

MENA-OECD Initiative on Governance and Investment for Development

Taking Responsibility for World Corruption: OECD Countries' Experience in Combating Bribery and Promoting Trade and Investment World-Wide

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Introduction

Bribery has for a long time been perceived as a necessary evil and the result of an unshakeable logic in international business. Having been tolerated by law and, in many exporting countries, even encouraged by tax regulations, the view on bribery in business transactions has however dramatically changed over the past ten years or so. OECD countries - the group of the thirty of the world's largest exporting countries – have showed interest in combating bribery in international trade and investment by taking steps to cut off the “supply” of bribes in international markets, i.e. the giving of bribes by their own companies to foreign public officials in order to gain or maintain a market. By taking such steps, OECD countries have taken responsibility for their economies’ role in world corruption, including in the Middle East and North Africa.

Curbing bribery in world’s regions: the contribution of OECD exporting countries

OECD countries have been actively addressing the issue of bribery in international trade and investment over the past six years, since the entry into force, in February 1999 of an international convention that bans the giving of bribes by companies of signatory countries to foreign public officials in international business transactions: the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (hereafter: the OECD Convention). Thirty-five countries have signed and ratified it: all 30 OECD countries (Australia, Austria, Belgium, Canada, Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Korea, Luxembourg, Mexico, Netherlands, New Zealand, Norway, Poland, Portugal, Slovak Republic, Spain, Sweden, Switzerland, Turkey, United Kingdom, United States) and five non-members (Argentina, Bulgaria, Brazil, Chile, Slovenia).

Under the Convention, the signatory countries have committed to penalize the payment of bribes to foreign public officials in international business transactions and to amend regulations in related fields (Convention, Article 1). The "foreign public official" is defined as "any person holding a legislative, administrative or judicial office" of any level of a foreign country; a person "exercising a public function for a foreign country, including for a public agency or enterprise;" and any officer or agent of a public international organization. (Article 1, Section 4). Parties to the Convention have also committed to adopt domestic legislation providing that such bribery be punishable by dissuasive criminal penalties, including prison terms (Article 3). Furthermore, under the Convention, countries are obligated to sanction those who participate in the laundering of the bribe and its proceeds and those who establish off-the-books accounts and make false accounting entries for the purpose of hiding the giving of such bribe (Article 8). All signatory countries have also committed to abandon tax-deductibility of bribes.

Last but not least, parties to the Convention have committed to ensure that adequate resources, including adequate investigative tools, are provided to permit implementation of these legal provisions; this includes an expanded jurisdictional nexus, the provision of prompt and effective legal assistance among signatory countries (and bank secrecy may not be asserted to deny mutual legal assistance) and that investigation and enforcement efforts are "not influenced by considerations of national economic interest, the potential effect upon relations with another State or the identity of the natural or legal persons involved"(article 5).

OECD countries’ reforms to deter bribery in international trade and investment

Thus, over the past four or five years, each party to the Convention has passed new legislation, establishing the offence of bribing foreign public officials in international business transactions, and today bribery payments are subject to severe criminal sanctions in most of the major exporting countries. Many countries have also established legal provisions aimed at banning companies found guilty of bribing public officials abroad from public subsidies and government procurement contracts. Similarly, tax-deductibility of bribes has been abandoned in all signatory countries.

Some countries which have felt that resources available to their law enforcement agencies were not adequate for an effective prosecution of bribery have provided them with new resources. For example,

France decided last year to increase the human resources available for conducting enquiries relating to domestic and transnational corruption through the creation of a Central Brigade for Combating Corruption, consisting of twenty or so officials (police, gendarmerie, customs officers, and officials from the tax and competition authorities). Others, such as Belgium, France, Norway and Switzerland, have decided to provide new investigative tools -- such as provisional measures affecting the assets of persons under investigation or tapping of phone messages -- to their law enforcement agencies.

More important, cases of bribery of foreign officials have begun to be investigated in many of the signatory countries. Cases falling under the scope of the Convention have been investigated in countries such as Argentina, Australia, Belgium (at least four cases, including one investigating the giving of bribes by a Belgian company to officials in a Middle East country), Canada (at least three cases), Germany (at least 5 cases), Korea (two to four cases), France (about 4-6 cases), Norway, Switzerland, etc.

In a few countries, cases of bribery of foreign publications have even led to condemnation. For instance, in Norway, the investigation on Norway's state oil company led to its condemnation last year for the giving of bribes to officials of a Middle East country. In Switzerland, in 2003, a Geneva first instance court condemned for the offence of money laundering two leading Swiss companies for having paid a more than USD 200 million bribe to top officials in a Middle East country to gain a customs clearance market.

OECD countries' commitment to take responsibility for combating bribery in trade and investment

How has all this happened? The adoption by OECD member and non-member countries of the OECD Convention has been a milestone in the efforts made by OECD countries' public authorities to combat corruption on international markets more effectively. Previously, OECD countries -with the notable exception of the United States which has prohibited the giving of bribes to foreign public officials in international business transactions since 1977 with the enactment of the Foreign Corrupt Practices Act (FCPA)- prosecuted only active and passive bribery involving domestic officials. Where international business transactions were concerned, most OECD countries tolerated bribes and even accepted their tax deductibility if they had been paid to a foreign public official.

The 1990s showed however a growing understanding among OECD governments that what had been tolerated before and even encouraged was getting out of control; they increasingly acknowledged and observed with concern that corruption was becoming widespread, that it erodes public confidence in political institutions and leads to contempt for the rule of law, that corruption undermines competition in the market place, and has generally a devastating effect on investment, growth and development.

This understanding of the negative impacts of corruption led to the decision to put the fight against corruption higher on the political agenda and, as a consequence, to the adoption of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions in December 1997 and its implementation by thirty-five countries. But the signing ceremony was not the end of it. Understanding that the fight against bribery is no an easy undertaking, that many diverging interests are at stake (interests of public officials who benefit from corruption, interests of companies which gain markets through the giving of bribes to foreign public officials, etc.), and that, at the end of the day, political commitments and conventions are meaningless unless they are enforced, parties to the Convention decided to adopt a monitoring mechanism to ensure that the Convention and its principles are filled with life through a thorough implementation and enforcement of its standards.

Known as peer review, this mechanism consists of a regular review by signatory countries of each other's regulatory system, measures and institutions to enforce the principles laid down by the Convention. This includes verifying the conformity of national laws with the Convention as well as assessing how far the new rules are enforced in practice. Thus, since 2001, experts from signatory countries and the OECD Secretariat visit each country to meet with political, administrative, police, judicial authorities and other relevant bodies to discuss enforcement. These on-site visits aim at revealing any flaws in the implementation of the Convention by its signatories and at encouraging further reforms.

The impact of the OECD Convention on the giving of bribes in international business transactions

The signing, ratification and transposition into domestic law of the OECD Convention have had several impacts on international business transactions. The first one has been to signal to law enforcement authorities of signatory countries that acts which, in the past, could be performed with impunity could now be investigated: by joining the Convention and transposing it into domestic legislation, political leaders have indeed demonstrated their commitment to dry up the sources of corruption. This was important as experience shows that, without political will, enforcement agencies often feel powerless to investigate bribery cases, especially when those cases involve prominent politicians and wealthy businessmen.

Second, the decision of political leaders to ban foreign bribery has led to a radical change in the mentality of large corporate groups when deciding to invest abroad, making them aware of new risks and giving rise to the development of internal corporate control mechanisms aimed at banning the giving of bribes to foreign public officials by their staff. For these companies, the vigilance of competitors ready to report to the prosecution authorities any suspicious payment, the adverse publicity of the institution of criminal proceedings that might follow have a strong dissuasive force. Thus, Western companies have begun to adopt strategies to deal with the risk of being prosecuted. Those strategies include written company codes of conduct circulated among staff, rigorous selection of the agents and intermediaries who are to be involved in the commercial process, implementation of financial monitoring and internal control procedures.

Addressing the issue of bribery of public officials by foreign investors: the growing involvement of importing countries

The last impact has been in relation to countries that have been "recipients" of bribes in the past. Although it is yet premature to assess the impact of the OECD Convention on investment and trade flows, there has been a growing understanding among various countries in the world that they might experience in the future a decrease in foreign direct investment and trade if they do not themselves address the issue of bribery seriously - simply because companies will not want to take the risk to accept solicitations of bribes and therefore run the risk of being investigated or prosecuted at home for giving bribes.

As a result of this, a growing number of countries in various parts of the world launched over the past few years regional initiatives aimed at addressing more effectively the corruption of their own officials by foreign investors. Understanding that corruption has become a significant drag on attracting much-needed foreign direct investment in the context of new laws on foreign bribery that have been passed in OECD countries, those countries - from the booming "tigers" of Asia to the rapidly liberalizing markets of former communist countries of Eastern Europe and the reforming economies of Latin America, have come to realize that contributing to the global efforts against corruption was much needed and that a concerted approach to combat this greatest obstacle to economic and social development was necessary.

The past five years have thus witnessed the emergence of an increasing number of regional initiatives aimed at fighting bribery of public officials. The first initiative of this kind targeted South East European countries in the context of post-war reconstruction. This regional Initiative then inspired 23 Asia-Pacific countries which decided to launch a more or less similar initiative for the Asia-Pacific region in 2000, the ADB OECD Anti-Corruption Initiative. They were quickly followed by a dozen countries of the former Soviet Union which also decided to tackle the issue of bribery of their own officials by foreign investors.

These mechanisms all share a comprehensive approach to fighting bribery in business transactions while respecting country differences and without interfering in internal corruption cases. They address the whole spectrum of aspects which must be covered by an effective anti-bribery system and combine a pledge to take actions on the basis of a regional platform developed by the countries of the region; a regional policy dialogue that provides a forum for exchange of views and update of progress; and the strengthening of capacities through the provision by the OECD, in partnership with regional organizations, of its know-how.
