be available under open data licences.

In addition, the Recommendation should require State Parties to:

- ensure all beneficial owners report their holding of shares or voting rights in exact percentages;
- use unique identifiers in addition to personal data such as name and month and year of birth;
- use data validation systems such as multiple choice fields to improve data quality; and
- ensure systems are in place to identify potential non-compliance and pro-actively pursue and sanction companies that report non-compliant data.

2. Addressing bribery in sensitive sectors (question 24)

The international oil, gas and mining (extractive) sector is widely recognised as one of the most bribery- and corruption-prone. Requiring oil, gas and mining industries to annually publish their payments to governments, country by country and project by project, is increasingly recognised and implemented as a necessary measure to increase transparency and accountability and address bribery and corruption in the sector.
Mandatory reporting laws in the European Union, Canada and Norway have required this form of annual reporting by hundreds of extractive companies covering billions of dollars of payments to governments since 2015/16. Complementing these laws, the Extractive Industries Transparency Initiative (EITI) requires disclosure and reconciliation of extractive company payments and government receipts in 51 countries where governments have elected to implement the EITI Standard.

The Recommendation should provide for mandatory reporting of payments by extractive industries and for State Parties to implement sector-specific extractive industry contract transparency to raise standards and harmonisation across the Working Group’s membership.

3. Transparency in public procurement (question 42)

An estimated 30% of global government spending and over 12% of global GDP is procurement-based. Public procurement remains government’s number one corruption risk. Some 57% of foreign bribery cases prosecuted under the OECD Anti-Bribery Convention involved bribes to obtain public contracts.

Increasing transparency of public procurement would have a significant positive impact on anti-corruption efforts. Public and transparent information would also create disincentives for criminal behaviour and make it easier to identify red flags and triangulate suspicious deals.

Technology and best practices have moved on significantly since the original OECD Recommendation was drafted and so it should be updated to reflect global best practices such as the Open Contracting Data Standard that is now being adopted by over 40 countries, regions and cities around the world from Argentina, Canada, Colombia and France to UK, Ukraine and Zambia.

The Recommendation should require public authorities to:

- fully publish all public contracts and amendments, except in cases where release would cause serious, demonstrable harm;
- collect, publish and regularly analyze public procurement data as structured open data, ideally through the Open Contracting Data Standard;
- publish information about bids and implementation to strengthen the ability of public institution, private sector and civil society to spot kickbacks and bribes; establish comprehensive, independent validation processes within government to ensure that data is accurate and complete, whilst highlighting concerns for the public; and
- establish effective and constructive feedback channels, open to stakeholders across government, industry and civil society, ensuring decisions are made taking into account the needs of affected communities.

Improving transparency and supporting open contracting in procurement also creates a fair and level playing field for business and fosters competition, innovation and entrepreneurship as well as government efficiency and helps procurement meet other social objectives such as inclusion and environmental protection. We also note the B20’s recent call in 2018 to:

“Ensure openness, fairness, transparency and accountability in the entire procurement cycle of public infrastructure – G20 Member Governments should ensure that all
stakeholders are able to participate in the procurement process by enabling timely access to information that is provided in line with the G20 Anti-Corruption Open Data Principles and across the contracting process and contract cycle, identifying opportunities to employ technology in the procurement process, and streamlining procedures”.

The G20 Anti-Corruption Open Data Principles of course support the adoption of the Open Contracting Data Standard.

### 4. Principles on asset recovery - GFAR principles (question 47)

The Recommendation should include a reference to promoting transparency and accountability in the return of assets confiscated from foreign bribery proceedings in line with the principles developed at the Global Forum on Asset Recovery\(^2\), including the participation of non-governmental stakeholders in the asset return process. It is essential that State Parties are encouraged to look at asset recovery opportunities arising from foreign bribery investigations, including using civil means to confiscate the proceeds of bribery in their jurisdictions. Ensuring that any assets confiscated this way are returned in line with the GFAR principles, is important.

Additionally, the Recommendation should encourage State Parties to adopt Principles for Compensation in foreign bribery proceedings and settlements. The UK represents best practice in this regard, although implementation remains inconsistent. Compensation for affected countries is crucial to ensure that the victims of corruption are at least symbolically recognised and recompensed, and could help build greater international buy-in for implementation of the OECD Convention, including by encouraging affected states to join in investigations. This could ultimately lead to more action against those who demand and take bribes.

### 5. Protection of the media and whistleblowers (questions 29 and 34)

There has been an increasing level of attacks on those that are revealing corrupt activities to the public, including the murders of a number of prominent journalists.

The Recommendation should ensure that comprehensive measures are in place to protect whistleblowers in both the public and private sector and to sanction those who harm or take retribution against them.

Governments should ensure that journalists and media and civil society organisations are protected against threats and harassment for their activities investigating corruption. They should be also protected against Strategic Litigation Against Public Participation (SLAPP) suits against them including libel and defamation actions, which are intended to deter investigations into corruption.

### 6. Transparency of enforcement (question 49 & 50)

State Parties should be strongly encouraged in the Recommendation to:

- put meaningful statistics relating to enforcement in the public domain on a regular basis;
- ensure that the public can easily access information about court proceedings in advance of their taking place;

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• ensure that law enforcement agencies are subject to access to information laws; and
• ensure that all court documents and judgements from foreign bribery trials are put in the public domain in an accessible manner.

7. Civil Society participation and involvement (question 53)

The Working Group should enhance the effectiveness of its monitoring by encouraging greater civil society participation, particularly in its follow-up reports and in its external stakeholder consultations.
Uniting Church in Australia

The Synod of Victoria and Tasmanian, Uniting Church in Australia, welcomes the opportunity to provide a submission in response to the review of the 2009 OECD Anti-Bribery Recommendation.

The Synod has campaigned for reforms to Australia’s anti-bribery laws to improve their effectiveness out of concern for the corrosive impact bribes have on good governance, particularly in developing countries. Further, bribes do real harm, with some resulting in government revenue being wasted paying more for goods and services than they should pay or in substandard goods and services being provided by the bribe-payer as a result of winning a government contract through bribery. In 2007 the meeting of around 400 representatives of the Synod resolved:

Recalling the Statement to the Nation of the Inaugural National Assembly in 1977 committing the Uniting Church in Australia to seek the eradication of poverty in the world, and that in 2004 the Synod committed itself to support the Micah Challenge campaign to halve global poverty by 2015;

(a) To acknowledge that:
   (i) There is a need to address corruption within developing countries in order to work towards the eradication of poverty;
   (ii) Some wealthy countries continue to maintain laws and practices that foster, reward and allow them to benefit from corruption in developing countries;

(b) To repent of the fact that it and its members have been beneficiaries, both unwittingly and also at times with indifference, of corruption in developing countries largely through the purchase of goods from developing countries where those involved in the production of the goods have been exploited and cheated through corruption;

(c) To commend the Australian Government for the efforts it has made so far in addressing corruption, especially by:
   (i) The introduction of comprehensive domestic legislation and regulations on anti-money laundering and counter terrorism financing;
   (ii) Being a party to the United Nations Convention against Corruption and the OECD anti-bribery Convention;
   (iii) Tightening the Criminal Code with regard to bribery by Australian companies in foreign countries;
   (iv) The Australian Taxation Office being part of the OECD’s Forum on Harmful Tax Practices; and
   (v) Issuing the AusAID anti-corruption policy ‘Tackling corruption for growth and development’;

(d) To call on the Australian Government to take further measures to tackle global corruption, specifically by:
   (i) Continuing to fund anti-corruption and good governance projects within developing countries in the Asia-Pacific region, including support for anti-corruption campaigners;
   (ii) Encouraging more countries and corporations to sign up to and implement appropriate multilateral agreements to combat corruption such as the UN Convention against Corruption, the OECD Anti-Bribery Convention and the Extractive Industries Transparency Initiative;
   (iii) Supporting an international approach to eradicating tax evasion and sharing information on tax administration;
   (iv) Supporting programs which enhance the protection of journalists and
whistleblowers in developing countries;

(v) Introducing guidelines that discourage lending or insurance of lending by EFIC (Australia’s Export Credit Agency) towards projects where there is dubious development benefit, where there is an unacceptable risk of non-repayment or where there are not adequate human rights or environmental safeguards;

(vi) Supporting the promotion of a global culture of respect for basic human rights, so that those seeking to tackle corruption do not become the targets of human rights abuses;

(vii) Advocating for reforms of the World Bank and International Monetary Fund (IMF) that enhance democratic representation and transparency;

(viii) Pressuring the World Bank, IMF and the Asian Development Bank to deal promptly with companies found to have engaged in corruption, and with sufficient penalties to deter other companies from engaging in corruption; and

(e) To write to the Australian Prime Minister, the Minister for Foreign Affairs, the Treasurer, the Attorney General, the Parliamentary Secretary to the Minister for Foreign Affairs, the Leader of the Opposition, the Shadow Minister for Foreign Affairs and the Shadow Attorney General to inform them of this resolution.

In 2014 the meeting of approximately 400 representatives of the congregations within the Synod resolved:

(a) To continue its support for action by the Commonwealth Government to combat corruption, both in Australia and internationally; and

(b) To request the Commonwealth Government:

(i) To modify the Australian Criminal Code to remove the defence of making a facilitation payment to foreign officials when bribes are paid by Australian companies to foreign officials;

(ii) To seek to assist Australian companies being subjected to extortion payments to be able to resist having to make such payments, especially in cases involving foreign officials;

(iii) To extend Australia’s anti-money laundering/counter-terrorism financing laws to cover designated non-financial businesses and professions named in the Financial Action Task Force international standards, and specifically to real estate agents in relation to the buying and selling of property, dealers in precious metals and stones, lawyers, accountants, notaries and company service providers;

(iv) To introduce by law a public register of the ultimate beneficial owners of companies and trusts, so that companies and trusts cannot be used as a veil for money laundering activities, and to seek to ensure such registries become a global norm;

(v) To require a bank or other financial institution which assesses that funds it is dealing with have a high risk of being associated with money laundering to refuse to deal with the funds unless instructed otherwise by the appropriate Australian law enforcement agency;

(vi) To modify Australian law so that a public official should be asked to provide a copy of any asset and income declaration form filed with their authorities, as well as subsequent updates, and, if a customer refuses, to require the bank or other financial institution to assess the reasons and to determine, using a risk-based approach, whether to proceed with the business relationship;
(vii) To share information automatically with the relevant foreign authorities when a foreign politically exposed person purchases property or transfers funds to Australia, unless the Australian authorities have some reason to carry out a prosecution of the person themselves and sharing the information would compromise that prosecution, or if the Australian Government has reasonable concerns the information is likely to be misused to carry out human rights abuses;

(viii) To require financial institutions to disclose full details of foreign government assets which they manage;

(ix) To establish a dedicated unit within the Australian Federal Police to investigate money and assets stolen from foreign governments and shifted to Australia by politically exposed persons and to seek to return the stolen assets where possible;

(x) To establish a national unexplained wealth scheme to combat the ability of organised criminals to profit from their crimes, where unexplained wealth provisions are not limited by having to prove a predicate offence;

(xi) To implement an effective non-conviction based confiscation and restraint mechanism to deal with criminal assets transferred from overseas to Australia; and

(xii) To introduce legislation to protect and reward private sector whistle blowers who expose fraud and corruption against Australian governments, similar to laws that already exist in the UK and US; and

(c) To write to the Prime Minister, the Attorney General, the Leader of the Opposition and the Shadow Attorney General to inform them of this resolution.

GQ1. What are your general impressions concerning the effectiveness and implementation of the 2009 Anti-Bribery Recommendation?

The Synod is of the view that the 2009 OECD Anti-Bribery Recommendation has assisted in curbing the level of bribery globally, through states having implemented laws to criminalise bribery and through enforcement action. It has also assisted in created a business norm where bribery is increasingly seen as unacceptable.

However, our experience in the case of Australia is that while the Criminal Code has made bribery a criminal offence the bar set for law enforcement to prove that a bribe was paid is so high that very few prosecutions have resulted.

An example of such a case relates to Australian phosphate company Getax, where there is yet to be an Australian prosecution. It was named by The Sunday Age in January 2013 as one of the 28 companies that the OECD had identified as having allegations of foreign bribery made against it. The Sunday Age reported that the AFP had interviewed two complainants on claims that Getax had bribed parliamentarians in Nauru in order to obtain a phosphate mining permit, but that the investigation could not continue due to lack of jurisdiction. Leaked emails to the Australian Broadcasting Corporation (ABC) alleged to show hundreds of thousands of dollars being paid to current Nauruan politicians whilst they


were in opposition to allegedly help install a government amenable to allowing Getax to buy phosphate at prices below market value.\textsuperscript{45}

In September 2016, the ABC made a further report about e-mails from 2009 and 2010 which suggested Getax was sending money to Nauru a number of politicians, including Nauru’s current President Baron Waqa and Justice Minister David Adeang.\textsuperscript{46} From 2008 amounts of $10,000 were transferred on several occasions from Getax’s Westpac account into the ANZ bank account of Madelyn Adeang, the late wife of Minister David Adeang.\textsuperscript{47} The payments were described as "Consultancy fees", or "Fees for Adeang". The transactions included:

\begin{itemize}
  \item $20,000 in April 2008
  \item $10,001 in June 2008
  \item $10,000 in July 2008
  \item $10,000 in September 2008
  \item $10,000 in October 2008.
\end{itemize}

While there has been no prosecution under Australian law, the Singapore-incorporated shipping company subsidiary, Getax Ocean Trades, was fined $83,000 on 28 June 2018 for giving $28,300 in bribes to a member of parliament from the Republic of Nauru.\textsuperscript{48} The court found that Getax Ocean Trades, which is the logistics arm of Getax Australia, transferred the bribe to Mr Ryke Solomon on 18 February 2010 in exchange for advancing

\textsuperscript{45} Hayden Cooper and Alex McDonald, ‘Nauru President and Justice Minister face bribery allegations involving Australian company’, 7:30 Report, ABC, 8 June 2015, \url{http://www.abc.net.au/7.30/content/2015/s4251115.htm}

\textsuperscript{46} Hayden Cooper, ‘Money trail from Australian phosphate company Getax leads to Nauru minister David Adeang’, 7:30 ABC, 14 September 2016, \url{http://www.abc.net.au/news/2016-09-14/australian-phosphate-company-getax-payments-to-nauru-minister/7838170}

\textsuperscript{47} Hayden Cooper, ‘Money trail from Australian phosphate company Getax leads to Nauru minister David Adeang’, 7:30 ABC, 14 September 2016, \url{http://www.abc.net.au/news/2016-09-14/australian-phosphate-company-getax-payments-to-nauru-minister/7838170}

\textsuperscript{48} Shaffiq Idris Alkhatib, ‘Company fined $80k for giving bribes to an MP from Nauru, a country north-east of Australia’, \textit{The Straits Times}, 28 June 2018, \url{https://www.straitstimes.com/singapore/courts-crime/company-fined-80k-for-giving-bribes-to-an-mp-from-nauru-a-country-north-east}
the business interests of Getax Australia with Nauru\textsuperscript{49}. The bribe was paid through Mr Solomon’s Australian bank account\textsuperscript{50}. Mr Solomon died in 2016\textsuperscript{51}.

As another example, Alcoa and a joint venture it controlled agreed to pay US$384 million to US authorities to resolve charges around the bribing officials of a Bahraini state-controlled aluminium smelter, marking one of the largest US anti-corruption settlements of its kind\textsuperscript{52}. It was alleged that officials were bribed for years so Alcoa could supply raw materials to Aluminium Bahrain, or Alba\textsuperscript{53}. Alcoa’s mining operations in Australia were the source of the alumina that Alcoa supplied to Alba\textsuperscript{54}. There has been no prosecution of Alcoa in Australia over the bribes that were paid.

Alcoa failed to maintain adequate internal controls to prevent or detect more than US$110 million in improper payments funnelled to Alba through a consultant between 1989 and 2009, according to the US Securities and Exchange Commission (SEC), which brought civil charges under the Foreign Corrupt Practices Act. In the words of the SEC\textsuperscript{55}:

\begin{quote}
An SEC investigation found that more than $110 million in corrupt payments were made to Bahraini officials with influence over contract negotiations between Alcoa and a major government-operated aluminum plant. Alcoa’s subsidiaries used a London-based consultant with connections to Bahrain’s royal family as an intermediary to negotiate with government officials and funnel the illicit payments to retain Alcoa’s business as a supplier to the plant. Alcoa lacked sufficient internal controls to prevent and detect the bribes, which were improperly recorded in Alcoa’s books and records as legitimate commissions or sales to a distributor.
\end{quote}

\textsuperscript{49} Shaffiq Idris Alkhatib, ‘Company fined $80k for giving bribes to an MP from Nauru, a country north-east of Australia’, The Straits Times, 28 June 2018, https://www.straitstimes.com/singapore/courts-crime/company-fined-80k-for-giving-bribes-to-an-mp-from-nauru-a-country-north-east

\textsuperscript{50} Shaffiq Idris Alkhatib, ‘Company fined $80k for giving bribes to an MP from Nauru, a country north-east of Australia’, The Straits Times, 28 June 2018, https://www.straitstimes.com/singapore/courts-crime/company-fined-80k-for-giving-bribes-to-an-mp-from-nauru-a-country-north-east


The Department of Justice brought criminal charges under the same law. The US SEC said Alcoa’s subsidiaries used a London-based consultant to funnel the payments to officials. The subsidiaries cited by the US SEC were Alcoa World Alumina and Alcoa of Australia, both of which were parts of the joint venture. The SEC stated:

According to the SEC’s order, Alcoa’s Australian subsidiary retained a consultant to assist in negotiations for long-term alumina supply agreements with Alba and Bahraini government officials. A manager at the subsidiary described the consultant as “well versed in the normal ways of Middle East business” and one who “will keep the various stakeholders in the Alba smelter happy...” Despite the red flags inherent in this arrangement, Alcoa’s subsidiary inserted the intermediary into the Alba sales supply chain, and the consultant generated the funds needed to pay bribes to Bahraini officials. Money used for the bribes came from the commissions that Alcoa’s subsidiary paid to the consultant as well as price markups the consultant made between the purchase price of the product from Alcoa and the sale price to Alba.

The US Department of Justice’s settlement was with Alcoa World Alumina LLC, a joint venture with Australia’s Alumina Ltd. The venture, 60 percent-owned by Alcoa, agreed to plead guilty to a single count of violating the Foreign Corrupt Practices Act and pay US$223 million in five installments over four years.

The Australian law also continues to allow bribes to be paid as facilitation payments and makes no effort to determine how corporations decide which bribes they are paying fail within the facilitation payment defence. Despite that increasingly Australian corporations are voluntarily banning the payment of all bribes, even where some bribes could access the facilitation payment defence.

The Australian Council of Super Investors (ACSI) published a report in October 2011 that found 59% of ASX 200 companies with international operations prohibit bribery, but only 16% of ASX 100 companies prohibit small bribes in the form of facilitation payments and only half restrict or control them. It was found 28% of the ASX 100 do not publicly disclose a policy that prohibits either bribery or bribes made as facilitation payments. The

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report concluded of over half of the ASX 200 companies that have operations in the UK or
US, 35% have no stated policy that prohibits bribery or bribes paid as facilitation payments
and 43% have inadequate management systems to implement company policy.

A survey of ASX100 company policies conducted by the Synod in 2013 found that 29
companies prohibited bribes paid as facilitation payments, a significant increase from 2013.
The Synod surveyed the ASX100 companies at the end of 2015 and 71 had policies banning
the payment of all bribes. Of the remaining 29, all but one had policies that banned bribes
as facilitation payments if the payment of the bribe would be illegal in the jurisdiction the
bribe was being paid in.

The impact of the OECD Anti-Bribery Recommendation has been more significant because
of the work the OECD Working Group on Bribery to review government’s implementation
and enforcement activities, with the findings being released publicly.

GQ2. Is there a need to increase impact of the OECD anti-bribery monitoring work
and, if so, how?

In the Australian context it is doubtful that increased monitoring work by the OECD
Working Group on Bribery could further improve the situation. What appears to be needed
is that combating bribery becomes a higher priority for the Australian Government and
Parliament and increased pressure on government to act from the Australian community
and from Australian businesses.

6. What recommendation could be envisaged to further address the issues of
responsibility of legal persons for foreign bribery through intermediaries?

The OECD Anti-Bribery Recommendation should be modified to ask that States implement
laws that make it an offence to fail to take adequate steps to prevent bribes being paid, so that
where a company or individual provides funds to an intermediary and the intermediary uses
the funds to pay a bribe, the person who made the payment to the intermediary must be
able to show they took appropriate actions to try and ensure the intermediary would not use
the funds to pay a bribe. As noted above in the Alcoa case, this difference in US and
Australian law appears to be a reason why US authorities were able to sanction Alcoa and
the Australian authorities did not.

The OECD Anti-Bribery Recommendation should also be modified to ask that States
include a fault element of recklessness in the payment of bribes in their anti-bribery laws,
to allow for a lowering of the bar on the level of evidence needed to successfully prosecute
a case involving foreign bribery. The current bar of proof needed to prosecute a case of
bribery of a foreign official under Australian law is one of the reasons there have been next
to no successful prosecutions in Australia.

Some jurisdictions appear to have already moved in this direction. For example, in the view
of UK Corruption Watch:

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62 Ibid. p. 5.
Under the FCPA [US Foreign Corrupt Practices Act], reckless disregard and wilful blindness, are enough to establish liability for knowledge of an offence.

14. What recommendation could be envisaged to address non-trial resolutions in the enforcement of the foreign bribery offence?

Non-trial resolutions, such as Deferred Prosecution Agreements, should only be available to legal entities and not to individuals. The OECD should recommend that non-trial resolutions only be used where they enhance the ability to prosecute the individuals that were involved in paying the bribes.

Data from the US shows that in Foreign Corrupt Practices Act (FCPA) Deferred Prosecution Agreements (DPAs) appear to have led to an increase in the number of individuals subsequently subjected to prosecution. From 2004-2014 there were 42 prosecutions of individuals involved in corporate FCPA cases\(^\text{64}\), while in the preceding decade 1993 – 2003 there were only 7 prosecutions of individuals and in the period 1982 – 1992 there were 21 prosecutions of individuals\(^\text{65}\).

Non-trial resolutions should only be available where a corporation admits to agreed facts detailing their misconduct, pays a financial penalty and is required to disgorge profits and benefits obtained through the bribery. Further the corporation receiving the non-trial resolution should be required to fully cooperate with law enforcement in any investigation towards prosecuting the individuals responsible for the serious corporate crime.

The US Department of Justice issued instructions to its prosecutors in 2015 to pull back from DPAs that grant immunity from prosecution for individuals. The US Department of Justice’s Yates Memo (issued by Sally Yates, US Deputy Attorney General at the time on 9 September 2015) emphasised the importance of holding individuals to account for corporate criminal activity they are involved with. It stated:

*One of the most effective ways to combat corporate misconduct is by seeking accountability from the individuals who perpetrated the wrongdoing. Such accountability is important for several reasons: it deters future illegal activity, it incentivizes changes in corporate behavior, it ensures that the proper parties are held responsible for their actions, and it promotes the public’s confidence in our justice system.*

It has been recognised that where a company is fined, rather than the sanction applying to the individuals involved, it fails to act as a general deterrent to the illegal behaviour. Associate Professor Soltes gives an example\(^\text{66}\):

*For instance, the day after settling criminal charges with federal prosecutors for helping wealthy individuals evade taxes, executives at Credit Suisse held a conference call to reassure analysts that the criminal conviction would have “no*
impact on our bank licenses nor any material impact on our operational or business capabilities.” And, ironically, fines levied on offending firms are ultimately paid by shareholders rather than by executives or employees who actually engaged in the misconduct. Without the spectre of the full justice system hanging over them as is the case with individual defendants, labelling firms as criminal often has surprisingly weak, or even misdirected, effects.

Also, it is necessary that individuals responsible for serious corporate crimes are held to account to maintain the public’s faith in the fairness of the criminal justice system. As US Senator Elizabeth Warren said in the US Senate Banking Committee Hearing in March 2013, in relation to the DPA with HSBC for extensive money laundering including of Mexican drug cartel money:

"... if you get caught with an ounce of cocaine, the chances are good you’re going to go to jail... if you launder nearly a billion dollars for drug cartels and violate our international sanctions, your company pays a fine and you go home and sleep in your own bed at night. I think that’s fundamentally wrong.

However, there is reason to be cautious about non-trial resolutions. Past academic review of the use of DPAs in the US has concluded that DPAs have at times been ineffective in deterring future criminal behaviour by the same corporation, finding that some of them obscure who was personally responsible for the company’s misconduct and failing to achieve meaningful structural or ethical reform within the company.

For instance, Pfizer Inc, the huge pharmaceutical company, entered into a DPA in 2002 due to one of its subsidiaries paying large bribes to a managed care company to give preferred status to one of its drugs. Pfizer was required to implement a compliance mechanism that would uncover illegal marketing activities and bring them to the attention of its board. Two years later, however, the company was again facing prosecution for similar illegal marketing activities that had continued at the same subsidiary. Pfizer then entered into a second DPA but by 2007 further criminal marketing activities by another subsidiary led to yet another DPA. In all these instances not one person was prosecuted.

Despite three DPAs, in 2009 Pfizer, the parent company, was found to be engaging in the same illegal marketing activities and was permitted to enter a fourth DPA, being required to pay US$2.3 billion in penalties, the largest criminal fine ever imposed up until then but most likely a small fraction of the profits derived from its long-term criminal activity. Again, no individuals were charged.

In 2008 the Aibel Group Limited pleaded guilty to violating the US Foreign Corrupt Practices Act anti-bribery provisions and “admitted that it was not in compliance with a

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67 Corruption Watch, ‘Out of Court, Out of Mind: Do Deferred Prosecution Agreements and Corporate Settlements fail to deter overseas corruption’, March 2016, 10 https://docs.wixstatic.com/ugd/54261c_423071d2a88f4af0be0a0309f6c51199.pdf


deferred prosecution agreement it had entered into with the Justice Department in February 2007 regarding the same underlying conduct. The US Department of Justice media release stated “This is the third time since July 2004 that entities affiliated with the Aibel Group have pleaded guilty to violating the FCPA.”

Similarly, in 2012 Marubeni Corp resolved a US 54.6 million FCPA enforcement action through a DPA concerning alleged improper conduct in Nigeria. In 2014, the company resolved another FCPA enforcement action – an US$88 million action concerning alleged improper conduct in Indonesia.

The US Government Accountability Office raised concerns in 2010 that the US Department of Justice has been unable to assess the impact of its DPA scheme:

*DOJ cannot evaluate and demonstrate the extent to which DPAs and NPAs – in addition to other tools, such as prosecution – contribute to the department’s efforts to combat corporate crime because it has no measures to assess their effectiveness. Specifically, DOJ intends for these agreements to promote corporate reform; however, DOJ does not have performance measures in place to assess whether this goal has been met.*

There has also been concerns about DPAs in the UK not being adequately used to prosecute the individuals behind the serious criminal conduct. The DPA granted to Standard Bank was in relation to its failure to prevent its Tanzanian subsidiary, Stanbic Tanzania, and its top executives from paying bribes to senior government officials to secure the Tanzanian Government’s mandate to raise US$600 million of sovereign debt financing in the form of a bond. The alleged bribes consisted of a US$6 million fee paid by Stanbic to a local agent, Enterprise Growth Market Advisors (EGMA) Ltd, paid out of international investors’ money raised by Standard Bank for the Tanzanian Government. EGMA, according to the agreed facts, provided no real services in return for its US$6 million fee. Its chairman at the time, Harry Kitilya, was Commissioner of the Tanzania Revenue Authority, which was responsible for advising the government on financing needs. A key factor behind Standard’s eligibility for a DPA was the fact it self-reported the alleged

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misconduct within days of being alerted by Stanbic Tanzania employees and cooperated with the UK Serious Fraud Office.

The Statement of Facts in the DPA identified either by name or role key players in the alleged criminal conduct. However, no single individual in the UK was held to account either by Standard Bank or the UK Serious Fraud Office (SFO) for their failure to prevent the alleged bribery. It was noted by UK Corruption Watch that there was a high level of control and approval by UK individuals for the transaction. These individuals still operate at senior levels within the financial industry. The team at the Standard Bank PLC in the UK drew up the collaboration agreement with the local agent, supposedly because the local Tanzanian team did not have the capacity or knowledge to do so. The team appears to have deliberately avoided giving any detail about the role of the agent to the compliance team within Standard Bank UK, to the Mandate Approval Committee. Staff in Standard Bank UK also helped draft the Mandate and Fee letters for the transaction. The Mandate letter was specifically drafted to avoid any mention of a partner or third party, while the Fee letter specified that the Government of Tanzania would pay Standard Bank, Stanbic and a ‘local partner’ a fee of 2.4% without naming who the local partner was.

In the view of UK Corruption Watch:

This particular DPA appears to set a precedent that UK employees can approve and draw up agency agreements on behalf of foreign subsidiaries, conduct no due diligence on those agreements, conceal the use of agents from a compliance function and institutional investors, and face no individual penalty. It is questionable whether such a precedent will act as a genuine deterrent to individuals not to engage in high risk behaviour with regards to foreign bribery.

A former senior bank official in Tanzania alleged that officials in London were “well aware” what was going on but “suppressed key facts” to help it secure the SFO deal. Shose Sinare, the former head of investment banking at Stanbic Bank, claims the bank secured the DPA by “suppressing key facts.” She claims the Standard Bank misrepresented the fact it was not aware of a local third party involvement in the deal insisting it was well aware before signing the deal and that a draft collaboration document had been circulated to the entire deal team including senior officials in London.

Any non-trial resolutions of bribery cases should be required to take into account those who were impacted by the criminal activity of the company and/or its employees in negotiating the restitution and penalty in the non-trial resolution. UK Corruption Watch has pointed out that the DPA with Rolls Royce made specific mention of concerns about the impact on innocent employees of the company and shareholders, but made no mention of the victims.

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of Rolls Royce’s criminal activity\textsuperscript{83}. Further, it appears the Rolls Royce DPA did not accept any input from prosecuting authorities in the countries where the bribes were paid and it would appear no real assessment of the harm from Rolls Royce’s corruption was assessed\textsuperscript{84}.

The results of a non-trial resolution of a bribery case should be made public, so that the community is able to scrutinise the application of justice, unless making the resolution public would jeopardise prosecution of the individuals involved in the payment of the bribe.

15. **What recommendation could be envisaged to further address the effective, proportionate and dissuasive nature of sanctions for foreign bribery?**

The OECD should recommend that sanctions for foreign bribery must be of a sufficient level to ensure that the bribe-payer does not profit from having paid the bribe.

19. **What recommendation could be envisaged to address the issue of mitigating circumstances in foreign bribery cases?**

As noted above, the OECD should recommend that mitigation apply where a legal entity alerts law enforcement that a bribe has been paid, before detected by law enforcement. Further, the mitigation in sanctioning should apply where the legal entity then fully co-operates with the investigation by law enforcement into the bribe and in bringing the individuals responsible to justice. Where an individual co-operates with an investigation into foreign bribery, any mitigation should still ensure there is adequate sanction for the bribe-paying behaviour to ensure both specific and general deterrence.

20. **What recommendation could be envisaged to address the issue of tax treatment of sanctions?**

The OECD should recommend that no form of sanction, be it a fine, confiscation or reparations to victims should be tax deductible. Government revenue for services to the community should not be forced to suffer as a result of foreign bribes having been paid. The full cost of the sanctions should be borne by those involved in the bribery.

22. **What step could the Working Group take to further address small facilitation payments?**

The OECD should recommend the banning of all bribes, including bribes paid as facilitation payments. Transparency International (using Kaufman and Wei’s landmark 1999 research) have highlighted that facilitation payments increase, rather than decrease, red tape and have wider reaching and long term consequences – impacting negatively on tax revenues, governance structures and opening the door to more serious forms of corruption, while also leaving companies open to risk\textsuperscript{85}. TI has pointed out “Small bribes

83 Corruption Watch UK, ‘Failure of Nerve: The SFO’s Settlement with Rolls Royce’.
84 Corruption Watch UK, ‘Failure of Nerve: The SFO’s Settlement with Rolls Royce’.
85 http://www.transparency.org/files/content/corruptionqas/The_impact_of_facilitation_payments.pdf
are part of a spectrum of corruption. They are not isolated acts. Often, facilitation payments are demanded within a network of bribery whereby junior officials have to share their bribery gains with seniors.\textsuperscript{86}\textsuperscript{86}\

TI has stated that facilitation payments are illegal in most countries, although a small number including Australia, New Zealand, South Korea and the USA provide exceptions, in certain circumstances, for bribes as facilitation payments when paid abroad\textsuperscript{87}. They remain illegal in their own domestic law. Canada passed legislation in 2013, the Corruption of Foreign Public Officials Act, that bans companies from paying small bribes to foreign officials in the form of facilitation payments\textsuperscript{88}. It is reported that out of 33 countries evaluated by the OECD, 25 report having no exemption for facilitation payments in their anti-bribery laws\textsuperscript{89}.\textsuperscript{89}

TI UK has stated there is growing international recognition that bribes paid as facilitation payments are not easily separated from other forms of small brie and more and more companies are following a no-bribes policy throughout their global operations, with no exemptions for facilitation payments\textsuperscript{90}. We noted above this trend for Australian corporations as well.

The UN Office on Drugs and Crime has stated that that “a facilitation payment is simply another term for a bribe.”

In permitting the payment of small bribes in the form of facilitation payments a company is likely to undermine its own anti-corruption policies. It is likely to be a source of confusion for employees and other parties the company deals with. On the one hand a company may state that it is committed to operating within the law and not paying bribes and having zero tolerance to bribes, while on the other it is allowing certain bribes to be paid if they meet a definition of a facilitation payment. Employees may find it hard to deal with the technical differentiation between a bribe and a bribe paid as a facilitation payment\textsuperscript{91}.\textsuperscript{91}

The not-for-profit international organisation TRACE interviewed 42 companies engaged in international business and found none of the companies that approached the issue of prohibiting bribes in the form of facilitation payments carefully and comprehensively reported significant or prolonged disruption to their business activities\textsuperscript{92}.\textsuperscript{92}

Ernst and Young reported six months after the implementation of the UK Bribery Act 2010, which prohibited the payment of any bribe, only 6% of 406 business representatives

\textsuperscript{87} Transparency International UK, ‘Countering Small Bribes’, June 2014, p. 4.
\textsuperscript{88} Transparency International UK, ‘Countering Small Bribes’, June 2014, p. 36.
\textsuperscript{90} Transparency International UK, ‘Countering Small Bribes’, June 2014, p. 4.
\textsuperscript{92} TRACE, ‘The High Cost of Small Bribes’, 2003, p.5.
believed the law had affected their ability to do business. Jonathan Middup, Head of the E&Y Anti-Bribery and Corruption team stated: “The premise that UK businesses need to pay bribes to be competitive abroad is a false one.”

Four months later E&Y reported that 24% of middle managers believed the Bribery Act 2010 was affecting the UK’s competitiveness. The survey revealed only 15% of the 1,000 middle managers surveyed had received any kind of training or guidance from their employer about the Bribery Act. John Smart a partner at E&Y stated:

Businesses may feel that they have been placed at a competitive disadvantage due to the Bribery Act. In the short term it may seem to hand opportunities to less scrupulous competitors, particularly in sectors or countries where the risks of bribes or facilitation payments are more common. However with increasing enforcement and a global drive to reduce corruption, in the long run there will be a level playing field among different countries.

Although the requirements set out by the Bribery Act clearly need to be taken very seriously, it is wrong to assume that the Act will hurt British competitiveness on the global stage. With the right policies, procedures and systems in place, British companies have nothing to fear, and neither do their customers.

A survey by Control Risks in March 2015 found that just 1.3% of businesses in the UK felt that bribes in the form of facilitation payments were essential to keep their business going.

A survey by Control Risks was reported in March 2015 to have found that 12.2% of Australian and New Zealand businesses felt that bribes in the form of facilitation payments were essential to keep their business going, compared to 1.3% of businesses in the UK, as noted above, and 24.6% of businesses in China. This would appear to reinforce the view that the willingness to pay bribes is strongly influenced by a business culture in a country.

It can be argued that being prohibited from engaging in any form of corrupt behaviour puts businesses at a disadvantage if other companies are able to engage in that corrupt behaviour without sanction. It is generally accepted that bribery has a corrosive impact on governance, good government and properly functioning markets. Allowing for small bribes in the form of facilitation payments on the grounds of competitive disadvantage is to say that a little bit of bribery is acceptable to level the playing field. Clearly the goal should be to work to

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93 Ernst and Young, ‘Nearly six months on, UK companies claim Bribery Act has not affected ability to do business says EY’, Media Release, 9 December 2011.
94 Ernst and Young, ‘Nearly six months on, UK companies claim Bribery Act has not affected ability to do business says EY’, Media Release, 9 December 2011.
95 Ernst and Young, ‘Nearly a year on, one in four worry that Bribery Act is affecting UK competitiveness’, Media Release, 30 April 2012.
96 Ernst and Young, ‘Nearly a year on, one in four worry that Bribery Act is affecting UK competitiveness’, Media Release, 30 April 2012.
97 Ernst and Young, ‘Nearly a year on, one in four worry that Bribery Act is affecting UK competitiveness’, Media Release, 30 April 2012.
raise the bar for all companies to have to compete without corruption being present in the business environment.

Companies should seek to actively collaborate with each other, including with foreign companies and industry associations, to deter and eliminate demands for bribes. Any problem of competitive disadvantage from refusing to pay bribes would be overcome if all companies refused to pay bribes and supported each other in such a policy.

An example of an industry association playing a positive role in combating bribery is the British Chamber of Shipping which offers to act as the conduit for passing on information on local corruption to the UK Serious Fraud Office and the local British Embassies or High Commissions. This may be useful where a company is reluctant to work with competitors (primarily because of competition law sensitivities) or be prepared to draw attention directly to the local corruption because of possible reprisals\(^{100}\). Such a role played by an industry association can assist companies in resisting the payment of bribes.

We find it difficult to understand the argument made by some companies and industry associations that it is impossible to resist the demands for small bribes from junior government officials for them to carry out their jobs, but at the same time the company is able to resist demands from more senior government officials for large bribes for them to do their jobs. Discussions with former employees of companies where the company has given in to demands for payments from foreign officials has indicated that such payments then extend to larger forms of payment to more senior government officials, in violation of the Criminal Code. The wall of secrecy around the frequency and amounts paid in bribes in the form of facilitation payments by Australian companies operating overseas make verification of such claims impossible.

29. What recommendation(s) could be envisaged to further strengthen whistleblower protection?

The OECD should recommend that governments put in place mechanisms not just to effectively protect whistleblowers who report cases of foreign bribery from retaliation, but to also compensate them for any loss they suffer as a result of their role as whistleblower and to reward them, where appropriate, for reporting foreign bribery. The OECD should also recommend the establishment of a central authority to deal with accepting reports by whistleblowers and assisting them in gaining protection, compensation and reward as appropriate.

\(^{100}\) Transparency International UK, ‘Countering Small Bribes’, June 2014, p. 25.
U4 (Monica TWESIIME KIRYA, Senior Adviser, U4 Anti-Corruption Resource Centre, Chr. Michelsen Institute, Bergen, Norway)

Strengthening the Gender Dimension in the OECD Anti-Bribery Recommendation

Introduction

Gender is not explicitly mentioned in the consultation document, but the G20 Anti-Corruption Action Plan for 2019-2021 and the overall growing prominence of this issue in the anti-corruption community is cognizant that gender is an important dimension to consider. This contribution covers the few aspects of the Review of the 2009 OECD Anti-Bribery Recommendation where adding a gender dimension might help to curb bribery in international business and its attendant negative effects on good governance, economic development and a level playing field for business. These are: enhancing internal controls, ethics and compliance in companies to ensure that they address sexual exploitation; conducting further research on the extent to which sexual exploitation is a factor in foreign business in different economic sectors; ensuring that whistleblowing policies are gender responsive and promote equity and inclusion; promoting gender balance on audit teams and promoting gender-smart procurement policies.

1.2.3 Enhancing compliance (Rec. X.C. and Annex II)

Question

How could the Good Practice Guidance on Internal Controls, Ethics and Compliance (the GPG) annexed to the 2009 Anti-Bribery Recommendation be revised to reflect evolving global standards?

Part A of the Good Practice Guidance for Companies, paragraph 5, enjoins companies to put in place ethics and compliance programmes or measures designed to prevent and detect foreign bribery, applicable to all directors, officers, and employees, and applicable to all entities over which a company has effective control, including subsidiaries, on, inter alia, the following areas: hospitality, entertainment and expenses.

Sexual exploitation is a particularly pernicious form of corruption that disproportionately affect women. The term “sextortion” has been adopted by the International Association of Women Judges (IAWJ) to describe this phenomenon where power is abused to obtain private gain in the form of sexual favours or benefits. The IAWJ defines sextortion as “the abuse of power to obtain a sexual benefit or advantage.” The “Me Too” Movement has drawn the attention of the international community to the reality that money, gifts, entertainment and related expenses are not the only forms that a bribe can take, and that sexual “favourites” are an egregious form of bribery where (mostly) women’s bodies are the currency of exchange.

A 2018 media expose in The Guardian lifted the lid on how multi-national companies can perpetuate, aid and abet the sexual exploitation of women as part of their business practices abroad. The report details the role of Heineken, a multinational company with operations in Asia and Africa, in exploiting “beer promotion girls” to promote sales in various countries. The Guardian reports that an internal inquiry in the company revealed that

Heineken employed, directly or indirectly through sub-contractors, 15,000 beer promotion girls who worked for low pay and were often at risk of sexual abuse and rape. The report further points out that female staff of Heineken in Africa often had to exchange sex for jobs or promotions. The reporter, Olivier van Beemen, says: “According to a number of people I spoke to, across the continent, ambitious women sometimes have to get intimate with the HR manager – usually a local member of staff – to get a job or secure a promotion. Expats at management level know the rumours, but rarely consider it their priority to bring the issue to attention.”

**Recommendation**

The Good Practice Guidance on Internal Controls, Ethics and Compliance (the GPG) annexed to the 2009 Anti-Bribery Recommendation as well as the Guidelines for Multi-National Corporations should:

1) Explicitly recognize “sex” as one of the undue advantages that can accrue in corrupt exchanges.

2) Be revised to encourage companies to take measures against the sexual exploitation of female staff, sales promotion staff or personnel hired by third parties or any other entities connected to the company. Such measures should include recognition of sexual exploitation as a form of corruption that is prohibited under the law as well as measures to prevent, detect and sanction such behavior.

**1.5.2 Sectoral Approach to strengthen understanding and prevention**

**Question**

What step could the Working Group envisage to address the particular foreign risks in certain sensitive sectors?

Sextortion as a form of corruption is under-researched, and therefore not much is known about the extent to which it is a factor in foreign business transactions. The Working Group on Bribery (WGB) should consider commissioning a study on the extent to which sexual exploitation is a factor in helping companies secure licences and other advantages in countries where they invest.

**3.1 Accessible channels for reporting foreign bribery [Rec. IX. (i)]**

**Question**

What recommendation could be envisaged to further strengthen whistleblower protection?

The whistleblowers in the Enron, WorldCom scandals were women, which drew attention to the importance of gender in whistleblowing. Since 2002 when Cynthia Cooper of WorldCom, Colleen Rowley of the FBI, and Sherron Watkins of Enron featured as Time Magazine’s people of the year, a number of academic studies have interrogated whether there are gender differences which effect decision making and the willingness to come forward to report wrongdoing. Some posit that females executives are excluded from the

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“old boys’ networks” and might therefore find it less risky to break ranks and blow the whistle. Glazer posits that girls are socialized to be nice and to play fair and are less likely to “play the game” when the rules are being broken. There have been numerous studies on whether women are more ethical than men, and the debate is unsettled. The Wiley Encyclopedia of Gender and Sexuality Studies summarises that the overall results indicate small differences in ethical sensitivity, no gender differences in moral reasoning (care or justice), slight differences in moral motivation/identity, and while studies vary greatly, some gender differences in moral behavior.

Beyond the debate, a recent paper by Tilton observes that “Any (whistleblowing) program that seeks to encourage participation within an existing context, such as the financial services workplace, risks entrenching bias and inequality if it fails to consider the differential effects of its design across different demographics.” She further observes that modern corporations structurally encourage women’s underrepresentation and therefore policymakers have a responsibility to ensure that the whistleblowing mechanisms they design avoid reifying the inequalities already at work in corporate structures.

Tilton’s paper recounts the following important gender differentials that are relevant to whistleblowing:

- Women are more likely to act based on observing the misconduct themselves, rather than collecting evidence that wrongdoing occurred.
- However, women were less likely to confront the person committing the wrongdoing directly. They were more comfortable reporting to a third party (either internally or externally).
- Women are more likely than men to report on “corporate misconduct.”
- Women are more concerned than men about violating social norms and whether they will be seen as heroines or snitches if they blow the whistle.
- Women tend to weigh friends’ and families’ reactions more heavily than men do when considering whether to blow the whistle.

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Tilton correctly cautions against over-simplification and the gender of gender-role stereotypes when considering the issue of women and whistleblowing. She recommends that it is important for whistleblowing programmes to consider men’s relatively greater norms-consciousness and create whistleblower systems that encourage equity by creating a duty to report rather than simply encouraging reporting. Thus, gender sensitivity could be enhanced by providing women whistleblowers the opportunity of being able to fall back on a legal duty or obligation and play the role of reluctant reporter, bound by an informal obligation or legal requirement, not driven by pride or greed.

Tilton emphasizes that whistleblowing policy design should consider the characteristics of the target population of social enforcers and incentivize them accordingly. This further implies that companies should avoid a simplistic “one-size-fits-all” assumption that all women would behave the same, regardless of their race, class or other socio-economic factors. After all, there is a complex power dynamic involved in reporting wrong-doing by an employee’s superiors, who might often be from a different demographic regarding race, education level, income, and so on. Accordingly, whistleblowing policy should, above all, protect from retaliation to encourage participation across different demographic groups as means of ensuring a progressive regulatory framework that promotes equity.

**Recommendation**

The existing recommendations and guidelines on whistleblower policies should explicitly recognize the gender differentials in whistleblowing motivation, method and impact. Whistleblowing policy should be sensitive to the characteristics of different demographics and aim to promote participation and equity in the work place.

### 3.6 Reporting of foreign bribery by certain professions [Rec. X.B (iii) and (v) and the Good Practice Guidance on Internal Controls, Ethics and Compliance]

**Question**

What recommendation could be envisaged to enhance detection and reporting of foreign bribery by external auditors and accountants?

The academic literature contains a significant volume of research on male versus female auditors. Some studies found that female auditors were more prudent and provided higher-quality audits than male auditors, but other studies found no significant differences between female and male auditors. Some studies found that the audit quality of male auditors was higher than that of female auditors; for instance, one study averred that female audit partners processed information more efficiently than male audit partners in a complex audit task but also found that male audit partners showed more accurate audit judgement. A recent study on Chinese auditors also suggests that in addition to gender, audit quality

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may be affected by the age of the auditors\textsuperscript{298}. Despite the debate not being settled, it would seem advantageous to promote gender-balance on audit teams.

**Recommendation:**
Companies should be encourage to ensure gender balance on audit teams to promote equity and fairness in the workplace and to improve audit quality.

5.3 **Supporting efforts of the OECD Public Procurement Committee and related Recommendations [Rec. XI. (iii)]**

**Question**

What step could the WGB take to further support the efforts to promote transparency in public procurement, including collaboration with the OECD Public Procurement Governance Committee for the implementation of the principles contained in the 2008 Council Recommendation on Enhancing Integrity in Public Procurement?

The OECD Recommendation of the Council on Public Procurement recommends that Adherents should “Promote fair and equitable treatment for potential suppliers by providing an adequate and timely degree of transparency in each phase of the public procurement cycle... Additionally, suppliers should be required to provide appropriate transparency in subcontracting relationships.” The foreword to the recommendation encourages the proper allocation of public resources by using public procurement as a strategic tool.

Together these provisions provide an entry opportunity to recommend Gender-Smart Procurement as strategic lever to accelerate gender-inclusive economic growth and create “a diversity dividend” through increased job creation and economic growth. Gender-smart procurement policies also have the potential to mitigate economic and business risk by making supply chains more diverse. Whereas Public Procurement accounts for 20% of global Gross Domestic Product, women entrepreneurs supply just 1% of the market. Chatham House notes that such policies are one of the most powerful tools G20 governments have to achieve their target of reducing the gender gap in the labour market by 25% by 2025.\textsuperscript{299}

Chatham House recommends:

3) Governments should reformulate procurement policies to make explicit the requirement that increasing women’s workforce participation through greater use of female suppliers is a key objective in bed selection for procurement contracts.

4) Companies should aim to have more diverse supply chains.

5) The G20 (OECD) should set measurable and time bound targets for gender-smart procurement as part of encouraging good practice and integrity in supply chain management.


REFERENCES


MULTILATERAL ORGANISATIONS

Council of Europe Group of States Against Corruption (GRECO)


In the framework of our 3rd round evaluation GRECO placed a particular emphasis on the need to ensure that bribery of all categories of employees in the public sector is criminalised (including those without official decision-making powers).

Concerns expressed by the Working Group in country evaluations since 2009 with respect to the foreign bribery offence, in particular the need to cover bribery of officials employed by foreign public enterprises and public officials acted within or outside their official duties go in this direction. Better guidance could be provided on this matter.

Other GRECO recommendations on criminalization may be of interest as well as our recommendations on sanctions (3rd Evaluation round).

1.3.3 Enforcing Article 5 of the Convention [Annex I.D.]

GRECO 4th round evaluation prominently highlighted the importance of safeguarding and guaranteeing the independence of judiciary, to be respected by all branches of power. The vast majority of member states received recommendations on judicial independence. “Judicial capacity to make decisions expertly and independently is essential to the proper functioning of the judicial system. Pressure on judges to refrain from fully exercising their judicial functions or to do so in a biased way not only taints individual judges but also undermines the authority of the judiciary as a fair and impartial arbiter for all citizens” (Report on conclusions and trends of the 4th evaluation round). GRECO made a number of recommendations to ensure that transparent and uniform procedures are implemented with a view to maintaining judicial independence (in particular regarding transparent and objective appointments, increasing the security of tenure, regulating transfers, limiting dismissals, ensuring clear and transparent disciplinary processes, increasing number of judges in judicial self-government bodies etc.)

e. Judicial training and specialization

In the framework of its 4th Evaluation Round GRECO specifically stressed the importance of practical examples to help work through ethical dilemmas and a range of situations where conflicts of interest might arise. Induction, on-going professional development training as well as dedicated confidential counseling was often recommended in particular for judges and prosecutors.

1.4. Small facilitation payments (SFPs)

This issue was not covered by GRECO but was recently discussed at the last meeting of the Sibenik Network (on an initiative from French representative). SFPs allow companies to avoid or reduce other significant costs (e.g. delays when crossing the border, reduced customs taxes). However these payments place companies in a situation of legal insecurity (some countries such as US make it exception to anti-bribery law, some other such as Canada, France or UK prohibit them). In any case, a better guidance is needed on the
matter. I think that the SFPs should not be an exception to the Anti-Bribery Convention. The trend internationally seems to go in this direction. See example of Canada
European Bank for Reconstruction and Development (EBRD)

Office of the Chief Compliance Officer to the OECD Working Group on Bribery

The Office of the Chief Compliance Officer (“OCCO”) at the European Bank for Reconstruction and Development (“EBRD” or “the Bank”) has a mission to protect the integrity and reputation of the Bank, with particular emphasis placed on pre-investment screening as a means of managing integrity risks. In addition to developing and monitoring the EBRD’s integrity and anti-corruption standards and policies, it is also responsible for investigating allegations of fraud, corruption and misconduct, both within the EBRD and in EBRD-financed projects. OCCO also cooperates with governments, international organisations and others to strengthen the global fight against corruption.

OCCO has prepared the following response to the Working Group on Bribery’s (“WGB”) invitation to provide input to the Review of the 2009 Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions (“the Anti-Bribery Recommendation”) in order to share OCCO’s experiences of preventing, investigating, and sanctioning corruption in its financing development projects, and in assessing corporate anti-corruption compliance programmes as part of its pre-financing screening due diligence process.

OCCO has in particular selected items from the proposed issues for discussion where its experience may assist the WGB as it reviews the Anti-Bribery Recommendation and strengthens its monitoring of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (“the OECD Anti-Bribery Convention”).

GQ1. What are your general impressions concerning the effectiveness and implementation of the 2009 Anti-Bribery Recommendation.

In OCCO’s experience working closely with both the public and private sectors in combating corruption, the main impediment to combating corruption is the absence of expertise on how to effectively implement the legal or other obligations to which countries and companies have agreed. While the topics covered by the Anti-Bribery Recommendation remain relevant, a revised Recommendation would benefit from stronger commitments and guidance focusing more specifically on implementation measures and adopting a risk-based approach. This may be achieved through more prescriptive language, accompanying each provision (where appropriate), on good practices for implementation and effectiveness.

Furthermore, the Recommendation, as currently drafted, may interpret the role of the WGB too narrowly by addressing foreign bribery too strictly, at the risk of not addressing broader issues which, whilst not strictly related to the foreign bribery offence, can nonetheless help with its detection and enforcement. For example, the findings of the OECD Foreign Bribery Report indicated the prevalence of state-owned enterprises in foreign bribery transactions. Specific provisions taking into account the recent work of the OECD Working Party on State Ownership and recommending that member countries ensure, as government owners, their state-owned enterprises are well-governed, with effective anti-bribery/corruption compliance measures in place, can help combat foreign bribery by addressing a prominent risk area from the demand side.

2. How could foreign bribery awareness-raising and training actions be further addressed?
WGB member countries should avail themselves of the various multilateral fora to which they are party or shareholders as channels for raising awareness of the importance of combating foreign bribery. Most, if not all, WGB member countries are also shareholders of one or more of the multilateral development banks. Such international financial institutions have significant leverage in effecting change, especially as they are often one of the largest investors in a number of high corruption risk countries. Requiring member countries to develop internal, coherent policy messages in their external development agendas on the importance of combating foreign bribery can create a stronger and more coordinated mandate for partner institutions, like the EBRD, to mainstream this message through investments, policy dialogue, training and capacity-building initiatives in countries of operation.

4. What recommendation(s) could be envisaged to address issues related to foreign bribery, concerning, for instance the demand side of bribery or the bribery of officials from sports organisations, bearing also in mind the specific focus of the Anti-Bribery Convention and the work carried out in other fora on these issues?

In the EBRD’s experience of assisting clients to enhance their anti-corruption controls, we are often confronted with the question of what efforts are being done to curb demand-side corruption. Focusing only on the supply side of corruption addresses only half of the problem, and therefore efforts to address demand side corruption are essential in the overall fight against foreign bribery.

The revised Recommendation would benefit from a specific provision for WGB member countries to more actively investigate and prosecute the demand side of the foreign bribery offence. For instance, in foreign bribery cases where both the bribe payer and the bribe recipient are both located in WGB member countries, the Recommendation could encourage the WGB member country of the bribe recipient to commit to investigate and prosecute the bribe recipient. Non-criminal means of addressing the demand side of bribery, such as the establishment of Business Ombudsman Councils, or HLRMs, could also be encouraged of member countries.

See also response to GQ1 on state-owned enterprises.

7. How could the Good Practice Guidance on Internal Controls, Ethics and Compliance (the GPG) annexed to the 2009 Anti-Bribery Recommendation be revised to reflect evolving global standards.

As currently drafted, the GPG reads as a checklist, which creates risks of “paper compliance”. Evolving global standards on compliance are much more focused on implementation, effectiveness, and tailoring compliance requirements to meet the risk profile of a company. Specific provisions expanding on the concepts of design, corruption risk assessments and the need for routine compliance audits, testing the effectiveness of a compliance programme, would strengthen a revised GPG, and focus more on results and effective implementation.

More broadly, evolving global standards in this area are also focusing more on creating a culture of integrity and thinking of compliance not as a “tick the box” exercise or how to be compliant with the law, but is moving beyond such *de minimis* standards by looking at the values a company wants to stand for, and how companies can create a culture of compliance and a value chain outside its corporation, by working more closely with its business partners, third parties, and external stakeholders. The GPG would benefit from incorporating such language through specific provisions, or in a more high level way, in the chapeau text.
15. What recommendation could be envisaged to further address the effective, proportionate, and dissuasive nature of sanctions for foreign bribery?

To date, the monitoring reports of the Working Group on Bribery have focused on imprisonment, fines, confiscation, and other monetary forms of sanctions. OCCO recommends that the Working Group on Bribery consider encouraging countries to consider applying debarment as an effective, proportionate, and dissuasive sanction for foreign bribery.

Under the Enforcement Policies and Procedures of the EBRD, which is harmonised with the enforcement policies of the other multilateral development banks, debarment is the primary sanction that is imposed. The EBRD and other MDBs use debarment as a protective measure against misuse and misappropriation of funds. Even so, companies have reported that debarment has significant financial and reputational impact and can sometimes be more effective and dissuasive than a monetary penalty. This has been supported in criminal foreign bribery cases, where companies will opt to plead guilty to crimes other than corruption (i.e., accounting violations) in order to avoid mandatory debarment.

By encouraging countries to consider the application of debarment, the Working Group on Bribery could monitor whether the Parties to the OECD Anti-Bribery Convention apply debarment as a sanction in foreign bribery cases, and whether companies sanctioned for conduct related to foreign bribery are subsequently subject to debarment. Monitoring of these elements may also provide insight as to whether and how debarment can be more effectively used in the foreign bribery cases.

19. What recommendation could be envisaged to address the issue of mitigating circumstances in foreign bribery cases?

As noted in the OECD Foreign Bribery Report, internal controls and compliance programmes are treated as mitigating factors in the sanctioning systems of some Parties to the OECD Anti-Bribery Convention. In order to encourage the development of anti-corruption compliance programmes, the Working Group on Bribery could consider encouraging countries to consider applying mitigation for effective anti-corruption compliance programme.

In investigations of Prohibited Practices under the Enforcement Policies and Procedures (EPPs”) OCCO has provided mitigation in cases where companies can demonstrate the adoption and implementation of an effective anti-corruption compliance programme. Under the EPPs, the sanction imposed shall take into consideration “the implementation of programmes by the Respondent to prevent and/or detect fraud and corruption and/or introduction of other relevant remedial measures”. In OCCO’s experience, mitigating the conduct on the basis of the implementation of a compliance programme creates incentives for the company to enhance its internal controls and processes and can be a positive influence on the market environment and investment climate. The genuine implementation of a compliance programme can therefore create sustainable and lasting change, in contrast to one-off monetary sanctions.

However, before providing mitigation for sanctions for such compliance programmes, clear guidance and capacity on how to evaluate internal controls and compliance programmes is

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1 Although the EBRD can also require restitution of funds, this is considered a “remedy” rather than a “sanction”.
required to ensure that proposed sanctions are not reduced for substandard or “paper” compliance programs. OCCO would therefore recommend that the Working Group enhance its Good Practice Guidance to incorporate new developments in compliance and risk assessment (see response to answer 7 above). Additionally, as noted in the public consultation document, the application of this mitigating circumstance must not diminish the dissuasive effect of the sanction.

50. What steps could the WGB take to further increase enforcement by Parties of the Anti-Bribery Convention and the Anti-Bribery Recommendation?

The multilateral development banks, including the EBRD, have useful knowledge about the political, economic, and social situations of their countries of operations that could inform on the work of the WGB in its fight against foreign bribery. The WGB could make more active use of the partnerships it has developed with the multilateral development banks, including the EBRD.

While there are already well-established partnerships on global relations and outreach/training/capacity building work, these partnerships can also serve as a resource in the encouragement of enforcement against foreign bribery. For instance, the multilateral development banks could be an important source of detection of foreign bribery and monitoring open foreign bribery cases. Through ex ante due diligence, as well as through enforcement actions, OCCO has considerable intelligence that can support the mandate of the WGB through more proactive information-sharing (having regard to relevant data privacy and confidentiality obligations). For instance, the WGB could consider inviting relevant multilateral development banks to be observers at its meetings, or could host a specific meeting among multilateral development banks to discuss their experiences of fighting foreign bribery.
United Nations Office on Drugs and Crime (UNODC)

Integrating a gender perspective

1. Criminalisation of Bribery of Foreign Public Officials and Enforcement

1.1. Foreign bribery offence


Suggested questions:

1. What recommendation could be envisaged to provide greater clarity with respect to certain elements of the foreign bribery offence?

Comment:
Consider including a discussion on how sextortion or sexual favor can be the currency of the bribe/undue advantage.

2. How could foreign bribery awareness-raising and training actions be further addressed?

Comment:
Consider including a module on nexus between gender and corruption when providing training/awareness-raising on foreign bribery; focus group discussion of business women on how vulnerabilities related to gender manifest themselves in the context of foreign bribery?

1.1.2. Other defences

Suggested question:

3. What recommendation could be envisaged to address other defences applicable to the foreign bribery offence?

Comment:
Collect sex-disaggregated figures on severity of sentences in foreign bribery cases when having a male and female defendant - do women receive lower sentences because they are perceived to be the "weaker" or "more innocent" gender?

1.1.3. Other issues related to criminalisation of foreign bribery

Suggested question:

4. What recommendation(s) could be envisaged to address issues related to foreign bribery, concerning, for instance the demand side of bribery or the bribery of officials from sports organisations, bearing also in mind the specific focus of the Anti-Bribery Convention and the work carried out in other fora on these issues?
Comment:
Consider exploring dynamics and vulnerabilities when demand-side is male and supply-side is female.

1.2. Legal persons

1.2.1. Guidance on Article 2 of the OECD Anti Bribery Convention [Annex I, B]
Suggested questions:
5. What further Guidance on liability of legal persons could be envisaged?

Comment:
Legal persons headed by women versus legal persons headed by men - any differences in dynamics, vulnerabilities or sentences, etc.?

1.2.2. Responsibility of legal persons for foreign bribery through intermediaries [Annex I, C]
Suggested question:
6. What recommendation could be envisaged to further address the issues of responsibility of legal persons for foreign bribery through intermediaries?

Comment:
Particular dynamics for and vulnerabilities of female intermediaries (when intermediaries are individuals, not legal persons).

1.2.3. Enhancing compliance [Rec. X.C. and Annex II]
Suggested question:
7. How could the Good Practice Guidance on Internal Controls, Ethics, and Compliance (the GPG) annexed to the 2009 Anti-Bribery Recommendation be revised to reflect evolving global standards?

Comment:
Consider identifying and using gender dynamics for ethics and compliance, such as gender-balanced teams are more accountable than teams dominated by one gender - more research needed in this area.

1.3. Periodic review of laws and approach to foreign bribery enforcement [Rec. V]

1.3.2. Investigative means
Suggested questions:
10. What recommendation could be envisaged to usefully address investigative means in foreign bribery investigations?

Comment:
Awareness on special vulnerabilities of women when confidential informants or cooperating witnesses – officers trained in gender sensitivity? Female officer handling the case? Special protection needs of female informants and witnesses?
1.3.4. Resolving foreign bribery cases

e. Judicial training and specialization.

Suggested question:

21. What recommendation could be envisaged to address the issue of judicial specialization and training?

Comment:
Actively include female judges and prosecutors in the training.

1.5. Awareness-raising and prevention

1.5.1. Awareness-raising initiatives in the public and private sectors for the purpose of preventing and detecting foreign bribery [Rec. III.(i)]

Suggested question:

23. What recommendation could be envisaged to address the issue of awareness-raising in the public and private sectors?

Comment:
Include module on gender and corruption to raise awareness on this issue.

1.5.2. Sectoral approach to strengthen understanding and prevention

Comment:
Study on gender and corruption in selected risk sectors?

3. Detection and Reporting of Foreign Bribery

3.1. Accessible channels for reporting of foreign bribery [Rec. IX.(i)]

Suggested questions:

27. What recommendation could be envisaged to enhance awareness and effective use of reporting channels for foreign bribery?

Comment:
Consider special vulnerabilities of women when/if they choose to report corruption, ensure reporting channels are accessible to women, enhance awareness on sextortion as the currency of corruption and develop appropriate reporting channels for such cases (including establishing cooperation with relevant expert agencies in regards to counseling and medical help).

3.2. Facilitating reporting by public officials [Rec. IX.(ii)]

Suggested question:

28. What recommendation could be envisaged to enhance detection and reporting by public officials to law enforcement authorities?
Comment:
See comment under 3.1./27.

3.3. Whistleblower protection [Rec. IX.(iii)]*

Suggested question:

29. What recommendation(s) could be envisaged to further strengthen whistleblower protection?

Comment:
Ensure whistleblower protection systems are gender-sensitive, train officers handling whistleblower protection systems in gender awareness and sensitivity.

3.6. Reporting of foreign bribery by certain professions [Rec. X.B(iii) and (v) and the Good Practice Guidance on Internal Controls, Ethic and Compliance]

Suggested questions:

32. What recommendation could be envisaged to enhance detection and reporting of foreign bribery by external auditors and accountants?

Comment:
I think similar considerations as above regarding gender sensitive reporting mechanisms, research whether the consequences for self-reporting are skewed.

3.7. Detection by the media

Suggested questions:

34. What recommendation could be envisaged to enhance detection and reporting of foreign bribery by the media?

Comment:
Special attention to female reporters and journalists?

10. Relations with international governmental and non-governmental organisations [Rec. XVIII]

Suggested question:

53. What further steps could the Working Group take to enhance cooperation with international organisations (including international financial institutions and other fora such as the G20), non-governmental associations and the business community?

Comment:
Consider joint research initiatives on gender and corruption, gathering and sharing of data and statistics.
PRIVATE SECTOR

Airbus

OECD Public consultation - Input into the review of the 2009 Anti-Bribery Recommendation

GQ1. What are your general impressions concerning the effectiveness and implementation of the 2009 Anti-Bribery Recommendation?

We recognize OECD’s work and effort to promote anti-bribery laws and to spread a culture of Ethics and Compliance across all members and beyond.

We consider that it is a useful guidance that has had an impact on legal systems in Europe including significant development of national legal frameworks combating bribery and corruption.

2. How could foreign bribery awareness-raising and training actions be further addressed?

The Working Group may have interest in issuing specific Anti-Bribery/Anti-Corruption Recommendations, Training, and Guidance tailored to individual industries in order to provide a more operational and sectorial approach on how to fight bribery and corruption.

It is recommended to make any awareness raising and/or training actions as concrete as possible with limited legal jargon and including concrete examples based on real case scenarios.

Another approach could be to promote collective actions around awareness-raising actions coming from big companies so they can drive the culture of change of the entire sector.

7. How could the Good Practice Guidance on Internal Controls, Ethics, and Compliance (the GPG) annexed to the 2009 Anti-Bribery Recommendation be revised to reflect evolving global standards?

The Working Group may be interested to include:

- in depth guidance covering risks associated with the use of intermediaries in compliance programmes (part 5);
- best practices from the highest international standards to improve the harmonisation of compliance models.

In addition the OECD may consider creating a specific status for “compliance manager” in order to promote and protect the profession.

8. What recommendation could be envisaged to address the issue of incentivising anti-bribery compliance?

Incentivising anti-bribery compliance is key to make the revised 2009 Anti-Bribery Recommendation a success.
Promoting self-reporting of potential misconduct, and promoting transparency in Compliance programs is a way to reduce serious consequences for corporate misconducts.

12. What recommendation could be envisaged to further support the enforcement of Article 5 of the Convention?

According to Article 5, investigation and prosecution of the bribery of a foreign public official shall be subject to the applicable rules and principles of each Party and must not be influenced by considerations of national economic interest.

The Working Group may reinforce the ABC enforcements' monitoring to ensure that this point is strictly observed.

18. Which other enforcement challenges (e.g. the interaction of remedies in cross-border corruption cases) could be addressed as part of the review of the Anti-Bribery Recommendation?

Even though authorities are collaborating – and have improved doing so - it may be difficult for a private company to anticipate (or not) further enforcement by other regulators on the exact same topic.

The Working Group may propose a mechanism of mutual recognition concerning a case resolution.

22. What steps could the Working Group take to further address small facilitation payments?

The Working Group may propose Guidance towards Governments and National authorities globally to help them raise government officials’ awareness regarding bribery and corruption. A main target could be Embassy employees or Customs.

The Working Group may be inspired by initiatives such like the Maritime Anti-Corruption Network (MACN) taken in the maritime transport sector.

The starting assumption is that tackling systemic integrity challenges requires collective action, with companies joining forces and sharing information and approaches, but also engaging governments and civil society.

Through collective action, MACN members work in partnership with local authorities to develop solutions that are both beneficial to all and realistic to implement.

23. What recommendation could be envisaged to address the issue of awareness-raising in the public and private sectors?

The Working Group and OECD globally may organise additional media campaigns for the Anti-corruption day to raise public awareness regarding this topic.

It would be advisable if the OECD were in contact with peer groups such as Transparency International or the UN in organizing media campaigns and other activities to raise public awareness.

In addition, refer to the answer 2.
What step could the Working Group envisage to address the particular foreign bribery risks in certain sensitive sectors?

We consider that two simultaneous goals must be envisaged:

a. Better advertise reporting channels possibly through national communication and awareness campaign
b. Strengthened whistle-blower’s protection to actively minimize societal fear of retaliation.

29. What recommendation(s) could be envisaged to further strengthen whistleblower protection?

Please see 27.

33. Should the recommendation address the issue of reporting of foreign bribery by other professional advisers, and if so, how?

38. What recommendation could be envisaged to strengthen the independence of external auditors in practice so that they can provide an objective assessment of company accounts, financial statements and internal controls?

Together 33&38.

We are in favour of an empowered and supervisory company board to report and advise on foreign bribery issues.

34. What recommendation could be envisaged to enhance detection and reporting of foreign bribery by the media?

35. To what extent and how would it be useful for the WGB to turn its attention to legal frameworks protecting freedom, plurality and independence of the press, as well as laws allowing journalists to access information from public administrations?

Together 34&35.

Freedom of press is a key part in the fight against bribery and corruption. Media reports and independent investigations in various low-rated countries (in terms of Corruption Index or level of freedom of press) are high value sources of information to conduct due diligence on third parties.

Furthermore, we recommend and support that the Working Group turns its attention to enhancing legal protection of freedom, plurality and independence of the press.

40. Should automatic suspension from public advantages be considered, and if so how, including as concerns notice and appeal mechanisms, and procedures for imposing or lifting suspension measures?

Suspensions should be considered when enforcing Anti-Bribery and Anti-Corruption laws, but should be proportionate to individual issue and the objectives of the ABC law and therefore it should not be automatic. In addition, automatic suspension may reduce the willingness to self-report.
48. What recommendation could be envisaged to address the enforcement challenges raised by multi-jurisdictional cases?

Guidance or rules have to be put in place at international level to better coordinate between prosecutors.

We do believe that multi-jurisdictional cases and investigations are best to adhere to the ne-bis in idem principle.

The Working Group may highly focus its effort on these challenges.

52. What steps could the Working Group take to further engage with key non-Members, act as a forum for consultation with such non-Members, and more generally promote application of the standards in the Anti-Bribery Convention and related instruments?

Non-members play an important economic role and may have great political influence.

The Working Group may consider organizing regular meetings (like the G20 session) in order to strengthened the OECD relationship and mutual understanding among important non-member countries.
Business at OECD (BIAC), April 2019

Review of the 2009 OECD Anti-Bribery Recommendation. Contribution to the public consultation

Business at OECD (BIAC) reiterates its strong support for the review of the 2009 Recommendation for Further Combating Bribery of Foreign Public Officials in International Business Transactions to ensure that it reflects changes in regulatory approaches as well as new trends that have occurred over the last ten years. The fight against corruption has developed significantly. Many businesses have constructively contributed by designing and implementing innovative compliance systems and promoting collective action, which should be reflected.

We believe that the update of the Recommendation is also a unique opportunity to include additional elements in the Recommendation to enhance the effectiveness of the fight against corruption and demonstrate that it is based on a truly comprehensive approach and effective cooperation among governments, business and key stakeholders. This will not only further increase the relevance of the Working Group on Bribery, but also establish the OECD as the leading organization in fostering integrity and fighting corruption in a comprehensive manner.

The following issues, some of which are further elaborated under the specific questions below, should be included in the revised Recommendation:

• Address the demand side: The fight against corruption can only be effectively addressed if both the supply side and the demand side are included. The 2018 OECD report on Foreign Bribery Enforcement, which explored whether there is a “flip side” to enforcement actions that ended in sanctions for the supply-side of a foreign bribery transaction, highlighted that much more must be done to effectively sanction public officials accepting bribes as in only one fifth of the 55 concluded foreign bribery cases formal sanctions were imposed on public officials. These findings highlight that the OECD must take decisive steps to address the demand side of bribery, requiring efforts to prevent corruption, and underline the need for clear processes that must be in place, including the possibility of firms to communicate solicitation. The review of the Recommendation provides an excellent opportunity for addressing the demand side in a key OECD instrument and make it part of a review process (see below).

• Support well-functioning anti-corruption and compliance systems: Compliance efforts help to foster corporate accountability, strengthen consumer and investor confidence, and are indispensable for the prevention against corruption. To support compliance, internal investigations should be officially recognized and protected. At the same time, it should be recognized that no compliance system can fully guarantee that it can prevent all infringements in the same way that states cannot guarantee there will be no criminal behavior of their employees. The Recommendation should support companies’ proactive engagement by providing positive recognition of effective anti-corruption and compliance systems. It should call for the recognition of compliance systems and self-cleaning measures in public procurement regimes to ensure that companies have the possibility to mitigate debarment decisions by implementing effective compliance measures after a corrupt activity was detected and remediated (see below).

There should be no automatic debarment from public tenders. The risk of a single person committing an infringement rises with a larger number of employees and a higher
frequency of change in personnel, therefore larger companies would disproportionately be disadvantaged. Debarment from public tenders needs to be a case-by-case decision taking into account all individual circumstances of the case, not only one factor. The company culture as a whole should be taken into account, not only a single incident. Compliance efforts could also be rewarded by using non-trial-resolutions as a leniency-measure.

- Encourage voluntary self-disclosure: The revision of the Recommendation should encourage voluntary self-disclosure by calling for the harmonization of administrative and legal approaches to give companies the certainty they need. This should include leniency programs for corporations, taking into account their compliance efforts, cooperation and self-disclosure (see below). The use of the Defense of effective regret should be recommended, as it is another incentive promoting self-disclosure, which also promotes the detection of deficiencies in domestic administration. In this regard leniency programs similar to antitrust law should be recommended. It is also necessary to preserve the legal privileges of “consultants”, such as tax accountants.

- Digital opportunities: Reflecting groundbreaking developments over the last decade and benefiting from the OECD Going Digital work, the Recommendation should support the increased use of information and communication technologies as a means to reduce corruption and promote trust and confidence in governments, including in public procurement systems, customs clearance and trade facilitation schemes more broadly.

- Include expectations for public institutions, including state-owned enterprises (SOEs): The 2018 OECD publication on SOEs and corruption has shed light on the worrying extent of corrupt behavior in SOEs. The Recommendation should therefore put due emphasis on actions that state members should undertake to prevent corruption from the public sector perspective. It currently largely limits this to “awareness raising activities”. The revised Recommendation should include clear expectations towards SOEs and public institutions more generally to implement internal controls, ethics and compliance requirements, including in the areas of risk assessment, internal anti-bribery policies, awareness, communication and training. Expectations should be at the same level as those for private companies, tailored to the public sector.

- Promote collective action: The Recommendation should promote collective action efforts with companies, including SMEs, to effectively and continually eliminate facilitation payments using various means, fostering business codes of conduct, standard interpretations of regulations impacting companies, promote regulation that ease doing business, increased use of electronic communication and official fee payment systems, training, independent audits and effective grievance mechanisms. Collective action and other integrity initiatives of the private sector should be supported.

- Include expectations for all stakeholders: The Recommendation should be comprehensive and consider the responsibilities of business, governments but also other stakeholders, such as non-governmental organizations in the fight against corruption. All stakeholders should be called upon to commit themselves to transparency as well as effective and risk-adequate compliance standards.

- Avoid double jeopardy: We recommend that the OECD further clarify the principle contained in article 4.3 of the OECD Convention according to which Parties shall consult with a view to determining the most appropriate jurisdiction for prosecution when more than one Party has jurisdiction over an alleged offence. The review of the Recommendation presents an opportunity to translate this into an effective rule of international ne bis in idem. Administrative assistance should be harmonized and competencies in cross-border cases
should be defined. Information exchange between prosecution authorities and compliance professionals in companies should be fostered. Avoiding duplicating proceedings for the same offense in several jurisdictions would increase overall efficiency and could in many cases accelerate remediation of the underlying causes of the offense. In the event of several sanctions across several jurisdictions for the same offense, it should be ensured that aggregate sanctions are appropriate in relation to the nature of the offense. In this regard non-trial-resolutions, e.g. settlements, also need to be considered.

• Update the good practice guidance: Annex II has been an important source of expected good practice in terms of designing an anti-corruption compliance program. However, it falls short on details on how to design an effective anti-corruption compliance program. The compliance elements should be modernized and reinforced, offering countries a generally agreed reference document in this area, taking into consideration the need for a risk-based approach, which could also be fulfilled by SMEs (see below).

Additional information in response to selected questions:

What are your general impressions concerning the effectiveness of the implementation of the 2009 Anti-Bribery Recommendation? Is there a need to increase impact of the OECD anti-bribery monitoring work?

The monitoring work of the OECD Working Group on Bribery regarding the implementation of the OECD Convention and the 2009 Recommendation is often referred to as the gold standard of OECD peer reviews. We value the rigorous peer review process that has been put in place and the publication of the peer review reports. We often cite the process as an example of how other OECD instruments should be reviewed. The outcome of the national peer review reports must be raised at the highest level in governments.

As the OECD is now involved in phase 4 of the review cycle, we underline that this should not take attention away from the fact that not all the recommendations from previous cycles have been comprehensively implemented and efficiently enforced. Existing gaps and areas for further action need to be highlighted. Continued monitoring of a correct implementation and enforcement of the Convention, where necessary, should therefore remain high on the OECD agenda going forward.

Peer reviews often focus on the number of cases or convictions. To further enhance the effectiveness of the peer review process, an additional goal the OECD review process should be to assess how to reach greater consistency of international anti-corruption standards, and consider how governments are encouraging and steering an effective dialogue with business, how they support modern anti-corruption measures, how they modernize and improve regulations that ease doing business, and how they support compliance efforts of companies. These issues should therefore be prominently included in the updated Recommendation. The current status of anti-corruption practices at a global level should be reviewed with the goal of identifying if there are common minimum standards to be reflected in the Good Practice Guidance.

To facilitate the effective participation of business in the peer review visits, we call upon the OECD to provide us with timely information on the planned visits. To encourage business organizations and companies to engage proactively in the peer review process, we also call upon the OECD to prepare a short guidance on what is expected from participants and the nature of the discussions, including on the level of confidentiality of the information provided by participants.
How could foreign bribery awareness raising, and training actions be further addressed?

The Recommendation should specifically underline the importance of reasonable funding by governments, adequate conditions for public officials, and educational measures at the national and local levels. Governments need to have adequate budgets in place to improve compliance in the public sector, customs authorities and training of public officials in general. We also need to invest in increased cooperation among government agencies to facilitate information exchange, timely access to information and a multi-disciplinary approach. International cooperation in foreign bribery is essential.

Education and training should be supported to build capacity, foster a culture of integrity and promote knowledge sharing between institutions and stakeholders. This would include education and training of future and current managers, engineers, government officials and civil society leaders through short-term and long-term courses. For this purpose, templates for workshops/trainings could be developed, based on lessons learned. International assemblies and platforms for discussion between the stakeholders should also be promoted.

What recommendations could be envisaged to address issues related to foreign bribery, concerning for instance the demand side of bribery or the bribery of officials from sports organizations, bearing in mind the specific focus of the Anti-Bribery Convention and the work carried out in other fora on these issues?

The fact that the OECD Convention has a specific focus does not mean that the Organization should not expand its work bearing in mind that to effectively combat corruption both the supply and the demand side of the equation must be addressed. In fact, we believe that the OECD is ideally suited to do so, which has also been highlighted by the Secretary General’s high-level advisory group on anti-corruption and integrity, which underlined the need to address the demand side.

Further guidance is needed on what public authorities can do internally to prevent bribery. Concrete action is also needed to address difficulties for firms to communicate solicitation to reduce and ultimately eliminate facilitation payments. Building on the initial deployment and experience of a High-Level Reporting Mechanism in some countries, the Recommendation should help encourage setting up similar schemes in other countries.

Among others the following elements should be reflected:

- **Prevention:** Increasing awareness and competencies of government officials, and mechanisms that minimize interactions with government officials for routine transactions, i.e. e-government, reduction of timelines for completion of transactions, streamlining of the number of public authorities involved in one transaction, introduction of single window systems, effective trade facilitation systems, etc. This should also include developing templates for workshops/trainings of civil servants and government officials, including lessons learned sessions and show cases of past infringements as well as methods to prevent them.

- **Reporting:** While a lot of discussion has focused on whistleblowing lines in companies, there are only few whistleblowing possibilities for companies that detect problematic situations. The Recommendation should not only call for the implementation of reporting systems in companies’ compliance systems, but also for high-level reporting mechanisms as a tool for companies to rely on when faced with bribe solicitation including in the area of public procurement. This process allows companies to report quickly and effectively on bribe solicitation to a dedicated and high-level institution that is tasked with
responding swiftly and in a non-bureaucratic manner. Reporting Mechanisms should be secure, data privacy compliant and fast. Keeping the identity of the reporting person confidential and protected is crucial. The reporting person, if acting in good faith, should be in no danger of unlawful retaliation.

- Collective action: We need a coordinated approach to enforce better governance. An effective means of addressing the demand side of bribery transactions would be collective action between governments and the private sector in several areas: a) codes of conduct for public and private employees to prevent the solicitation and payment of bribes; b) clear guidance on regulations governing business operations, in order to eliminate ambiguity in interpreting regulations, and c) projects focusing on improving the regulatory environment to do business, elimination of facilitation payments and d) closer linking of internal company processes and applications with control instruments of the organization.

We also underline the importance of seeking coherence with the OECD guidelines and standards for public sector integrity. Contrary to the anti-bribery instruments, these standards do not create legally binding obligations and do not require formal peer-review monitoring to ensure their implementation and enforcement. The Recommendation should underline the importance of public sector integrity policies and make a link to work in other parts of the OECD. Guidance on public sector integrity should be given additional weight and be subject to regular monitoring.

How could the Good Practice Guidance on Internal Control, Ethics, Compliance annexed to the 2009 Recommendation be revised to reflect evolving global standards?

We have underlined the importance of recognizing corporate compliance efforts when awarding public contracts and when imposing sanctions for breaches. For this it is essential that there is a common understanding of what a good ethics and compliance program entails.

The 2009 Recommendation “Good Practice Guidance on Internal Controls, Ethics and Compliance” provides a useful overall framework for a risk-based ethics and compliance program. The Guidance should be updated to ensure a holistic and comprehensive approach and should take into consideration relevant standards and accepted best practices which have been developed since 2009, including the work of the G20-B20 process.

While recognizing that the guidance is meant to be broad to fit the considerations of different sizes of companies and sectors, it would benefit from further guidance on how to put in place an effective program (e.g. how to put the “tone from the top” into action and ensure the relevant procedures are understood by all employees and relevant business partners, how to ensure accessibility of information on the program, how to apply ethics and compliance programs to business partners, communication and training to ensure the necessary skills are available, the link between compliance-driven behavior and human resources policies, etc.). This should also help to avoid the unnecessary proliferation of many local regulations or guidance and provide further clarity.

Implementation of internal reporting channels (whistleblowing-systems) should be recommended. Internal reporting channels should be secure, data privacy compliant and fast. Keeping the identity of the reporting person confidential and protected is crucial, and the reporting person, if acting in good faith, should be in no danger of unlawful retaliation. To prevent abuse of reporting mechanisms, there should be no financial reward using the reporting mechanism, except leniency effects. Recommendations with specific proposals should be published on how to clearly communicate reporting channels, how to ensure the protection of reporting persons, how to ensure confidentiality of identity, which measures
would be considered as retaliation and how to prevent such measures. Such Recommendations should consider the financial and other resources of SMEs and adapt requirements accordingly to lessen the burden on SMEs.

Regarding Annex II A) a risk-based due diligence should be recommended pertaining mergers and acquisitions. In A) 6) it should be clarified, that “appropriate and regular oversight of business partners” means continued monitoring for the time of the business relationship. Number A) 7) should be clarified by stating “books, records and accounts have to be maintained in a way reflecting transactions and dispositions accurately and fairly in reasonable detail.”

**What recommendations could be envisaged to address the issue of incentivizing anti-bribery compliance?**

Companies’ investment in compliance systems, substantial support to collective action projects, companies’ efforts of cooperation to prevent bribery by employees, companies’ pursuit and punishment of wrongdoers, self-disclosure and full cooperation with governments in investigations should be considered as mitigating factors in case companies face penalties.

**What recommendation could be envisaged to address awareness-raising?**

Education, training and awareness-raising should remain a key priority to foster a culture of integrity and promote knowledge sharing. This would include education and training of current and future managers, engineers, government officials and civil society leaders, SMEs, but also capacity building campaigns in emerging and developing countries. The recommendation should also call for public-private partnerships and increased dialogue to address corruption risks.

**What recommendation could be envisaged to address the issue of voluntary self-disclosure?**

As highlighted by the 2017 OECD study on the Detection of Foreign Bribery, self-reporting or voluntary disclosure is a major source of detection as 23% of the foreign bribery schemes that have resulted in definitive sanctions since the entry into force of the OECD Anti-Bribery Convention were detected via self-reporting. This underlines the importance of further supporting voluntary self-disclosure by fostering international coherence and certainty.

The recommendation should call upon adhering countries to harmonize their administrative and legal approaches to self-disclosure of compliance breaches, recognize effective reporting (in their own and other jurisdictions), and support adequate self-cleaning. This involves among others aligning laws and regulatory requirements that strengthen voluntary self-disclosure mechanisms through reduced penalties and recognize self-cleaning efforts after misconduct has been detected and remediated, for example, by allowing them to be reconsidered for inclusion in public tenders.

**What steps could the Working Group take to further appeal to key non-members to adhere to and implement the Anti-Bribery Convention and related instruments?**

The fact that several major economies are not yet parties to the Convention undermines the efforts to create a level playing field for international business. The OECD should therefore use its well-established cooperation with key partners to bring them closer to OECD policy standards, involve them in discussions and capacity building programs, with the ultimate objective to work towards their adherence to the Convention to ensure a global level
playing field. The G20 process, in which the OECD is actively involved, should be used to encourage the adherence of G20 countries that are not yet part of the OECD Convention. Non-members should be offered assistance regarding the implementation of individual aspects of the Anti-Bribery Convention. This should include among others publishing sample texts in the different national languages of key non-members on a website, providing material for aspects of a basic implementation, etc.

**What steps could the Working Group take to enhance cooperation with international organizations, non-governmental organizations and the business community?**

Business at OECD (BIAC) is the official advisory body of business to the OECD, representing over 7 million companies across sectors, both large and small from OECD countries and beyond. We appreciate the opportunity to participate in the consultations with the Working Party on Bribery and thank the Secretariat for the constructive engagement process. To further improve our cooperation, the Working Party could consider sharing strategic papers and studies of the Working Group early in the process to allow us to help shape them as they are being developed.
Ethics and Compliance Management and Consulting (ECMC)

1. Introduction

Herewith you find the response of ECMC (Ethics & Compliance Management & Consulting) to the OECD consultation on the review of the 2009 OECD Anti-Bribery Recommendation.

It has almost been 10 years since the 2009 Anti-Bribery Recommendation was launched and the OECD Working Group on Bribery thought that it was time to review it. Hoping that this would benefit the review, the Working Group has asked the view of major stakeholders in the fight against foreign bribery. The consultation document contains just over 50 questions to these stakeholders.

ECMC has been founded in 2016 by Geert Vermeulen, who is still the CEO and sole owner of the company. ECMC provides ethics & compliance training, education, consulting services and interim ethics & compliance management. Within the broad area of compliance, ECMC is specialized in establishing and improving anti-bribery and corruption programs.

Geert Vermeulen has been working in regulatory compliance since 2002. In 2007 the company, where he was working, disclosed that it was being investigated in multiple jurisdictions for possible violations of anti-corruption laws. Geert coordinated the investigation into the past in 60 countries in Europe, the Middle East and Africa (EMEA) and at the same time also launched an anti-corruption program in this region, in close cooperation with corporate headquarters. When the company reached settlements with the US Department of Justice (DoJ), the US Securities and Exchange Commission (SEC) and UK Financial Services Authority (FSA), their compliance program was labelled as ‘best in class’ by the authorities, who recommended that other companies would implement a similar program. Since that time Geert has been speaking, teaching and writing on anti-bribery and corruption. See the website of ECMC for an overview: www.ethicscompliancemc.com.

ECMC is committed to fight bribery and corruption and therewith improve the lives of people. The main perspective of ECMC is the perspective of the ethics and compliance practitioner. The response of ECMC will therefore focus on a limited number of questions. We will start by answering question GQ1 about the effectiveness and implementation of the recommendation. We will then make a few suggestions in respect of the regulatory framework in paragraph 3 and on the enforcement practices in paragraph 4. In the following paragraphs we will discuss Speak-up procedures, Ethics & Compliance Programs, Culture and Behavior and the Governance of the Ethics & Compliance function. We will conclude with a couple suggestions in respect of some of the other questions and a Summary. For most of the recommendations we will indicate to which questions from the consultation document this recommendation relates to.

2. OECD Accomplishments

In our view the OECD has played a pivotal role in combatting bribing and corruption. The year-on-year progress may look incremental, all the small steps combined make a huge difference in the time period since 1997, when the OECD Anti-Bribery Convention was launched.
With all the bribery and corruption cases that have come to light lately, some people have argued that the situation only has become worse in recent years. And though some signals are rather mixed \(^1\) in our view anti-bribery and corruption laws have become better in recent years \(^2\) and are also being enforced better \(^3\). This combined with the increased transparency as a result of whistleblowing, investigative journalism and the pace with which large amounts of information travel around the world nowadays, also due to social media, it may very well be the case that the situation has not become worse but that more bribery and corruption cases are being exposed that in the past may just have gone by unnoticed.

The consistent follow-up by the OECD Working Group on Bribery through country reports, emphasizing the importance of a proper legislative framework and the enforcement of the laws, made a big difference. But perhaps the biggest benefit lies within bringing national prosecutors together, creating mutual trust between them and finding ways to exchange information faster and to conduct joint or parallel investigations. In recent years we have seen an increasing number of joint investigations and multi-jurisdictional settlement agreements.

In a yet unpublished article, Mark Pyman and Brook Horowitz conclude that in Latin America in the 1980s ‘only’ 30% of heads-of-state were prosecuted for corruption. By the 2000s, that had risen to 61%. So far this decade, 10 out of the 11, or 91% of the presidents elected since 2010 who have finished their mandates, either have been, or are currently being, prosecuted for corruption. This is a most remarkable development. The events in Brazil for example have been breath-taking and the Odebrecht case has now spread all over the continent, causing other Latin American countries to start prosecuting many of their higher (former) government officials.

In The Netherlands, the country where ECMC is established, bribes paid abroad could still be deducted as a legitimate business expense 20 years ago. In several steps the legislation in The Netherlands has been tightened, so companies can now be fined up to 10% of their global revenue plus forfeiture if they pay a bribe and there are maximum jail sentences of 4-6 years for bribery and corruption. Ten years ago, the Dutch public prosecutor lacked the resources, knowledge and expertise to prosecute bribery and corruption cases. That situation has changed dramatically. Since 2016 over 100 people are working at the public prosecutor’s office on prosecuting money laundering and corruption cases. In addition, some 60 people are working full-time investigating bribery and corruption cases in the Expert Center on Corruption at the Dutch tax services. And this has paid off. In recent years

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\(^{1}\) The EY 2017 Global Fraud Survey found for example that 42% of the CFO’s would justify unethical behavior in order to meet financial targets and the EY 2018 Global Fraud Survey found that people under 35 are more likely to justify fraud or corruption in order to meet financial targets or help a business survive an economic downturn. That doesn’t sound very promising for the future. If you compare the 2018 survey to the 2012 survey, it appears that around the same percentage of respondents think that bribery and corruption occurs widely in their country (38-39%) and around 13%-15% of the interviewees are prepared to make cash payments in order to obtain or retain business when helping a business survive an economic downturn. A survey of law firm White & Case in 2018 revealed that 40% of employees from legal/compliance departments indicated that they had felt pressure to approve the engagement of a third party despite bribery and corruption red flags. These statistics show that improvements still need to be made.

\(^{2}\) Think for example about the Brazilian Clean Companies Act and the French Loi Sapin II

\(^{3}\) We are not able to provide empirical evidence for that statement here, only anecdotally. See also the description of the situation in Latin America a bit further in this article.
there have been a number of multi-million dollar settlements in The Netherlands with companies like Ballast Nedam, KPMG, SBM Offshore, ABN Amro, VimpelCom, Telia, Pon, Peugeot, Renault, Engie and ING Bank. And it looks like this is just the start. Apart from that more than 35 individuals have been sentenced to jail for bribery or corruption on an annual basis in recent years.

So, in respect of question GQ1 we would say that the 2009 Anti-Bribery Recommendation has had significant positive effects in some countries. At the same time, some of the other OECD Member countries and signatories to the Convention have remained rather passive in the enforcement area and even in the countries that have actively been prosecuting bribery and corruption, things can still be improved.

Perhaps some naming and shaming could work here. **In order to stimulate Member countries to follow the recommendations we suggest to publish country rankings on how well countries are following the recommendations. And as no country wants to be at the bottom of the list, this should stimulate them to take a more active stance.**

This suggestion is an answer to question GQ2.

3. Regulatory improvements

As we are not legal experts, we only want to highlight a few matters in this section and leave the other discussions to the lawyers. The suggestions in this paragraph are our answer to question 9 of the consultation: What recommendation(s) could be envisaged to further enhance the effectiveness of foreign bribery enforcement?

To prove that bribery or corruption has taken place is sometimes quite difficult for the public prosecutors. People usually try to hide these practices and therefore it is often difficult to prove, beyond a reasonable doubt, that somebody obtained a business advantage because they offered, promised or gave something of value.

The US and the UK have both developed mechanisms that make it a lot easier for prosecutors to go after bribery and corruption. The US put in place the ‘accounting and internal controls’ provision of the Foreign Corrupt Practices Act (FCPA), that effectively lowers the bar when providing evidence. If a company has made a suspicious payment, that may have been a bribe payment, one can argue that the internal controls of the company did not work, otherwise the suspicious payment would not have been made or the company would have been able to provide a valid reason for the payment. In popular language: if a payment cannot be sufficiently explained, the FCPA has been violated.

The UK introduced the ‘failure to prevent bribery’ offense. This also lowers the bar for the prosecutors when they have to provide evidence. They don’t have to prove anymore that a bribe was paid, they only have to prove that a company took insufficient measures to prevent that bribes could be paid.

We consider these types of approaches to be best practices and wished that other countries would adopt similar legislation. We have seen a couple cases where presumably corrupt payments have been made, that could be prosecuted under the UK Bribery Act, while it would have been very difficult to prosecute these cases under the previous UK legislation.

**In our view, the OECD should encourage the signatories to the Convention to adopt similar legislation as the UK ‘failure to prevent bribery’ offense or the US ‘accounting and internal controls’ provision that effectively lower the burden of proof for the prosecutors.**
This suggestion not only answers question 9 but also question 36 on the enforcement of false accounting offences and accounting requirements. The suggestion here goes beyond the OECD recommendation that penalties should be set for falsification of the books and records. What we suggest here is that, if a company can not sufficiently explain why a certain payment was made or why it had to be this order of magnitude, the authorities can argue that the internal controls of the company were not working properly, which is a bribery and corruption offence.

We would also like to discuss the extraterritorial reach of the anti-bribery legislation. Both the US FCPA and the UK Bribery Act have an extraterritorial reach, in the sense that, when the US or the UK has jurisdiction over the head-office of an organization, this company can be prosecuted when it pays a bribe anywhere else in the world. In The Netherlands, the public prosecutors can not prosecute the Dutch head-office of the company, if one of the independent local subsidiaries pays a bribe abroad and the Dutch head office has not been involved in that. This does not only apply to The Netherlands, but to most OECD Member countries. The line of reasoning behind that is, that these bribe payments should be prosecuted locally, in the countries where the payments were made. In theory that sounds reasonable and fair. However, in practice this often doesn’t work, as these payments are often made in jurisdictions with a weak legal framework, where bribery and corruption are often not or hardly ever prosecuted.

If the payment of bribes in foreign countries goes unpunished, this can lead to a practice where companies tell foreign subsidiaries between the lines, without giving explicit orders, that they should pay bribes if this is necessary to obtain the business as long as they don’t tell the head office about it. This goes something like: “This is your target, you need to make sure that you meet your target, otherwise you will be fired. Don’t tell me how you do it, because I don’t care how you do it, as long as you do it”.

Therefore, our proposal would be that laws should ensure that the head-office of a company can be prosecuted in the country where it is situated if one its subsidiaries abroad pays a bribe.

That may mean that there has to be more cooperation between the prosecutors of the various countries who claim jurisdiction, but this is a process that is becoming increasingly more common anyway. We will come back to international cooperation in the next paragraph.

A positive side-effect could be that countries may be more inclined to investigate bribery and corruption that took place in their country, when other countries start investigating these cases.

As the final, and probably the most important, topic in this paragraph, we would like to raise the issue of individual liability of the top-management in case they have not addressed the bribery and corruption risk properly. We will illustrate this with two anecdotes.

In the first case we tried to convince the CFO of a multinational company that the company should invest into conducting third party due diligence. When we were asked why the company should dedicate money to that, we responded by saying that this would reduce the bribery and corruption risk and therefore also reduce the risk of being prosecuted by the authorities or getting involved in lengthy settlement negotiations with a government, causing legal and investigative costs and a lot of valuable management time wasted on problems. We added that this was also the right thing to do and could prevent reputational damage to the company and to the CFO. The next question we received was, how many CFO’s had gone to jail in the country for failing to invest in a due diligence program. We
had to admit that no CFO ever went to jail for that. The conclusion of our discussion was that no investments were made into third party due diligence.

In the second case, external counsel had convinced the CFO of a US company that the CFO could be held personally liable because the CFO had signed the ‘in control’ statement under the Sarbanes Oxley legislation. Investigations had revealed that suspicious payments had been made, that apparently the internal controls had not been working and as the CFO had signed the ‘in control’ statement, the CFO could be held personally liable under the Sarbanes Oxley legislation. The outcome of this discussion was that the CFO granted the compliance department an unlimited budget to fix the problem. We find it remarkable by the way that the described scenario has never occurred so far.

We hope that this anecdotal evidence makes it clear that personal liability is a game-changer and we recommend that countries introduce something like the senior managers regime in the UK financial services industry, where a senior manager is appointed who ‘owns’ a certain risk, like e.g. the bribery and corruption risk. This person can then be held personally liable in case bribery or corruption takes place and the senior manager had not taken sufficient measures (adequate procedures/controls) to prevent that.

Also, in some cases multinationals have paid major fines, while there were no consequences for the top-management, under whose watch the corrupt practices took place. The general public does not understand why this should be the case; it generates a lot of public anger. It creates the impression that top managers receive the benefits of unethical behavior in the form of higher performance-related bonuses, while there is no downside if they get caught.

So our suggestion would be: **have a senior manager, preferably an executive board member, sign a statement confirming that the organization took adequate measures to combat bribery and corruption, and hold this individual personally liable in case this appears to be incorrect.**

### 4. Enforcement practices

At ECMC we endorse out-of-court settlements, as this saves both the organization, that is under investigation, and the authorities a lot of time and money that can then be dedicated to other, more productive activities. However, there should also be some checks and balances, ensuring that the outcome of the settlement is not arbitrary and in line with what the outcome would be in case of a full prosecution.

**Therefore, we suggest that out-of-court settlements are marginally checked and approved by a member of the judiciary.**

This suggestion is our answer to question 14 regarding non-trial resolutions.

These out-of-court settlements should also have a deterrent effect. It always helps if the general public is informed that companies and/or individuals have been fined, so they know that these crimes do not go unpunished. **Therefore we recommend that settlements are published, together with a statement of facts and the reasoning behind the nature and magnitude of the fine.** This suggestion is our answer to question 17 of the consultation document regarding publicity of sanctions.

No matter how good your anti-corruption compliance program is, there is always a chance that some bad actor decides to pay a bribe anyway. It is not possible to design a program that provides a 100% guarantee that no corrupt payments are made or accepted. In order to
ensure that justice is done, it would make sense that organizations self-report violations of anti-bribery and corruption laws that they discover, e.g. through internal investigations. However, many organizations don’t do that. One of the main reasons for that is that they find it difficult to calculate the benefits of self-reporting. And if they try to make a calculation, the outcome would many times be that not reporting is likely to be cheaper. We should change this equation.

As ethics & compliance practitioners, I think it would also help if companies can obtain some kind of benefit in case they implement a thorough anti-corruption compliance program.

Therefore, we think that companies who have implemented an adequate anti-bribery and corruption compliance program and who voluntarily self-disclose violations of these laws, should receive a benefit that they can calculate. This could be a declination of prosecution or some other kind of benefit. It should change the likely result of a calculation in such a way, that companies will be encouraged to self-report and put a proper compliance program in place. And it should help to ensure that guilty individuals will be prosecuted by the authorities and not be able to continue their illicit practices at another company. We noticed that in countries where companies receive credit for putting in place adequate anti-corruption programs or where they can be punished if they don’t, the anti-corruption compliance programs are moved to a higher level within one or two years.

Therefore, we recommend that organizations should receive credit for voluntary self-disclosures and for putting in place adequate anti-bribery and corruption programs. They should be able to calculate how much credit they will get for the self-disclosure and for their ethics & compliance program.

This is also our answer to question 8 of the consultation on the topic of incentivizing anti-bribery compliance, question 19 on the issue of mitigating circumstances and question 31 on voluntary disclosures.

Another initiative that may shift the balance in favor of self-disclosures could be the temporary suspension from public advantages if organizations do not self-disclose while they were aware of the corrupt practices.

Temporary suspensions can also be imposed automatically if an organization loses a bribery case in court. This suspension can be set for a certain period of time (e.g. 1-5 years) and be lifted on the condition that a monitor has confirmed that the organization has put an adequate ethics & compliance program in place.

This is our answer to questions 39 and 40 about the suspension from public advantages. Note that the US, the World Bank and a few other development agencies already have similar procedures in place and this has indeed stimulated organizations to put ethics & compliance programs in place.

Finally, we notice in practice that it takes the authorities a lot of dedicated resources, knowledge, expertise and skills to investigate and prosecute bribery and corruption cases. The countries who have been the most successful in this, have established specialized units who take care of this, like the Fraud section of the US DoJ, the UK Serious Fraud Office, the Dutch Center of Expertise at the tax service (the FIOD), the KPK in Indonesia and the anti-corruption commission in Thailand (the NACC). Therefore, we recommend that the OECD encourages Member countries to establish a specialized unit and/or a center of expertise for investigating and prosecuting bribery and corruption cases.
This recommendation should also be seen as an answer to question 9 on the effectiveness of foreign bribery enforcement.

In the previous paragraph we indicated that multi-jurisdictional prosecutions are happening more and more often. For a company this is complicating factor, as they have to negotiate with multiple authorities about a settlement. Companies would like to settle with as many jurisdictions as possible at the same time. It also doesn’t help if a company gets 3 different monitors from three different countries for example, who may all have a different view on a situation. The only people who benefit from that situation are the monitors. And will organizations still be inclined to self-disclose, if they may get a declination from two countries and a fine of up to 10% of the revenue from the third country that may also have jurisdiction?

Therefore, we recommend that the OECD encourages Member countries to better coordinate multi-jurisdictional investigations and/or to create a coordinating mechanism.

This may be considered our response to question 18 about cross-border corruption cases.

Some scholars regularly plea for establishing a global anti-corruption court. This may be a good idea in theory and in the long term, but we doubt whether this is feasible in the current political landscape.

5. Speak-up procedures and other reporting channels

The 2009 Recommendation states that Member countries should ensure that easily accessible channels are in place for the reporting of suspicious acts and that the Member states should encourage companies to provide reporting channels for communication by, and protection of, persons not willing to violate professional standards or ethics and who are willing to report breaches of the law or professional standards.

Many major scandals have come to light recently through these persons, who we usually call ‘whistleblowers’. At ECMC we prefer to call them ‘reporters’. The two most important factors that hold people back from submitting a concern or a question are the fear that nothing will happen with their report and the fear of retaliation. This is not without a reason; there is some evidence that more retaliation takes place towards reporters than in the past4. Some people who exposed scandals are consecutively fired, demoted or even prosecuted by their organization for exposing confidential information. More and more countries have realized that this is not in the public interest and they are currently adopting laws to protect whistleblowers. The EU recently adopted an EU Directive to that effect, for example. Another effective way to take away the fear of retaliation is to create channels that facilitate

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4 In a recent blog post Matt Kelly indicated that, based on the 2019 Hotline Benchmark Report of Navex Global, over the last two years the retaliation against whistleblowers seems to have risen with 27%. See: http://www.radicalcompliance.com/2019/04/05/hotline-metrics-are-you-missing-any/. Research of ECI in 13 countries shows that 36% of the reporters indicate that they feel like they experienced some kind of retaliation. In the US this percentage rose from 22 to 44% between 2013 and 2017. The likelihood of retaliation was higher if the report concerned the behavior of a more senior manager. See: ECI (Ethics & Compliance Initiative), “2016 Global Business Ethics Survey, Measuring risk and promoting workplace integrity”, 2016, ECI, “The state of ethics and compliance in the workplace, Global Business Ethics Survey”, March 2018 and ECI, “Interpersonal misconduct in the workplace, What it is, how it occurs and what you should do about it, Global Business Ethics Survey”, December 2018
anonymous reporting. After all, if you don’t know who made the report, you can’t retaliate against the person. However, anonymous reporting is usually not stimulated by the Member countries.

Therefore, our suggestion is that countries encourage the establishment of anonymous reporting mechanisms or speak-up procedures for persons who would like to report a violation of the law or other unethical business practices within their organization and, if their concerns are not addressed properly by their organization, also to their government and/or to journalists.

This recommendation is also our answer to question 29 on how to further strengthen whistleblower protection.

6. Ethics and Compliance Programs

This paragraph and the following paragraphs should be considered to answer question 7: How could the Good Practice Guidance on Internal Controls, Ethics, and Compliance annexed to the 2009 Anti-Bribery Recommendation be revised to reflect evolving global standards?

When reviewing the Good Practice Guidance on internal controls, ethics and compliance of 2010, we noticed again how good and comprehensive this guideline is, even though it is already 9 years old, relatively short, and a lot of things have happened in the compliance community since then.

Section A5 and A6 of the Good Practice Guidance mention a number of areas that ethics and compliance programs should address in order to prevent or detect foreign bribery. We suggest to add three extra areas:

- Hiring processes,
- Managing conflicts of interests and
- Procurement processes

Controls on hiring practices are relevant for a number of reasons:

- To ensure that a company hires employees who will commit to the values and policies of the organization, who fit within the company culture (see the next paragraph) and who have a good track record in respect of ethics and compliance.
- In recent years a number of financial institutions have settled FCPA cases with the US authorities because they had offered jobs or internships to family members of government officials, in order to obtain or retain business from these government officials. Better controls in the hiring process could have prevented this.
- We have also seen cases where a company hired (interim) managers, who in turn hired other people on behalf of the company, asking a kickback of these people in return. These types of schemes are quite difficult to prevent. However, it would help if the HR department would be actively involved in the hiring process ensuring that the best person is selected for the job and not the person who pays a kick-back.

The other control that we are missing are procedures in order to manage potential conflicts of interests. This control should for example prevent the following types of practices:
An employee gives benefits to family members or friends in a corrupt way, like a job in the hiring process, the award of a tender in a buying process, or a cheaper price or other favorable conditions in a sales process.

Steering business towards a supplier in which the buyer has a considerable ownership share. Or giving more favorable conditions to a client in which the sales person has a considerable ownership share.

An executive director who arranges that his or her family or friends are appointed in the non-executive, monitoring body.

Giving a sponsorship or donation to an organization in which the person has a personal interest, for example because he or she holds a position in that organization.

As you may have noticed, some of the practices listed above relate to the internal controls in the procurement process. In the current guidance, the topic of internal controls is mentioned in paragraph A7, but it is mostly related to financial and accounting procedures. Internal controls in the procurement process are also important in order to prevent corruption. Possible controls in the procurement process could be the implementation of the 4-eyes-principle when procurement decisions are made, transparency towards a broader audience in respect of the procurement criteria and the final award of the tender, let buyers rotate so they don’t develop too close of a relationship with the sellers, separation of duties, independent checks of the invoices, etcetera.

7. Culture and behaviour

This paragraph continues to answer question 7: How could the Good Practice Guidance on Internal Controls, Ethics, and Compliance annexed to the 2009 Anti-Bribery Recommendation be revised to reflect evolving global standards?

The most important development in the compliance profession in recent years has been the inclusion of cultural and behavioral aspects. In the compliance profession we have come to realize that even the best compliance program is useless when the culture of the company and the behavior of individuals is wrong. If the culture is wrong, people will be able to find a way to circumvent the controls. However, if you have a good culture, you may even need fewer controls, as people are automatically doing the right things. At ECMC we think that culture & behavior is the most important element of an ethics & compliance program.

And we are not alone. Establishing a good, ethical company culture has been introduced as a responsibility of the board in an increasing number of corporate governance codes recently. However, so far boards have struggled how to do that. They should be assisted here by the ethics and compliance professionals, who have now fully embraced this topic, a few exceptions aside.

In 2018 the Dutch Compliance Officer Association launched a toolbox for example that contains some 40 tools that Ethics & Compliance Officers can use to influence the culture of the organization and the behavior of individuals, using the latest insights of behavioral science. More in general we have seen a trend lately that psychologists, behavioral scientists, pedagogues and criminologists are joining the compliance profession. We think that this should be reflected somehow in the OECD Recommendation.

Therefore we recommend that more emphasis is placed on the importance of culture and behavior, which is a responsibility of the board but ethics & compliance officers
can assist the board in this respect. Influencing culture and behavior should be listed as an essential part of an ethics & compliance program.

8. The Governance of the Ethics & Compliance function

This paragraph also goes back to question 7: How could the Good Practice Guidance on Internal Controls, Ethics, and Compliance annexed to the 2009 Anti-Bribery Recommendation be revised to reflect evolving global standards?

In item A4 of annex II it is recommended that the oversight of ethics and compliance programmes is the duty of one or more senior corporate officers, with an adequate level of autonomy from management, resources and authority. In the recommendation it is stated that this person should have the authority to report matters directly to independent monitoring bodies such as the internal audit committees or supervisory boards.

ECMC usually advises large organizations to appoint a Chief Ethics and Compliance Officer who is well informed, authorized, relatively independent and has access to sufficient resources. We usually recommend that this person should report directly to an executive director and also have a reporting line to the supervisory board or the audit committee.

Over the past 10 years we have seen that more and more organizations are appointing a Chief Ethics & Compliance Officer, but many of them still report into the Legal function and don’t have a reporting line to the monitoring body. Or sometimes the General Counsel is also the Chief Ethics and Compliance Officer. For small organizations this may make sense, but not for large organizations, as the Legal advice may very well be different from the Compliance advice and we think that boards should hear both.

A common saying in our profession is that Ethics & Compliance Officers should ‘chose their battles’. There is still a fair chance that, if they raise matters that are inconvenient to the management, they will get fired. At the same time most Ethics and Compliance Officers are not seeking some kind of legal protection that would prohibit organizations to fire them, because that may mean that information will be held back from them and they will no longer be considered a ‘trusted advisor’.

Therefore, we recommend that the OECD more strongly recommends that Member countries encourage large organizations, or organizations who face considerable bribery and corruption risks, to appoint a capable, independent, authorized, well-informed and adequately resourced Chief Ethics and Compliance Officer who reports to a member of the executive board and to the monitoring body. For example by adding this good practice to corporate governance codes. The dual reporting line should provide the Ethics and Compliance Officers some protection. And whereas the role of the internal auditor, who should detect misbehavior, fraud and deficiencies in the internal controls, is now commonly described in corporate governance codes, the role of the Chief Ethics and Compliance Officer, who aims to prevent bribery and corruption and other unethical practices, usually is not. We think this needs to change.

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5 We previously made this recommendation in the OECD report ‘Trust and Business, Corporate Governance and Business Integrity, A stocktaking of corporate practices’, OECD, 2015, page 85/86.
9. Research the link between business ethics and financial results

As promised in paragraph 4, we would come back to question 8: What recommendation could be envisaged to address the issue of incentivizing anti-bribery compliance?

Over the last couple of years, we have seen more and more empirical evidence pointing into the direction that companies with ethical business practices also perform better financially in the long term.

This is not a surprise to most Ethics & Compliance Officers. Well managed, values-driven organizations, who have an effective ethics & compliance program and a culture of ethics and compliance are usually less involved in company scandals. This saves a lot of direct costs because they have to spend less money on fines, settlements and legal and forensic support. The management of these companies doesn’t have to focus on problems from the past but can instead focus on the strategy for the future. Clients may be more inclined to buy from a company with a good reputation and talented employees may prefer to work there.

Perhaps even more important, these companies usually have an open and transparent culture of trust. In these types of organizations employees are not afraid to speak up or to come up with ‘crazy’ ideas and share these with their colleagues. This enables these organizations to be more creative, which creates better business results.

Investors are starting to buy in. Larry Fink of BlackRock for example announced in his annual CEO letter in 2018 that “To prosper over time, every company must not only deliver financial performance, but also show how it makes a positive contribution to society”. Yngve Slyngstad of the sovereign wealth fund of Norway said in 2018: "We expect all companies we are invested in to have effective anti-corruption measures in place". And in January 2019 Cyrus Taraporevala, the CEO of asset manager State Street, called upon boards to invest in corporate culture.

**We recommend that the OECD organization conducts more research to check whether ethical business practices and/or investments in a culture of ethics and**

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6 See for example the report “Total Societal Impact” that the Boston Consulting Group published together with MIT end of 2017. Other relevant articles are Kiel et al, “Return on Character: The Real Reason Leaders and Their Companies Win” in Harvard Business Review April 2015 and Stubben & Welch, “Evidence on the use and efficacy of internal whistleblowing systems”, October 2018, that shows that companies who use the speak-up procedure more often perform better financially. The 2016 “HOW” report of LRN comes to the conclusion that values-based organizations have better business results. More evidence can be found on the websites of Trust Across America/Trust across the World (https://trustacrossamerica.com/documents/offerings-companies/2018-Most-Trustworthy-Public-Companies.pdf) and Ethical Systems (http://ethicalsystems.org/content/ethics-pays).

7 Larry Fink, the CEO of BlackRock, in this annual letter to CEO’s in January 2018. See: https://www.blackrock.com/hk/en/insights/larry-fink-ceo-letter

8 See: https://www.thelocal.no/20180213/norway-wealth-fund-tells-companies-to-fight-corruption

compliance lead to better business results, or that the OECD organization makes an inventory of existing studies in order to drive this point forward.

Miscellaneous

The OECD Consultation document contains a few other questions that we would like to quickly address.

**Question 11** for example states: What recommendation could be envisaged on the issue of transparency of beneficial ownership information, given this issue is currently already addressed in other fora? We think that public records of Ultimate Beneficial Owners (UBOs) are a good step ahead in the fight against corruption, despite that there are some genuine concerns in respect of data privacy. At the same time, the effects should also not be over-estimated. Some Member countries are implementing UBO registers at the moment, but the quality of the data leaves much to be desired. This initiative will also only work if it is a global effort. As the document rightly states, there are probably other fora that can address this matter better, like the FATF. Our only suggestion would be that we recommend that the OECD starts an experiment with UBO data in the blockchain. The blockchain may be able to solve the data quality problem. It may also be possible to do some collective screening against terrorist lists, bad news databases, etc. However, the main challenge would still be that the data that goes into the blockchain has to be correct. How does any guarantee that?

**Question 22** is about the steps that the Working Group could take to further address small facilitation payments. The issue of facilitation payments is a difficult and painful one. It is very hard to solve. The OECD has already done some great work in this area by facilitating High Level Reporting Mechanisms and promoting collective action. I think that the OECD should continue to do what they are doing in this respect. The only suggestion that we have here is that companies, who face demands for facilitation payments, should get some more support from the embassy of the country where they are headquartered. In order to do that, the people from these embassies would have to be trained. So our suggestion would be that countries train their embassy staff to help the companies from their country deal with requests for facilitation payments.

**Question 23** is about awareness-raising in the public and private sectors. Our view is that there is already quite a bit of awareness about corruption in the world. In the countries with a bad reputation for corruption, many people consider the payment of (small) bribes/facilitation payments as ‘normal’. It is something that they have been doing all their lives. However, paying bribes leads to sub-optimal economic outcomes. Bribe demands and corruption may also lead to uncertainty, lack of trust in the authorities, unnecessary slowdown of procedures and under-investments in public services like health and education systems. On a macro-economic scale, the economic consequences are huge and you can easily see that when you compare the Corruption Perceptions Index of Transparency International to the average income per person in a country. Therefore the narrative could focus more on the fact that bribery and corruption are holding countries back in their economic development on a macro-level and are harmful to public goods, like the health and education systems and the physical infrastructure.

In some of the countries with a good reputation for corruption the challenge may be that bribery and corruption are not on top of mind and people may not even recognize it when they see it. In countries like The Netherlands and the Scandinavian countries, the corruption
may also take a different shape, like network corruption for example\(^\text{10}\). Apart from writing and talking about this and stressing the topic in country reports, we don’t have good suggestions to address this at the moment.

**Question 27** asks for recommendations to enhance awareness and effective use of reporting channels for foreign bribery. The only thing that comes to mind right now is that **one can make an analysis of where the bribery demands usually take place, and then take targeted action there.** We remember for example that there were huge posters at the airport in Johannesburg calling out the reporting channel in case the entrant to the country was asked to pay a bribe. Or a letter from the authorities in Indonesia to all freight forwarders on how to handle demands for facilitation payments by the customs authorities.

**Question 30** concerns the detection and reporting of foreign bribery under AML requirements and **question 32** is about the detection and reporting of foreign bribery by external auditors and accountants. Accountants and financial institutions are more and more considered to be gatekeepers who should prevent and/or report fraud and financial economic crime. Our view is that we shnot expect miracles from this. Bribe payments are usually concealed and difficult to identify for a single financial institution or accountant. Recently, Geert Vermeulen wrote and spoke on a few occasions on this topic. His view is that the expectations of the role of these gatekeepers are just too high. At the same time, bearing the Danske Bank case in Estonia in mind, **more needs to be done than in the past.** A more basic question is whether this gatekeeper role should be given to commercial organizations. It more looks like a government responsibility\(^\text{11}\).

We know that at this moment EY is being prosecuted by the Dutch public prosecutor. Allegedly they had not reported suspicious transactions in time when they were the external account of VimpelCom. EY does not agree with this point of view and has announced that they will take the case to court to get more clarification on what the external accountant is supposed to see and report. Recently it was also announced that the Danish authorities are investigating EY related to the Danske Bank scandal and KPMG in another money laundering case. At the Danske Bank subsidiary in Estonia, there were more indicators that should have alarmed EY. The Dutch authorities have announced that they are still following up on 7 out of 70 potential bribery cases that were reported to them by accountants. We are curiously following the next developments, but it is still a bit early to draw conclusions. That is, it would be good if other Member countries would also look into this area.

**Question 51** on how the OECD could appeal to the non-signatories to the convention is difficult to answer. Perhaps it would make sense if the signatories of the convention would get more preferential terms from international development banks. But that is probably not up to the OECD to decide.

**Summary**

This summary contains an overview of all recommendations:

- In our view, the 2009 Anti-Bribery Recommendation has had significant positive effects in some countries.

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\(^{10}\) See: Willeke Slingerland, “Network corruption, when social capital becomes corrupted”, 2019.

\(^{11}\) See for example: Geert Vermeulen, “Banken als poortwachters van het financiële stelsel, werkt dat een beetje?”, Tijdschrift voor Compliance, maart 2019 (Dutch language)
In order to stimulate Member countries to follow the Recommendation, we suggest that the OECD publishes country rankings, indicating a percentage of the compliance with the recommendation.

In order to lower the burden of proof for the prosecutors, the OECD should encourage the signatories to the Convention to adopt similar legislation as the UK ‘failure to prevent bribery’ offense or the US ‘accounting and internal controls’ provision.

Another recommendation would be that Member countries adapt their legal framework so they have jurisdiction over the payments that local subsidiaries of a multinational company, that is headquartered in the Member country, even if the head office was not actively involved in making these payments.

We also propose that a senior manager, preferably an executive board member, signs an annual statement confirming that the organization took adequate measures to combat bribery and corruption. If this appears to be incorrect, this board member will be held personally liable.

ECMC supports the use of out-of-court settlements but would like to see them marginally checked and approved by a member of the judiciary.

We also recommend that settlements are published, together with a statement of facts and the reasoning behind the nature and magnitude of the fine.

We recommend that organizations should receive credit for voluntary self-disclosures and for putting in place adequate anti-bribery and corruption programs. They should be able to calculate how much credit they will get for the self-disclosure and for their ethics & compliance program.

If an organization does not self-disclose while they were aware of the corrupt practices, it should be possible to temporarily suspend them from public advantages.

Temporary suspensions can also be imposed automatically if an organization loses a bribery case in court.

The OECD should encourage Member countries to establish a specialized unit and/or a center of expertise for investigating and prosecuting bribery and corruption cases.

The OECD should also encourage or facilitate that Member countries coordinate multi-jurisdictional investigations better and/or create a coordinating mechanism.

Countries should encourage the establishment of anonymous reporting mechanisms or speak-up procedures for persons who would like to report a violation of the law or other unethical business practices within their organization and, if their concerns are not addressed properly by their organization, also to the authorities and/or to journalists.

We suggest to add the following areas that ethics and compliance programs should address in order to prevent or detect foreign bribery:

1. Hiring processes,
2. Managing conflicts of interests and
3. Procurement processes
- More emphasis should be placed on the importance of culture and behavior, which is a responsibility of the board but ethics & compliance officers can assist the board in this respect. Influencing culture and behavior should be listed as an essential part of an ethics & compliance program.

- Large organizations, or organizations who face considerable bribery and corruption risks, should appoint a capable, independent, authorized, well-informed and adequately resourced Chief Ethics and Compliance Officer who reports to a member of the executive board and to the monitoring body.

- We recommend that the OECD organization conducts more research to check whether ethical business practices and/or investments in a culture of ethics and compliance lead to better business results in the long term, or that the OECD organization makes an inventory of existing studies in order to drive this point forward.

- The OECD may want to start an experiment establishing a UBO register in the blockchain

- Countries should train their foreign embassy staff to help companies deal with requests for facilitation payments.
Forensic Risk Alliance (FRA)

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Internal controls

7. How could the Good Practice Guidance on Internal Controls, Ethics, and Compliance (the GPG) annexed to the 2009 Anti-Bribery Recommendation be revised to reflect evolving global standards?

Emphasize the role of third parties in bribery schemes, and provide detailed recommendations for companies to address this threat.

Annex II Section A.6 to the 2009 Anti-Bribery Recommendation briefly mentions the role third parties may play in corrupt schemes. Since 2009, however, enforcement actions have made clear that third parties increasingly are the consistent thread in the majority of corrupt schemes, in particular through joint ventures and co-marketing and co-distribution agreements. The Recommendation should focus on this evolution and give detailed guidance on how to conduct due diligence and, in particular, how to negotiate and enforce audit rights on third parties.

Informing business partners of anti-corruption commitment and seeking reciprocal assurances (Section A.6. ii and iii), while advisable, have proven ineffective in practice. Only the “appropriate and regular oversight of business partners” recommended in A.6.i have proven (in our experience) to discover and dissuade corrupt activities; the Organization should focus its efforts on this aspect.

Anti-bribery compliance

8. What recommendation could be envisaged to address the issue of incentivizing anti-bribery compliance?

Create macro-level incentives for emerging market governments to crack down on corruption

There are limits to the effectiveness of supply-side corporate enforcement and appeals to reputational risk, particularly in emerging markets where corruption risk is often greatest. In these areas, oligarchs, kleptocrats and influential organized crime syndicates are able to limit access to information and eliminate dissenting opinion to the degree that reputational risk, for them, is non-existent.

In this context, developed countries must create more incentives for these markets to combat corruption. At the state level, incorporating transparency and anti-corruption aspects into trade agreements can be an effective tool. For example, member nations can make effective bribery
crackdowns in the commercial sphere a pre-condition to foreign aid. The U.S. government can also pressure major global financial institutions to prioritize corruption policies and controls as part of their mandatory lending analysis. The International Monetary Fund (IMF) is currently modelling this approach in the Ukraine, where $17.5 billion in assistance was recently tied to strict anti-corruption conditions.

Finally, member nations should explore ways to confer preferential treatment in foreign procurement opportunities to companies with strong anti-corruption compliance programs. This approach would align with the policies already implemented in some jurisdictions, such as the Brazil, which requires a compliance program to compete for public tenders.

**Facilitation payments**

22. What step could the Working Group take to further address small facilitation payments?

*Eliminate exceptions for small facilitation payments*

Although many companies have argued that facilitation payments are necessary to conduct basic operations in some regions, the line drawing/definitional problems created by these legal exceptions can do more harm than good. Philosophical issues aside, these legal carve-outs make it necessary for many corporate compliance programs to adopt a country-by-country approach to facilitation payments, which ultimately increases the compliance burden on many organizations. Additionally, the uncertainty and complexity of such an approach can in and of itself lead to a heightened risk of improper payments – either accidentally through confusion over requirements, or intentionally as a result of increased difficulty in monitoring and detection.

As a result, the global trend is to adopt a “golden standard”, and prohibit all facilitation payments. Member organizations should do the same to reflect and support these efforts. Elimination of the facilitation payment exception would benefit corporations due to increasing the clarity and cohesion of global expectations. On a normative level, the OECD would no longer send the message that such payments are acceptable, in clear violation not only of current global legal trends, but the intent of the FCPA and similar anti-corruption schemes. Finally, eliminating the statutory exception would mitigate the economic harms that result from facilitation payments, and ultimately diminish the demand for such payments.

Clearly, enforcement would need to follow any such changes, with its own challenges.

**Media detection and reporting**

34. What recommendation could be envisaged to enhance detection and reporting of foreign bribery by the media?

*Develop a public-private partnership to incentivize and protect journalists investigating corruption*

The OECD should advocate for, or sponsor, a public-private partnership (PPP) to provide a platform for businesses and governments to invest in anti-corruption reform, including whistleblower incentives and protections. Further, current best practices for whistleblower protections, and awards to incentivize whistleblower activity, should be available to investigative journalists in developing or corrupt regions.
In general, a free media with active investigative reporting is an aid to anti-corruption efforts. If the local media are weak and dependent on either the government or wealthy private interests, outside actors should help support any independent outlets and engage in reporting activities independent of local entities. These groups might support and publish well-researched stories by journalists with local access. This could provide a credible platform for journalists to publish allegations anonymously in extenuating circumstances when their safety may be at risk. Equally, it could be a place for whistleblowers to report and could provide protection to those who reveal corruption if that is a risky activity.

The OECD should also seek reform in legal schemes that make it easy for entrenched political interests to attack journalists for “insulting” or libeling the regime. Such a PPP could also assist local media in making more effective use of social media and other outlets, and help members of the public participate in newsgathering and dissemination.

Non-trial resolutions

14. What recommendation could be envisaged to address non-trial resolutions in the enforcement of the foreign bribery offence?

Adopt standards for transparency in settlements, including judicial oversight and publicly-disclosed terms

Principles of limited corporate liability are key to the global economy, and companies have the same right to a trial with the criminal burden of proof borne by prosecutors as individuals do. However, the nearly universal practice of settling civil cases without criminal charges against companies, and the lack of a detailed and explicit recounting of companies’ alleged conduct in enforcement settlements, has obscured patterns of corruptions and the actors that are often involved in corruption. Neither the public, nor companies that are attempting to negotiate the same potentially corrupt marketplaces, are served by this lack of transparency and accountability.

The OECD should consider adopting detailed guidelines for non-trial settlements, including specific descriptions of the architecture of corruption in each enforcement action, including dates, the names or descriptions of key players in corrupt schemes and, importantly, a detailed summary of how the monetary amount of a settlement was reached, and how it is proportionate to the corruptly-obtained profit or corrupt conduct.

Role of external auditors

3. What recommendation(s) could be envisaged to:

- Enhance detection and reporting of foreign bribery by financial and non-financial professions subject to AML requirements?
- Address the mechanisms of detection of foreign bribery by FIUs?
- Address access by law enforcement authorities to information held by financial institutions relevant to foreign bribery enforcement?
  a. Encourage reporting of potential corruption by auditors
Rarely are bribery and corruption identified/reported by auditors, who may not see it as clearly stated role to report on suspicions of bribery. It should be clarified that auditors who have a reasonable suspicion that their client has been involved in a corrupt scheme, should have a duty to report such suspicions through the same channels as suspicions of Money Laundering, with the same duties and protections. This would be a separate obligation to AML.

This would not change the role of the auditor to that of an investigator, but would mean that auditors should have sufficient experience and the understanding of their client’s business to enable a material bribery scheme to be identified, by undertaking such enquiries and testing as appropriate.
International Chamber of Commerce (ICC)

ICC Contribution to the public consultation on the Review of the OECD Anti-Bribery Recommendation

ICC appreciates the opportunity given by the OECD Working Group on Bribery (WGB) to provide input on the Public Consultation Document.

ICC has long placed high importance on the work performed by the OECD on matters of integrity and in particular on the outstanding work produced by the OECD Working Group on Bribery.

The ICC Commission on Corporate Responsibility and Anti-corruption, successor to the ICC Anti-Corruption Commission, has reviewed the questionnaire provided with the Public Consultation Document and submits to the OECD replies and information deemed of particular importance for business and for the furtherance of greater integrity in the business world.

General Questions for Consultation

General Question 1

The OECD Convention is a milestone in anti-corruption and has undoubtedly marked a point of no-return for business integrity. The OECD 2009 Anti-Bribery Recommendation has reinforced this result.

Although corruption has not disappeared, one may state with certainty that anti-corruption efforts are widespread now, and that must be considered as one of the most remarkable results of the OECD anti-corruption legal instruments.

Progress on implementation of the OECD Convention and Recommendation progress remain slow, however, with a number of member countries enforcing too little. Also with regard to other aspects, such as communication and training and effective protection of whistleblowers, more progress needs to be made.

Indeed, we note a gap in the implementation of the OECD Recommendation from one country to another. While many western companies are making strong efforts in order to rigorously comply with the OECD rules, it is not always the case for companies headquartered in many other regions. There is a risk that this discrepancy would in the end severely penalize some of the more ethical companies. Therefore, we consider it a priority for the OECD to further promote the implementation of the current Recommendation in every State Party.

Indeed, challenges to implementation of the OECD Convention and Recommendation include difficulties in identifying cases, different liability regimes, legal obstacles to information exchange among countries, and lack of incentives for companies to self-report.

It is further noted that twenty-one Parties to the OECD Convention have not yet sanctioned foreign bribery, which indicates the need for stronger efforts by the WGB in this matter. It is crucial that the effort to combat foreign bribery takes place in all the WGB Parties and thus create a better scenario for international business around the globe.
Another issue is the problem of the flow of information between demand-side and supply-side authorities. It is noted in the OECD Consultation Document that "none of the demand-side countries detected the bribes involving their public officials through formal or informal communications with the supply-side enforcement authorities". The problems for supply-side authorities to become aware of transgressions committed abroad by domestic companies are also no different. Consequently, it would be appropriate for the WGB to improve and monitor the mechanisms for exchange of information among countries.

**General Question 2**

Monitoring is essential and gives the Convention and the Recommendation a unique role among international instruments.

One may enhance the progress and make the reviews more efficient by considering making annual public reporting by the countries on their achievements and progress mandatory.

The OECD Working group on Bribery might also consider providing experts, businesses and NGOs an earlier notice for their on-site monitoring visits, so as to give these stakeholders a longer preparation time for the often very precise questions the monitoring countries and the Secretariat will ask.

It should be noted that these stakeholders continue to be very interested in participating in the monitoring sessions but that they are often taken unawares due to the short time given to them before these sessions.

**Specific questions**

**Q1 – Guidance on foreign bribery offense**

Consideration can be given to further clarification of the language of Article 1 of the Convention and bringing the definitions of OECD and UNCAC more in line.

One can consider distinguishing in a new draft of the Recommendation the difference between what is outright solicitation (including extortion) and the mere suggestion or inuendo of a possible hidden deal. The former is a clear form of crime and has to be dealt with accordingly by the enforcement authorities, while the latter may be brought to the attention of a person, institution or ombudsman designated in the framework of a High-Level Reporting Mechanism (HLRM).

**Q2 – Awareness-raising and training**

There should be more specific recommendations for WGB Countries on training which should subsequently be assessed.

Awareness-raising can the best be obtained through insisting on creating, maintaining and improving constantly in all businesses a solid, sustainable, continuous and realistic ethics and compliance program.

One may refer at this stage to the French Sapin II law which requires companies of a certain size in its section 7 to have an ethics and compliance program meeting certain requirements. If the French anti-corruption agency (AFA) sees that a company fails to put into place a satisfactory program, an administrative fine may be imposed.
The new recommendation could include comparable provisions, particularly as concerns the need to conduct training actions and the designation of an ethics and compliance officer.

An ongoing training program is required for public officials appointed to investigate and punish foreign bribery.

The fact that these transgressions take place abroad, and not in the territory where the supply-side company is headquartered, brings undeniable obstacles to the identification of the cases. In this scenario, the permanent training of the public officials assigned to these functions is essential.

In addition, many public officials are not used to dealing with this issue and have recently been assigned to this role, which makes training even more relevant. It must also be considered that these officials must be ready to correctly recognize and assess all the details of the case and the environment where the offense was committed so that it will be possible to take into consideration any particularity and difficulty faced by the company in a concrete case.

In this way, the WGB should ensure that training is offered by all the Parties to their public officials, making possible the adequate enforcement of the foreign bribery legal provisions.

**Q4 – Demand side**

ICC constantly has insisted on the need to address the difficult question of the demand side. One is aware that criminalization of the demand side is harder to make effective than the criminalization of the supply side.

One is struck by the repeated and strenuous complaints from many ICC members about the harassing demands they receive in many countries and industry segments. Leaving this problem totally unattended is hardly acceptable.

In the field of international public corruption, it would be at least normal, when a case of supply side corruption (so-called active corruption) has been adjudicated in an OECD country or more largely in one of the 44 Parties to the Convention, that an investigation or prosecution procedure be started in the jurisdiction of the person or body, which was at the origin of the bribery demand (so-called ‘passive corruption’). The WGB, which keeps a record of investigations or prosecutions in the OECD zone, could serve as a ‘clearing house’, which would give warnings to the demand side country in question, each time a demand side investigation should be started.

**Q5 – Liability of legal persons**

It is noted that there has been little progress in some WGB countries concerning sanctioning of legal persons involved in foreign bribery. Thus, it is necessary to regularly monitor these countries in the enforcement of foreign corruption provisions, to ensure an adequate and equal enforcement of the law around the globe.

It must be taken into consideration that certain legal frameworks do not admit criminal liability for legal persons. However, this fact, per se, should not be an obstacle to sanctioning legal persons involved in foreign bribery. It should be noted that the administrative system can often be more efficient and faster than civil and criminal procedures.

The continuous monitoring of the WGB Parties where sanctions have not yet been imposed is recommended, to make it possible to understand the obstacles that these countries have been facing.
**Q6 - Enhancing compliance**

The new Recommendation could impose two requirements on legal persons which contract with or intend to contract with intermediaries in difficult or risky circumstances: (i) an obligation to establish at the time of the contract negotiations and to provide in case of an investigation an economically reasoned explanation for the use of an intermediary (such as for instance the absence of any representation in the country concerned, the launching of a new project, while the market concerned is new for the principal...) and (ii) an obligation to establish (again at the time of the contract negotiations and to provide in case of an investigation) a reasoned justification for the quantum of the fee paid or payable to the intermediary (for instance based on hours effectively worked or on a percentage of the turnover obtained).

It is noted that in paragraph 1.2.3. one refers to a possible 'harmonization' of compliance models. We wish to warn against any excessive harmonization in compliance programs. SME's cannot in many circumstances build oversize programs. Harmonization of ethics and compliance programs could bring these companies into problems.

**Q7 – How can the Good Practice Guidance be revised**

The Good Practice Guidance might made more explicit along the lines of the Sapin II law and the Recommendations produced by French AFA. Furthermore, a revised GPD should make clear that this guidance also applies to state-owned enterprises.

**Q8 – Incentivizing compliance**

Develop a Recommendation that leaves the following options to WGB countries to incentivize compliance: either by making compliance systems a partial or complete defense to foreign bribery, or by taking compliance into account when deciding to dispose of foreign bribery charges with a non-trial resolution, or as a mitigating factor at sanctioning.

**Q9 – Foreign bribery enforcement**

Consider making public annual reporting by the WGB Countries mandatory and carry more regular OECD reviews.

It is to be noted that a certain number of countries, which used to consider anti-corruption as a high priority in their enforcement policy, now are considering anti-corruption as a lower degree priority. They should be encouraged to prioritize again anti-corruption by allocating enough resources and personnel and by putting their anti-corruption agency in a high priority place in their public governance organogram.

**Q13 – Independent judiciary**

States need to comply not just with recommendations of the OECD but also with other organizations such as GRECO. The Dutch Parliament is ignoring recommendations of Greco re: independence of judges, as some judges continue to be also a member of the Dutch Senate.
Q 14 – Non-trial resolutions
Recommendations need to provide for clear criteria, clear conditions, transparency and judicial approval. Recommend publication of non-trial resolutions together with all the facts.

Non-trial resolutions are very successful. The countries which use them are in the top list of the best enforcers. For companies, non-trial resolutions can save (management) time, can help improving the company’s integrity practices and culture and give the possibility to move forward without being dragged down by lengthy procedures. The new Recommendation could encourage Parties to the Convention to adopt non-trial resolutions for companies and to use them rather than to bring such instances to the courts.

Qs 15 to 18 - Sanction/double jeopardy
Recognition of the “ne bis in idem” or the double jeopardy principle or at least mandatory consultation between the WGB countries involved so that penalties are considered.

Double sanctioning is seen as unfair by business. Furthermore, sanctions should be dissuasive but should not put companies into danger of bankruptcy.

Q 19 – Addressing mitigating circumstances
Companies expect a real mitigating effect from their genuine ethics and compliance program. They want to see that the enforcement authorities understand that there can be instances which escape any possible control, even well organized.

Recommend developing a clear set of rules like in the US Sentencing Guidelines. The criteria should also be part of a published non-trial solution.

Q 20 – Tax ramifications
No sanction of whatever nature should be tax deductible.

Q 21 – Judicial training
Specialized training of prosecutors and judges is a necessity. One should not forget that the matter of international corruption is still relatively recent and very complex.

Q 22 – Small facilitation payments.
ICC has arrived at the position that small facilitation payments are unacceptable and that it is impossible in an international company to have differentiated commercial policies, with some branches accepting those payments, and others condemning them.

The only exception in this matter accepted in the ICC Rules on Combating Corruption is a threat of physical harm. In the latter exceptional case, the expense should be properly registered in the accounts.
Q 23 – Awareness raising
We need to take stock of the fact that the public sector now is lagging on matters of training. We recommend active information providing and training by WGD countries and close cooperation between the public and private sector. During OECD reviews the achievements of the countries should be carefully reviewed.

Q 24 – Sensitive sectors
Collective action can be of particularly valuable help in fighting international public corruption. OECD has been instrumental in several experiences in this respect and can probably help setting up additional and successful experiences. There again business stands ready to play its part.

Q 27 – Whistleblower protection
Adequate protection of whistleblowers is of the essence. This should not only be legal theoretical protection, but also good effective protection, which is lagging in many countries. A thorough review is desirable.

Q 31 – Self-reporting
The WGB countries should be recommended to develop and publish clear rules and standards so that the benefits and risks of self-reporting are transparent and clear.

Q 41 - Supporting implementation of the 1996 ODA Recommendation
The ODA recommendation should reinforce assessment of the corruption risk posed by a project or an entity receiving the aid and should encourage the development agencies to promote the implementation of compliance programs within the entities receiving the aid.

Q 44 - Mutual legal assistance
The exchange of information among countries is essential in raising awareness of cases of foreign bribery committed abroad. However, the delay in information exchange and the legal obstacles to make it works (such as the different liability regimes to sanction foreign bribery) are relevant challenges.

Thus, the Parties must ensure that all the necessary legislative measures have been adopted to facilitate the flow of information and the sharing of evidence among different authorities. The WGB should make all necessary efforts to facilitate the aforementioned and monitor information request, whenever possible. It would be a good measure to keep a standing committee to work just on this mission.

Q. 48 – Multi-jurisdictional cases
As stated in the Convention (art. 4-3), “when more than one Party has jurisdiction (…), the Parties involved shall (…) consult with a view to determining the most appropriate jurisdiction for prosecution”. What matters is that bribery acts are effectively prosecuted; there is no need for prosecutions by several countries of the same acts. It can put companies in a very difficult situation where cooperation or settlement with an authority of one country may jeopardize the defense of this
company before the court of another country. The recommendation should therefore include mechanisms promoting the effective implementation of article 4-3.
UK Finance

Thank you for the opportunity to comment on the decennial review of the OECD Anti-Bribery Recommendation. We support this form of detailed engagement with the private sector and have taken the opportunity to provide comments from our members’ experience of anti-bribery provisions under general criminal offenses and from financial sector regulation.

UK Finance is the collective voice for the banking and finance industry. Representing more than 250 firms across the industry, we act to enhance competitiveness, support customers and facilitate innovation. This response has been developed by the UK Finance Anti-Bribery and Corruption Panel, with wider member input on anti-money laundering, tax and export credit issues.

Summary of UK Finance suggestions for amending the Recommendation:

- We would suggest amending the Recommendation to provide new Good Practice in relation to incentivising business compliance and cooperation / voluntary disclosure, non-trial resolutions and cooperation in multi-jurisdictional investigations and settlements. We would also suggest amending the Recommendation’s existing Good Practice on compliance and corporate liability to reflect this new Good Practice.

- We would suggest amending the Recommendation in regard to facilitating payments, to encourage Parties to narrow any exemptions to only cover individual safety payments.

- We would suggest amending the Recommendation to encourage Parties to support targeted action against bribe recipients.

- We would suggest amending the Recommendation to provide greater clarity on the compliance expectations of auditors, accountants and lawyers, to support enforcement against corrupt intermediaries and improved reporting of bribery suspicions.

- We would suggest amending the Recommendation to clarify that Article 5 prohibitions should apply to action against bribe recipients and MLA / extradition considerations, but that Article 5 should not prevent consideration of proportionality around non-trial resolutions and public procurement exclusions.

Question 1: What recommendation could be envisaged to provide greater clarity with respect to certain elements of the foreign bribery offence?

16. Clarity could be improved by requesting greater explanation and guidance in Parties to the Convention’s foreign bribery legislation, such as through confirming the coverage of bribes to officials employed by foreign SOEs / SWFs, bribes to influence acts within foreign official duties, and bribes by best-qualified bidders to influence public tenders and private mandates.

17. For example, most corporate mandates or public/private procurement style tenders have criteria that permits judgment or success based on other activity undertaken by the bidder with the tender entity (e.g. demonstrating trust/capability etc.), so influencing a tender or mandate through other independent and distinct work with the entity or SOE, may be acceptable under the criteria of the tender, but there could be a perception of bribery. Clarification would assist considerably on these more complex commercial standard financial institutions’ work.
Question 2: How could foreign bribery awareness-raising and training actions be further addressed?

18. Amending the Recommendation to encourage Parties’ to support targeted action against bribe recipients would help emphasise the seriousness of the prohibition on bribery of foreign officials in relation to transnational business transactions. It would also provide new avenues for awareness raising through partnering and campaigning (e.g. alongside the UN and multilateral development banks).

Question 3: What recommendation could be envisaged to address other defences applicable to the foreign bribery offence?

19. Effective regret/remediation defences recognise the value of business cooperation in the fight against bribery, but this would be enhanced if addressed through a mix of other tools (including corporate liability, prosecution policy regarding the public interest, penalty discount regimes and protocols for non-trial resolutions and multi-jurisdictional settlements).

Question 4: What recommendation(s) could be envisaged to address issues related to foreign bribery, concerning, for instance the demand side of bribery or the bribery of officials from sports organisations, bearing also in mind the specific focus of the Anti-Bribery Convention and the work carried out in other fora on these issues?

20. Amending the Recommendation to encourage Parties to support targeted action against bribe recipients would be a valuable improvement, helping to support business compliance and cooperation as well as improving the global investment climate. Recommendations could seek prosecutions or equivalent administrative penalties of bribe recipients as well as controls over the organisations or public agency by way of remediation. Also see response to question 22.

21. Amending the Recommendation to clarify the required coverage of conspiracy to bribe could also be valuable, helping to level the playing field by simplifying the prosecution of those deliberately using layered intermediaries to distance themselves from a bribery scheme. Also see response to question 6.

22. It would support business compliance and cooperation if the Recommendation was amended in regards of facilitating payments, to narrow the allowance to cover individual safety payments. See response to question 22.

Question 5: What further Guidance on liability of legal persons could be envisaged?

23. The current Good Practice Guide adequately covers the range of effective approaches to corporate liability for bribery of foreign public officials in relation to transnational business transactions.

24. However, it does not capture the importance of non-trial resolutions, which the recent OECD report on the topic has confirmed are used disproportionally by the more effective enforcing Parties to the Convention. Good Practice for Non-Trial Resolutions could support standardisation of
approach, greater enforcement and cooperation across all Parties, as well as supporting business compliance and cooperation.

Question 6: What recommendation could be envisaged to further address the issues of responsibility of legal persons for foreign bribery through intermediaries?

Question 5: What further Guidance on liability of legal persons could be envisaged?

25. Greater clarity on the knowledge standard required for bribery through intermediaries and/or conspiracy could help level the playing field, through ensuring coverage of those seeking deliberately to distance themselves from a bribery scheme, at the same time as supporting efficient and risk-based business compliance. As an example, it is currently unclear how far down the sub-contractor chain a business is expected to apply due diligence, even if the business has contractual anti-bribery controls (including exception reporting and audit rights) that are required to be cascaded to all sub-contractors supporting the engagement.

26. Greater clarity on the compliance expectations of auditors, accountants and lawyers could also be valuable, supporting enforcement against corrupt intermediaries and improved reporting of bribery suspicions. Our preparation of this response to consultation has raised the question of whether there should there be an additional responsibility or legal liability standard on professional advisors, due to their enhanced level of knowledge and responsibility for advising or auditing corporations. Obviously, any such additional responsibility or liability would be subject to any professional privilege restrictions that were relevant.

Question 7: How could the Good Practice Guidance on Internal Controls, Ethics, and Compliance (the GPG) annexed to the 2009 Anti-Bribery Recommendation be revised to reflect evolving global standards?

27. We consider that the Good Practice Guidance adequately covers the key elements of effective business compliance systems, without going in to excessive detail on sector-specific issues or undermining the importance of a risk-based approach.

28. It is important to keep the Good Practice Guide focused on the key elements of internal controls, ethics and compliance, in order to allow business to extrapolate and tailor these to their specific business model, geographical footprint, customer base and sector/product lines.

29. Other more detailed and less flexible guides and standards exist for those firms seeking to simplify their compliance certification for public procurement and private business purposes. It is important to acknowledge that these other purposes may not be suitable as a guide to business compliance in relation to corporate liability and enforcement of the Convention.

Question 8: What recommendation could be envisaged to address the issue of incentivising anti-bribery compliance?

30. New Recommendations regarding the incentivising of compliance should be neither too lenient nor too severe towards offenders. Proportionate incentives are important given the centrality of a risk-based approach to effective compliance and the role that business compliance plays in many Parties’ corporate liability regimes.
31. Greater clarity and consistency in regard to key elements of compliance credit would be valuable to support business cooperation and a level playing field (including the recognition that rogue actors may evade well-designed and proportionate compliance systems). Also see the response to questions 7, 12 to 18.

32. Incentivising whistle blowers financially is a challenging topic in some Parties’ legal systems, and any new Recommendations on this topic should acknowledge that this step may not be appropriate as a minimum requirement.

33. Equalising the playing field between the use of non-prosecution agreements for corporates and for individuals could assist to incentivise whistleblowing and self-reporting by individuals. Currently, the use of non-prosecution agreements in many jurisdictions is unequal and tend to only be offered to corporations, potentially disincentivising self-reporting by individuals.

**Question 9: What recommendation(s) could be envisaged to further enhance the effectiveness of foreign bribery enforcement?**

**Question 10: What recommendation could be envisaged to usefully address investigative means in foreign bribery investigations?**

34. New Recommendations in regard of bribe recipients and intermediaries (sub-contractors) could support enforcement of the Convention under a conspiracy theory.

35. Some of the challenges to enforcement of the Convention relate to divergent national laws relating to criminal law enforcement (including professional privilege, standardised use of non-prosecution agreements and disclosure). These challenges are of broader application than bribery of foreign officials in relation to transnational business transactions, however, a new Recommendation for dedicated study of these divergences could be a valuable addition to current international debate and help progress a more consistent legal environment for multinational enterprises. Also see the response to questions 12 to 18.

**Question 11: What recommendation could be envisaged on the issue of transparency of beneficial ownership information, given this issue is currently already addressed in other fora?**

36. New Recommendations in relation to transparency of beneficial ownership could support business compliance by simplifying due diligence processes. However, it would be important to improve on existing G20 principles and new EU AML requirements in this area, by requiring Parties to verify information provided to public registers of beneficial ownership. Requiring the regulated sectors to improve the data quality of public registers is neither efficient nor sufficient, and might be unduly burdensome and difficult to maintain for the regulated sectors.

37. The regulated sectors currently make use of commercial lists of the most senior foreign public officials to comply with their AML requirements to identify and manage the risks arising from Politically Exposed Persons (PEPs). The latest EU Money Laundering Directive requires Parties to publish their definition of the roles and public functions that constitute their domestic PEPs. However, there is no comparable list or definitional rule in respect of foreign public officials,
and a new recommendation could seek to address this gap, possibly in collaboration with commercial list providers.

Questions 12: What recommendation could be envisaged to further support the enforcement of Article 5 of the Convention?

Question 13: What recommendation could be envisaged to address the independence of the judiciary as it relates to foreign bribery enforcement?

38. Article 5 prohibitions should not prevent prosecutors and the judiciary from considering legitimate public interest factors when approving non-trial resolutions or imposing penalties, as permitted but non-determining considerations. These could include considerations of proportionality around public procurement exclusions.

Questions 14: What recommendation could be envisaged to address non-trial resolutions in the enforcement of the foreign bribery offence?

Question 15: What recommendation could be envisaged to further address the effective, proportionate and dissuasive nature of sanctions for foreign bribery?

Question 18: Which other enforcement challenges (e.g. the interaction of remedies in cross-border corruption cases) could be addressed as part of the review of the Anti-Bribery Recommendation?

Question 19: What recommendation could be envisaged to address the issue of mitigating circumstances in foreign bribery cases?

39. New recommendations in relation to non-trial resolutions could promote good practice in incentivising business compliance and cooperation, as well as supporting active enforcement of the Convention and cooperation in multi-jurisdictional investigations and settlements.

40. Such recommendations could add value by supporting consistency and simplifying the international legal environment faced by multinational enterprises. It would be valuable for new recommendations to identify key elements of incentives, business cooperation and enforcement practice, and encourage Parties to review and adapt their legal and policy regime to converge on these key elements. This might include encouraging Parties to develop policies that promote cooperation with authorities in other jurisdictions and entering into joint resolutions to avoid unfair duplication of sanctions, other penalties and asset recovery.

41. Any such recommendations should be consistent with any updates to the 2009 Recommendations’ Good Practice on corporate liability and business compliance. This should include the equal treatment of individual corporate employees and senior management and consideration of due process and fairness to individuals, along with corporations.

42. It would be valuable to require Parties with an exemption or defence for facilitating payments to consider replacing this with a defence for payments made to protect individual safety. See the response to question 4 and 22.
Question 21: What recommendation could be envisaged to address the issue of judicial specialisation and training?

43. Judicial specialism could be supported by the establishment of specialist courts dedicated to foreign bribery and other complex economic crimes. It could also be valuable to encourage cases to be allocated to specialist trained judges and experts in non-trial settlements.

Question 22: What step could the Working Group take to further address small facilitation payments?

44. We support the Recommendation with regard to discouraging facilitation payments, as, after all, a bribe is a bribe. However, it could help support business compliance and cooperation, as well as the level playing field and development, if the Recommendation was amended to require Parties to consider replacing exemptions or defences for the payment of facilitating payments with a defence for payments made to protect individual safety. Such Recommendations could include requirements for business reporting to their home authorities and cooperation between Parties to address bribe solicitation, with the business requirements reflected in Good Practice for business compliance.

Question 23: What recommendation could be envisaged to address the issue of awareness-raising in the public and private sector?

45. Dedicated awareness-raising campaigns by Parties’ law enforcement can help promote industry good practice in risk assessment and compliance, as well as cooperation and self-reporting. Local awareness-raising can also be helpful in targeting regionally concentrated exporting industries, such as the oil and gas sector.

46. The regulated sectors currently make use of commercial lists of the most senior foreign public officials to comply with their AML requirements to identify and manage the risks arising from Politically Exposed Persons (PEPs), with the latest EU Money Laundering Directive requiring Parties to publish their definition of the roles and public functions that constitute their domestic PEPs. There is no comparable list or definitional rule in respect of foreign public officials, and a new Recommendation could seek to address this gap, possibly in collaboration with commercial list providers.

Question 24: What step could the Working Group envisage to address the particular foreign bribery risks in certain sensitive sectors?

47. The review of the Anti-Bribery Recommendation should limit its impact on tax-related issues given the complexity of this specialist international issue.

Question 25: The 2009 Tax Recommendation is a joint instrument of the Committee on Fiscal Affairs and the WGB. To what extent should the review of the Anti-Bribery Recommendation address tax-related issues? In particular, what recommendation could be
envisaged to enhance reporting and sharing of information between law enforcement and tax authorities in foreign bribery cases?

Question 26: What step could the Working Group take to further support the implementation of the Recommendation of the Council on Tax Measures for Further Combating Bribery of Foreign Public Officials in International Business Transactions?

48. The review of the Anti-Bribery Recommendation should limit its impact on tax-related issues given the complexity of this specialist international issue.

49. Relevant considerations could include clarifying the tax deductibility of facilitation payments, including in support of business reporting and information sharing between authorities to target action against bribe recipients.

Question 27: What recommendation could be envisaged to enhance awareness and effective use of reporting channels for foreign bribery?

50. Given the Convention’s focus on bribery of foreign public officials in international business transactions, a new Recommendation could add value by encouraging additional reporting channels through home country embassies, consulates and trade promotion agencies. Such additional channels could support business compliance and cooperation, including reporting solicitation of facilitation payments and targeting action against bribe recipients.

Question 28: What recommendation could be envisaged to enhance detection and reporting by public officials to law enforcement authorities?

51. Given the relatively limited number of Parties, a new Recommendation could add value by encouraging the development of international reporting channels outside of the host country’s control. Such international channels could encourage reporting by host country businesses and government officials that might otherwise be reluctant to engage with a local reporting mechanism.

Question 29: What recommendation could be envisaged to further strengthen whistleblower protection?

52. Incentivising whistle blowers financially is a challenging topic in some Parties’ legal systems, and any new Recommendation on this topic should acknowledge that this step may not be appropriate as a minimum requirement.
Question 30: What recommendation(s) could be envisaged to:

Enhance detection and reporting of foreign bribery by financial and non-financial professions subject to AML requirements?

Address the mechanisms of detection of foreign bribery by FIUs?

Address access by law enforcement authorities to information held by financial institutions relevant to foreign bribery enforcement?

53. We suggest that the WGB input into FATF considerations rather than establish stand-alone work.

54. We note that supportive legislation and public/private partnerships can enable access by law enforcement authorities to information held by financial institutions, through information sharing initiatives such as the UK’s Joint Money Laundering Intelligence Taskforce (JMLIT). These initiatives can support a more effective intelligence-led approach to detecting and preventing financial crime, including through development and sharing of detailed typologies of bribery and corruption techniques.

55. We also note that there is a narrower AML focus on PEPs rather than all foreign public officials. AML requirements for enhanced due diligence for PEPs reflects the generally heightened money laundering risk posed by this type of client because they hold very senior positions that can be abused for the purpose of laundering illicit funds or other predicate offences such as corruption or bribery. More junior public officials do not present the same type of generally heightened risks, and it would neither be proportionate nor effective to extend requirements for enhanced due diligence to all types of foreign public officials. However, other approaches, such as accessible lists, public definitions and an intelligence-led approach, may enable an improved ability to identify instances of bribery in this wider group of clients.

56. Similarly, we note that there are significant challenges of proactive detection of bribery when the transfer of value is disguised within high volume transactions.

57. Proactive detection is particularly challenging where bribery is disguised through moving value through the use of trade transactions. AML work has identified a number of trade-based money laundering techniques to move value from one location to another without triggering suspicious activity reports, such as over-invoicing, multiple invoicing and under-delivery.

Question 31: What recommendation could be envisaged to address the issue of voluntary disclosure?

58. New recommendations in relation to voluntary disclosure could promote good practice in incentivising business compliance and cooperation, including through non-trial resolutions, as well as supporting active enforcement of the Convention and cooperation in multi-jurisdictional investigations and settlements.

59. Such recommendations could add value by supporting consistency and simplifying the international legal environment faced by multinational enterprises. It would be valuable for new
recommendations to identify key elements of incentives, business cooperation and enforcement practice, and encourage Parties to review and adapt their legal and policy regime to converge on these key elements. This might include encouraging Parties to develop policies that promote cooperation with authorities in other jurisdictions and entering into joint resolutions to avoid unfair duplication of sanctions, other penalties and asset recovery.

60. It would be important for such recommendations to be consistent with any updates to the 2009 Recommendations’ Good Practice on corporate liability and business compliance. This should include the equal treatment of individual corporate employees and senior management and consideration of due process and fairness to individuals, in equality with Good Practices for corporations.

**Question 32: What recommendation could be envisaged to enhance detection and reporting of foreign bribery by external auditors and accountants?**

**Question 33: Should the recommendation could be envisaged to address the issue of reporting of foreign bribery by other professional advisors, and if so, how?**

61. We suggest that the WGB should input to FATF considerations on this issue rather than stand-alone work.

62. It is important that work in this area contributes to a level playing field in regulating the same AML risks as they arise in different regulated sectors. For example, current UK efforts to improve the quality and consistency of the UK AML regime include the establishment of the Office of Professional Body Anti-Money Laundering Supervisors (OPBAS) as a ‘supervisor of supervisors’ for non-financial professional sectors.

**Question 34: What recommendation could be envisaged to enhance detection and reporting of foreign bribery by the media?**

**Question 35: To what extent and how would it be useful for the WGB to turn its attention to legal frameworks protecting freedom, plurality and independence of the press, as well as laws allowing journalists to access information from public administrations?**

63. We suggest that the WGB input to OSCE and other regional considerations of press freedom, as well as address in external engagement with regional bodies and non-Parties.

64. We note that the UK national whistleblowing regime currently extends protection for reporting directly to the media, subject to a higher threshold (e.g. need to demonstrate belief that the information is substantively true, not disclosed for purposes of personal gain, etc).

**Question 36: What recommendations could be envisaged to enhance the enforcement of false accounting offences and accounting requirements in foreign bribery cases?**

65. Greater clarity on the compliance expectations of auditors, accountants and lawyers could be valuable, supporting enforcement against corrupt intermediaries and improved reporting of bribery suspicions. Our preparation of this response to consultation has raised the question of whether there
should there be an additional responsibility or legal liability standard on professional advisors, due to their enhanced level of knowledge and responsibility for advising or auditing corporations.

66. Obviously, any such additional responsibilities or liabilities would be subject to any professional privilege restrictions that may be relevant. In this regard, note international accounting profession standard for reporting of non-compliance with laws and regulation (NOCLAR).

Question 37: What recommendations could be envisaged to clarify that both natural and legal persons can be held liable in application of Article 8 of the Convention?

Question 38: What recommendations could be envisaged to strengthen the independence of external auditors in practice so that they can provide an objective assessment of company accounts, financial statements and internal controls?

67. We suggest that the WGB input to international professional body considerations of this issue, including on professional auditor liability for both natural and legal persons and of professional independence.

Question 39: What recommendations could be envisaged to further address the enforcement challenges of suspension from public advantages?

Question 40: Should automatic suspension from public advantages be considered, and if so how, including as concerns notice and appeal mechanisms, and procedures for imposing or lifting suspensions measures?

53. Article 5 prohibitions should not prevent prosecutors and the judiciary from considering legitimate public interest factors when approving non-trial resolutions or imposing penalties, as permitted but non-determining considerations. These could include considerations of proportionality around public procurement exclusions.

54. We suggest that the WGB should engage Multilateral Development Banks on their development of good practice on appeal mechanisms and conditional debarment.

Question 41: What step could the Working Group take to further support the implementation of the Recommendation of the Council for Development Co-Operation Actors on Managing the Risk of Corruption, that it has jointly endorsed with the OECD Development Action Committee?

55. It could help support business compliance and cooperation, as well as the level playing field and development, if the Recommendation was amended to require Parties to consider replacing exemptions or defences for the payment of facilitating payments with a defence for payments made to protect individual safety. Such Recommendations could include requirements for business reporting to their home authorities and cooperation between Parties to address bribe solicitation, with the business requirements reflected in Good Practice for business compliance.
Question 42: What step could the Working Group take to further support the efforts to promote transparency in public procurement, including in collaboration with the OECD Public Governance Committee for the implementation of the principles contained in the 2008 Council Recommendation on Enhancing Integrity in Public Procurement?

56. Clarity could be improved by recommending greater explanation and guidance in Parties’ foreign bribery legislation, such as through confirming the coverage of bribes to officials employed by foreign SOEs / SWFs, bribes to influence acts within foreign official duties, and bribes by best-qualified bidders to influence public tenders and private mandates.

57. For example, most corporate mandates or public/private procurement style tenders have criteria that permits judgment or success based on other activity undertaken by the bidder with the tender entity (e.g. demonstrating trust/capability etc.), so influencing a tender or mandate through other independent and distinct work with the entity or SOE, may be acceptable under the criteria of the tender, but there could be a perception of bribery. Clarification would assist considerably on these more complex commercial standard financial institutions’ work.

Question 43: What step could the Working Group take to further support the implementation of the Council Recommendation on Bribery and Officially Supported Export Credits, adopted by the OECD Working Party on Export Credits and Credit Guarantees?

58. Lack of awareness (particularly amongst exporters) is a continuing concern. To deter bribery, an amended Recommendation could encourage Parties to become more pro-active in raising awareness and supporting management control systems. For example, to encourage adherents not only to focus on enforcement and the use of warranties and conditions in the provision of support but to be pro-active in the provision of guidance to financiers and exporters.

59. We consider that the WGB could also support the adoption of tailored guidance for major contracts and project finance. These could include guidance by prosecutors and regulators, as permitted in line with Parties’ legal regimes. For example, the US Department of Justice’s Foreign Corrupt Practices Act Opinion programme enables “… issuers and domestic concerns to obtain an opinion of the Attorney General as to whether certain specified, prospective - not hypothetical - conduct conforms with the Department's present enforcement policy regarding the antibribery provisions of the Foreign Corrupt Practices Act of 1977 ….”.
Question 44: What recommendation could be envisaged to further clarify the existing legal requirements that serve as a basis for mutual legal assistance and extradition?

Question 45: What recommendation(s) could be envisaged to facilitate MLA and extradition in foreign bribery cases?

Question 46: What recommendation(s) could be envisaged to further address the issues of cooperation with multilateral and regional development banks in the context of foreign bribery investigations?

60. We consider that it could help support international cooperation against foreign bribery if new recommendations could clarify that mutual legal assistance and extradition should not be denied based on Article 5 factors. This should include considerations relating to bribe recipients.

61. New recommendations in relation to non-trial resolutions, incentivising business compliance and cooperation could also support cooperation in multi-jurisdictional investigations and settlements, including MLA and extradition considerations.

Question 47: What recommendation could be envisaged to address the issue of international asset recovery and related challenges, given work already undertaken in this area in other fora?

Question 48: What recommendation(s) could be envisaged to address the enforcement challenges raised by multi-jurisdictional cases?

62. New recommendations in relation to non-trial resolutions could promote good practice in incentivising business compliance and cooperation, as well as supporting active enforcement of the Convention and cooperation in multi-jurisdictional investigations and settlements.

63. Such recommendations could add value by supporting consistency and simplifying the international legal environment faced by multinational enterprises. It would be valuable for new recommendations to identify key elements of incentives, business cooperation and enforcement practice, and encourage Parties to review and adapt their legal and policy regime to converge on these key elements. This might include encouraging Parties to develop policies that promote cooperation with authorities in other jurisdictions and entering into joint resolutions to avoid unfair duplication of sanctions, other penalties and asset recovery.

64. It would be important for such recommendations to be consistent with any updates to the 2009 Recommendations’ Good Practice on corporate liability and business compliance. This should include the equal treatment of individual corporate employees and senior management and consideration of due process and fairness to individuals, in equality with Good Practices for corporations.

If you have any queries about this response, please contact Nick.vanBenschoten@ukfinance.org.uk
US. Chamber. Institute of Legal Reform

Comments of the U.S. Chamber Institute for Legal Reform To the OECD Working Group on Bribery Regarding the 2009 Anti-Bribery Recommendation

The U.S. Chamber Institute for Legal Reform (“ILR”) is a not-for-profit public advocacy organization affiliated with the U.S. Chamber of Commerce—the world’s largest business federation representing the interests of more than three million companies of all sizes, sectors, and regions, many of which are based or conduct business internationally. As an affiliate of the U.S. Chamber, ILR’s mission is to make the legal system simpler, fairer, and faster for all participants. We welcome the opportunity to provide comments in connection with the review by the OECD Working Group on Bribery (the “Working Group”) of the 2009 Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions (the “2009 Recommendation”).

The OECD Anti-Bribery Convention has been vital in reducing corrupt business practices globally and strengthening the rule of law. In our view, the 2009 Recommendation, by providing guidance on internal controls and compliance, has been useful and effective in furthering the goals of the Convention. Given developments in anti-corruption enforcement and compliance practices during the past decade, however, the 2009 Recommendation also would benefit from careful review and updating. In particular, we encourage the Working Group to seek to foster greater international harmonization of anti-corruption laws and increased clarity in such laws. In this respect, we strongly support the December 2018 comments of Business at OECD (“BIAC”), including that “the proliferation of parallel standards would be counterproductive and lead to increased complexity for business.” We believe that consistent, well-defined anti-corruption standards across jurisdictions—including all signatories to the Convention—will enhance compliance by businesses throughout the world. We offer the following recommendations.

- The review and revision of the 2009 Recommendation represents an opportunity for the Working Group to support clear incentives for voluntary disclosure, cooperation, and remediation by businesses that discover potential violations of anti-corruption laws. During the past several years, the U.S. Department of Justice has issued formal policies, including the 2017 Corporate Enforcement Policy, that have provided specific, quantifiable incentives for companies that uncover wrongdoing to come forward voluntarily, report to enforcement authorities, cooperative with subsequent investigations, and take remedial steps. Those policies, by making clear the benefits to businesses of taking such steps, help raise the level of compliance within the business community, foster a more productive working relationship between regulators and the regulated business community, and bring to light compliance issues that otherwise might not be adequately identified or addressed.
• We encourage the Working Group to support greater cooperation and coordination among enforcement authorities globally. It has become increasingly common for anti-corruption investigations and enforcement proceedings to span multiple countries, but the coordination of such matters by authorities has not kept pace. Companies may face an assortment of separate and even successive investigations and proceedings with respect to the same conduct. While each country clearly has the authority to enforce its own laws, an increased level of cooperation and coordination would enhance both the effectiveness and the fairness of multijurisdictional investigations and enforcement actions. Enforcement authorities would be able to better allocate their resources, reduce duplication of effort, and develop evidence more quickly and thoroughly. A company could work with all relevant enforcement authorities to achieve a global resolution of any potential liabilities arising from particular conduct, rather than facing a series of separate resolutions or sanctions. The U.S. Department of Justice recently emphasized the importance of such coordination, issuing in May 2018 a “Policy on the Coordination of Corporate Resolution Penalties,” which appropriately seeks to reduce “pling on” by different enforcement authorities for the same underlying conduct.

• The Working Group also should encourage the Convention’s signatory countries to provide more detailed communication regarding their enforcement policies. In many countries that are signatories to the Convention, businesses seeking in good faith to comply with applicable anti-corruption laws find only limited guidance in the text of the laws themselves. The policies and practices of prosecutors and regulators charged with the enforcement of such laws provide crucial additional guidance to the regulated community, including with regard to developing and maintaining effective compliance programs, identifying and mitigating areas of legal risk, and responding to potential risks when they arise. However, such policies and practices are not always communicated clearly or effectively to the business community. More transparent, detailed communication from the relevant government agencies regarding their approaches to anti-corruption enforcement would further the cause of compliance by providing better guidance to companies seeking to keep their compliance programs current and effective. For example, when there have been crucial developments in case law, meaningful enforcement activities in a particular area, or changes in the government’s approach to enforcement, clear and timely communication of those developments would be beneficial.

• We agree with BIAC that the Working Group should provide further guidance to address the “demand side” of bribery and related corrupt activity. Such guidance could inform enforcement authorities about steps to support reporting to the authorities when companies and individuals are solicited for bribes, including even low-level facilitation payments.

• We further encourage the Working Group to support more widespread adoption of a compliance defense by the Convention’s signatory countries, some of which already have incorporated such a defense into their anti-corruption laws. The consistent adoption of a compliance defense – that is, a defense that would permit a company to limit liability if the person or people responsible for bribery or related corrupt conduct circumvented compliance measures that were otherwise reasonably designed to identify and prevent such violations – would enhance compliance and better prevent corruption. Historically, anti-corruption initiatives have focused more heavily on enforcement rather than compliance. However, no company can guarantee that all of its many employees worldwide will comply with
applicable anti-corruption laws at all times. A company that has a strong pre-existing anti-
corruption compliance program that is effective in identifying and preventing violations
therefore should be permitted to present that program as an affirmative defense where
employees or agents have circumvented the compliance program to engage in wrongdoing.
Consistent adoption of a compliance defense by all signatories to the Convention will
provide businesses with a powerful incentive to ensure the optimal allocation of finite
compliance resources and to implement and maintain compliance programs that effectively
prevent and identify violations.