

## **EXPERT MEETING OF THE OECD ANTI-BRIBERY CONVENTION:**

### **THE ROAD AHEAD**

**Rome, 21 November 2007**

## **ENHANCING THE IMPACT OF THE CONVENTION: A REFLECTION PAPER**

*Dr. Maria Gavouneli,*

Vice-chair of the Working Group on Bribery

1. When adopted, ten years ago, the OECD Convention combating bribery of foreign public officials in international business transactions constituted a unique instrument in more ways than one. It was the first time that the spirit of free enterprise was regulated with a view to enhance transparency and fair play in the market place, ultimately: respect for the rule of law. It was also one of the first cases where, in pursuit of the objectives of the Convention, the member States agreed to subject themselves to a vigorous and thorough examination in the framework of a comprehensive peer review system. It proved to be an efficient and effective tool of implementation control and today it has become an international standard of excellence.
2. The mutual evaluation of laws and practices is but a manifestation of the commitment the States party to the Convention exhibit in creating and enforcing rigorous anti-corruption and integrity standards. Nevertheless, they remain limited to the contractual relationship existing between the present 37 States to the Convention<sup>1</sup>, effectively creating a two-tier

---

<sup>1</sup> They are Argentina, Australia, Austria Belgium, Brazil, Bulgaria, Canada, Chile, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Korea, Luxembourg, Mexico, The Netherlands, New Zealand, Norway, Poland Portugal, the Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Turkey, the United Kingdom and the United States of America. South Africa has just become the newest member of the Working Group on Bribery and the first African country to join the Convention.

system where some international players do have an organised framework within which to engage in the fight against corruption whereas major emerging economies, committed to such a fight, remain without any effective support and coordination system. There is no doubt that such a situation allows for a squandering of means and resources without any discernible results.

3. Although the Convention brings together a number of major economies, its effectiveness and, finally, its contribution to the world anti-corruption effort depends upon its ever wider impact. We are looking therefore to a number of concentric circles, which will further disseminate the integrity standards, created by the laws and practice of the States party to the Convention, to diverse groupings of emerging regional economies.

#### **I. The family circle**

4. The OECD Convention and the Working Group on Bribery are in a position to help in enhancing the effectiveness and, ultimately, the impact of international regulation and the global fight against corruption. Although an integral part of the OECD, the Convention and the Working Group on Bribery partake, nonetheless, of a dual nature, both as organs of the Organisation and as a contractual commitment of sovereign States. Consequently, they can benefit from both worlds, the comprehensive network of cooperation and joint actions inherent in the OECD and the initiative and flexibility of individual State priorities.

5. Already the Working Group on Bribery includes a number of States, which are not members of the Organisation<sup>2</sup>. The Convention is open to accession by any country that becomes a full participant in the OECD Working Group on Bribery and that is willing and able to assume the Convention's obligations. The presence of the non-member Parties enriches the WGB with the insight offered by States not necessary already attuned to the inner workings of the Organisation. It also provides a flexible route, whereby those able and willing to engage in the anti-corruption fight could do so in an immediate and straightforward manner, without any further encumbrances or even an obligation to join the Organisation in due course. The end-result provides for flexible, yet in-depth cooperation in the wider possible contractual context.

6. Some of the States party to the Convention but non members of the Organisation, namely Chile, Estonia and Slovenia, have now been invited to open discussions with a view to join the OECD and there is no doubt that their level and quality of continued contribution within the WGB would constitute an important part of their membership requirements. The other two countries, Russia and Israel, will also have to accede to the Convention and thus become members of the WGB as part of the accession procedure.

---

<sup>2</sup> They are Argentina, Brazil, Bulgaria, Chile, Estonia, Slovenia and South Africa.

7. The interplay between members and non-members to the Organisation and current and prospective parties to the Convention is further accentuated in the group of States, with which the Organisation has been committed to an enhanced engagement process: Brazil and South Africa are already valuable members of the WGB, China was a welcome guest only recently and we actively pursue further cooperation with Indonesia and India.

8. The mechanics of enlargement and the accession process are for the competent bodies to decide. It would be, however, most useful to have a view from the ‘outside’, those members of the world community who consider – or even consider considering – involvement with the Working Group on Bribery and the Organisation as an effective means to enhance and coordinate their anti-corruption efforts, with a view to achieve maximum impact.

9. A first question is, therefore, necessarily posed, addressed to all interested parties:

- Would the Working Group on Bribery be considered as the proper venue to enhance and coordinate national anti-corruption efforts, irrespective of the prospect of an eventual membership to the Organisation?

## **II. Pursuing institutional cooperation**

10. The OECD Convention was among the first international treaties dealing with corruption matters. It constitutes a global agreement on a specific, precisely defined subject: bribery of foreign public officials in international business transactions. To a certain extent, its success and especially the effectiveness of its peer-review system is due to the specificity of the offence and its delineated scope of application.

11. The other regional conventions on corruption also include the foreign bribery offence and employ for its enforcement variations of the peer-review system. GRECO’s mandate within the Council of Europe is to safeguard compliance with both the Criminal Law Convention on Corruption (ETS No. 173) and the Civil Law Convention on Corruption (ETS No. 174) “through a dynamic process of mutual evaluation and peer pressure”. The Inter-American Convention Against Corruption has also followed this route with the subsequent creation of a follow-up mechanism (MESICIC). The newest addition, the African Union Convention for Preventing and Combating Corruption, has opted for a rudimentary, centralised rather than peer-review-based, system although it is not as yet fully operational.

12. Nevertheless, besides the criminalisation of the offence and the adoption of the peer review system, at least in principle, the practice of regional bodies has been uniform in not dealing expressly with the foreign bribery offence. Would that be interpreted as an attempt to avoid duplication of effort or, simply, as evidence of a different set of priorities?

13. Whatever the answer, it is reasonable to suggest that the OECD Convention and the WGB could well contribute to the regional evaluation processes and, at the same time, benefit from their insight in certain other aspects of corruption and the best practices developed therein. Yet, such institutional cooperation is lacking – although in April 2007 the OECD and the OAS have concluded a memorandum of understanding focusing on anti-corruption cooperation. It is true that the regional bodies and the WGB maintain open lines of communication and occasionally exchange courtesy calls. It is also well known that the published reports produced by one body are part of the file for the evaluation exercise for any specific State by another body. Is that enough to conclude that we make full use of each other's experience or even, to concentrate on the impact of the OECD Convention, we export the high standards set by the WGB peer review exercise, assuming at all times that it is desirable to do so?

14. Cooperation between entities sharing similar objectives and employing the same evaluation method has indeed proven both manageable and mutually enforcing elsewhere. The alternate evaluation cycles of the IMF and the FATF easily come to mind, where a State evaluated by the FATF could well use the results of that exercise towards the more comprehensive IMF evaluation – or, at its discretion, may choose to undergo the full procedure once again. Thus, the standards of both systems are coordinated and actually elevated to the highest common denominator whereas the States concerned may avoid the double effort to respond to two different sets of evaluation.

15. Three further questions are then posed, addressed to the States member to the WGB and other regional anti-corruption conventions:

- Would a more formal institutional cooperation between the Working Group on Bribery and the regional bodies be advisable as a means to further enhance the impact of the Convention, the standards it has generated and the best practices developed in practice?
- Would, assuming that institutional cooperation is affirmed, such cooperation expand to joint and/or complementary procedures?
- Would the Working Group on Bribery and the regional bodies be willing to explore other methods of cooperation, perhaps better tailored to the needs of each cycle of evaluation or even each particular evaluation exercise?

16. The culmination of the world anti-corruption effort has been undoubtedly the adoption of the UN Convention Against Corruption. Although the foreign bribery offence is expressly covered in mandatory terms, the UNCAC is distinctly different from the other anti-corruption conventions in that it does not provide for a ready-made enforcement mechanism.

The Conference of the Parties, entrusted with the task to come up with a system both practical and universal, thorough but not cumbersome, effective and efficient but avoiding duplication of effort, has launched, through the relevant working group, a pilot programme to test a “transparent, efficient, non-intrusive and impartial” review mechanism, which would “provide opportunities to share good practices and challenges” and, furthermore, “complement existing international and regional review mechanisms”. As almost all States parties to the Convention are already at least signatories to UNCAC, the task to create such a new enforcement mechanism is clearly also addressed to the WGB and its associates. Indeed, it provides an excellent opportunity to disseminate the standards of the Convention, make full use of the experience gained in implementing it and enhance its impact upon the rest of the world employing the best practices developed by the States participating in the WGB. At the same time, it is understood that the specificity of the offence and the similarity of economic standards, which have caused the success of the Convention review system, cannot be easily exported to the wider and much more diverse universal audience of the UNCAC. Indeed, this very diversity in economic status and actual needs would require an additional effort to ensure that peer groupings are avoided so as to guarantee the widest possible dissemination of the existing (presumably high) standards without resorting to the lower common denominator.

17. Two additional questions are therefore to be posed to all the States concerned, current and prospective parties to the OECD Convention as well as current and prospective parties to the UNCAC:

- Would such States envisage an enhanced cooperation with the UNCAC review mechanism, including institutional cooperation?
- What would the parameters of such cooperation be? – and, in particular, could the procedure and the results of one evaluation process conceivably feed into the other in a meaningful way?

### **III. Moving beyond contractual cooperation**

18. Expanding our contractual networks is certainly an effective way to enhance the impact of the Convention. It is, however, a slow, cumbersome, difficult procedure, which requires agreement at several levels, both internationally and domestically, and a veritable flurry of official actions. It would therefore be beneficial both for the Working Group on Bribery and the international community at large to pursue other, less formal arrangements: commitment to the same objectives of fighting corruption and promoting integrity standards should perhaps suffice as a basis for joint actions.

19. The OECD is already involved in a series of such arrangements, inspiring anti-corruption initiatives in different parts of the world, participating in awareness-raising projects, providing technical assistance in drafting laws and regulations, sharing good

practices in enforcement and implementation, enhancing the impact of the Convention. Such examples of cooperation and joint action are particularly valuable where no other anti-corruption system exists, regional or otherwise.

20. A typical example of such a project would be the Anti-Corruption Initiative, jointly developed by the OECD and the Asian Development Bank, where some 28 States have formally endorsed an Anti-Corruption Action Plan and have worked together in pursuit of its objectives. Other joint projects pursue similar goals in the Eastern Europe and Central Asia area, where 20 States have jointed an Anti-Corruption Network, or in the Middle-East and Northern Africa, where governance matters are more closely linked to investment through the MENA Initiative on Governance and Investment for Development.

21. What these regional initiatives have in common is a commitment to a regular exchange of information and good practices, which in some cases can even lead to the development of a peer-review evaluation system of their own. Their commitment is no less stronger in practice because it is not legally binding: their voluntary participation in the project keeps at bay the difficulties of treaty-making while facilitating experimentation with tools and methods most suited to the particular requirements of their diverse economic environment.

22. The Working Group on Bribery has limited involvement in such arrangements. There is no doubt, however, that similar arrangements in other areas of the world would promote most efficiently the purposes of the Convention and enhance its impact; all the more so because they use its know-how and best practices as an inspiration. After all, the proliferation of such initiatives, especially in Asia and Africa, where regional contractual arrangements are either absent or non operational, could well multiply the effectiveness of anti-corruption measures and help create a much needed rule-of-law culture in each region.

23. A final question is therefore to be posed, addressed not only to the States parties to the Convention but also to the wider community of States, irrespective of their economic status and comparative strength:

- Would the Working Group on Bribery be well advised to pursue, as a question of priority, cooperation initiatives, drafted in non-compulsory terms, as an efficient and effective means to enhance the impact of the Convention beyond its traditional audience?