MENA-OECD Initiative on Governance and Investment for Development

Curbing Bribery and Promoting Trade and Investment World-Wide: Characteristic Features of the OECD Anti-Bribery Work

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Introduction

Three features characterise the OECD work on bribery in international business transactions: a general mandate to achieve the highest sustainable economic growth and employment in Member countries, sound economic development of non-members and the expansion of world trade and investment; a specific mandate, defined by the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (hereinafter the Convention), to take an active role in the global fight against corruption; and the implementation mechanism of this Convention based on peer reviews and analytical work addressing the broad spectrum of aspects which must be covered by an effective anti-bribery system.

The OECD Anti-Bribery Convention and its related Instruments

The OECD's anti-bribery instruments target "active" bribery, i.e., the offering side of the corruption deal, and are thus essentially an effort to dry out the "supply" of bribes on international markets. Four instruments support this work: the OECD Convention itself, as well as the 1997 Revised Recommendation of the Council on Combating Bribery in International Business Transactions, the Agreed Elements of Criminal Legislation and Related Action, and the 1996 Recommendation urging countries to disallow tax deductibility for bribes. Both the Convention and its related instruments contain a lengthy and comprehensive list of measures, including supporting legislation and rules, public and private sectors oversight, and coalition building, that parties to the Convention are required to take to successfully reduce the supply of bribes.

By taking steps to cut off the "supply" of bribes in international markets, OECD countries take responsibility for their economies' role in world corruption. They agree that to achieve this aim effective domestic mechanisms must encompass elements of prevention, detection, prosecution and sanctioning of international bribery and require effective and swift international judicial cooperation. Thus, the OECD anti-bribery efforts relate to prevention and detection, criminalization and punishment of bribery of public officials by any person, individuals and legal persons (companies) alike. As the instruments cover the whole chain from early stages of prevention to punishment, they provide the ideal platform for an integrated and holistic approach to combating corruption of public officials.

With regard to sanctioning, the Convention and its related instruments require signatories to establish criminal, administrative and/or civil responsibility to cover a wide range of acts, including not only bribery of foreign officials, but also the 'laundering' of the proceeds of corruption, the concealment of bribery through omissions and falsifications in respect of the books, records, accounts and financial statements of companies and any attempts to pass off bribes and commissions paid in respect of exports as tax deductible charges. It also calls for governments to impose powerful disincentives to potential bribers, such as the liability of legal persons for bribery of foreign officials, seizure and confiscation of the bribe and the proceeds of bribery, and the denial – as a sanction for bribery – of public subsidies, licenses, government procurement and other public advantages.

The criminalization of bribery of foreign public officials has important consequences on the work and functioning of individuals, institutions and rules. Consequently, the Convention's binding provisions affect not only a country's legal framework but have an impact on the whole set of national agencies in charge of enforcing the offences. The Convention and its related instruments recognize that an independent judiciary is a key precondition to ensuring that corruption of public officials is swiftly and effectively investigated and prosecuted. This aspect is of particular importance if national economic interests are at stake or prominent public leaders or wealthy businessmen are involved. The Convention and its related instruments also recognize that, without appropriate investigative and prosecution tools, there is a risk that insufficient evidence will be gathered to successfully bring a case to court; a defective legal framework or complex formal procedures may also render prosecution of bribery difficult. Last but not least, given the often transnational nature of bribing public officials, the OECD anti-corruption instruments recognize that an

effective international judicial and administrative cooperation is key to avoid that individuals escape justice or that bribes or their proceeds disappear forever in bank accounts in foreign jurisdictions.

Thus the Convention and its related instruments put strong emphasis on measures that allow for effective prosecution of corruption by signatory parties to the Convention. These include, *inter alia*, investigating actively and even pro-actively any complaints of bribery; exercising prosecution on the basis of professional motives and free from improper influence by concerns of national economic interest or of political nature; providing for judicial procedures that take adequate account of the complexity of cases involving corruption acts; and providing adequate resources to law enforcement authorities.

The Convention also codifies international co-operation by obliging parties to give specific forms of mutual legal assistance in gathering and transferring evidence for use in court, to extradite offenders, to ensure that the bribe and the proceeds of bribery of foreign public officials (or property the value of which corresponds to that of such proceeds) are subject to seizure and confiscation or that monetary sanctions of comparable effects are applicable; bank secrecy may not be asserted to deny mutual legal assistance. The Convention and the 1997 Recommendation and the Agreed Elements of Criminal Legislation and Related Action also provide a framework for international cooperation, including with regards to asset recovery, between signatory parties and third countries investigating cases of bribery of domestic public officials by western companies and individuals, as parties to the Convention are committed to tailor their laws on mutual legal assistance to permit such cooperation with countries where the action of receipt or the giving of bribe to public officials occurred.

Not only do the Convention and its related instruments address the sanctioning of corruption; they pay also due attention to the role that institutions and individuals in signatory countries can play with regard to detection. Lack of information all too often hampers criminal investigations, in particular with crimes such as corruption when neither of the two parties involved has an interest in revealing the act. In this respect, the requirements of the OECD instruments for criminalization and effective punishment are key measures, not only because of their own forceful dissuasive value, but also because they have consequences on parties' processes and policies to detect and report indications of a possible act of bribery. Such policies may include effective protection from potential retaliation or intimidation for any person, including domestic public officials, who gives testimony of, or reports in good faith, any facts concerning offences established in accordance with the Convention.

Complementing the emphasis on the need to combat bribery of foreign public officials more effectively, the OECD anti-bribery instruments require parties to adopt processes and measures that bolster the ability of relevant actors to resist and prevent corruption. This is the prevention component of the OECD anti-bribery instruments. It includes measures initiated by governments to foster ethical business and enhance corporate transparency and accountability, such as the promotion of company compliance systems and codes of ethics, internal company control mechanisms, sound accounting and auditing, as well as self-regulatory measures instigated by the private sector. Emphasis is also being put on greater professionalisation which is an essential element among OECD instruments. The criminalization of corruption also has an impact on policies to promote public integrity, transparency, accountability and professionalism, as these must reflect the principles and standards set by the Convention. And finally, the detection and reporting of cases of bribery are facilitated by measures aimed at increasing and disseminating knowledge about corruption among businesses and their representative bodies, professionals (accountants and auditors, lawyers), community-based and civil society groups, as well as domestic public officials.

Monitoring and surveillance of the OECD Anti-bribery instruments

The Convention's oversight mechanism provides a framework for assessing country performance with regard to the requirements, principles and standards spelled out in the instruments. Grounded in a peer review process directed by the OECD Working Group on Bribery, the OECD Convention monitoring system has been looking at all aspects covered by the OECD anti-bribery instruments through a meticulous review of the adequacy of the countries' implementing legislation and a holistic approach to

assess the effectiveness of their anti-bribery systems. It is a systematic, analytical assessment addressing all the aspects (policies, laws, regulations, organization, resources, and function) of an effective anti-corruption system. As a result, the OECD Working Group on Bribery has developed a well-recognized policy competence with regard to sound anti-bribery systems over the last few years.

Box 1: The OECD anti-bribery instruments: addressing all aspects of an effective anti-bribery system

Prevention	Detection	Investigation Prosecution	Sanctioning
Public awareness and involvement of the private sector. **Training** public officials **Procurement rules** containing "no bribes" clause and black- or white-list mechanisms **Preventing transfers of proceeds** of bribery □ financial institutions' requirement to verify the identity of customers and of beneficial owners of funds □ Scrutiny of accounts sought or maintained by or on behalf of publicly exposes persons, their family members and close associates.	**Disclosure mechanisms** for □ tax administration □ constituted authorities, and public officials □ regulatory authorities responsible for individual sectors such as securities and banking commissions □ export credit agencies, aid agencies and public procurement authorities □ anti-money-laundering units □ audit courts and internal inspectors that monitor the use of public funds by public institutions and enterprises and private bodies receiving public funds **Whistleblower &witness protection** **Enabling environment for a free press**	**Performing prosecution system** featuring: □ independent investigation and prosecution □ adequate procedures and investigative techniques and no bank secrecy rules □ co-operation between law enforcement agencies, international cooperation, □ Training of investigative authorities. **Effectiveness of the framework** enabling the establishment of the offence of bribery of public officials and the liability of individuals and legal persons **Broad jurisdiction** over corruption offences	**Effective sanction mechanisms** through □ legislation governing the judiciary □ limitation of immunity from prosecution □ extradition arrangements **Deterring sanctions** for corruption offences: □ primary and ancillary penalties, including confiscation of assets, exclusion from public subsidies, licenses, and public procurement, □ liability of legal persons, □ Criminal record. **Deterring penalties** for related offences as money laundering, accounting and tax offences.

Given the OECD anti-corruption instruments' wide substantive scope, areas covered by the assessments have ranged from preventive and awareness measures to detection and enforcement. Thus, a great amount of attention has been paid to the comportment and effectiveness of civil servants in carrying out regulatory functions, and generally implementing public policy areas covered by the instruments (for instance in public procurement, export credits and development aid). Similar attention has been paid to the degree to which the corporate governance system allows, or prevents, corruption in international business transactions (e.g., existence and respect of professional and ethical codes of conduct, regular financial reporting, and independent external audits).

Due attention has also been paid to laws, institutions and mechanisms that contribute to investigate and punish corruption. Thus the Working Group has carefully examined agencies and mechanisms that may possibly play a role in the chain of public authorities leading to judicial proceedings (including public oversight bodies and mechanisms aimed at preventing parties' exposure to the laundering of proceeds

from bribery abroad), as well as to reporting and witness protection tools (including whistleblower hotlines and help lines) for citizens and public officials alike. The independence and effectiveness of the judiciary (as determined by formal arrangements, as affected by professionalisation, willingness to accept bribes, and practices that co-opt or intimate the judiciary) and the independence of prosecution and enforcement of judgments have also been a major focus of analytical work.

The monitoring of the instruments has allowed for the development of a common vocabulary, the establishment of an analytical framework and the institutionalization of norms and standards that guide action supporting countries' performance. It has served as a repository of accumulated know-how of what works and what does not, making the OECD Working Group on Bribery a unique and invaluable store of trans-governmental social capital of public policy competence accumulated over six or seven years.

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