

Joint AfDB/OECD Initiative to Support Business Integrity and Anti-Bribery Efforts in Africa

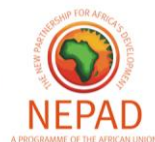
Stocktaking report on business integrity and anti-bribery legislation, policies and practices in twenty african countries

*This document has been prepared as a background document for the 5th NEPAD-OECD Ministerial Conference on 26-27 April 2011 in Dakar, Senegal, and will be discussed in further detail during **Focus Session 3.3 on Promoting Business Integrity**.*

This document contains the Table of Contents, the Executive Summary and the Recommendations of the Stocktaking Report.

The full document will be made publicly available in May 2011 and will be accessible at: www.oecd.org/corruption/africa

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Stocktaking Report on Business Integrity and Anti-Bribery Legislation, Policies and Practices in Twenty African Countries¹

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¹ **Note:** The twenty African countries studied in this Report are: Benin, Burkina Faso, Cameroon, Ethiopia, Ghana, Kenya, Madagascar, Malawi, Mali, Mauritania, Mozambique, Niger, Nigeria, Rwanda, Senegal, Sierra Leone, South Africa, Tanzania, Uganda and Zambia

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EXECUTIVE SUMMARY

Bribery, whether internal or foreign, active or passive, is a widespread phenomenon that covers all parts of the globe, public officials taking bribes and companies or businessmen bribing foreign public officials in the course of their business transactions being from all regions of the world. Bribery raises serious moral and political concerns, undermines good governance and sustainable economic development, and distorts competition. To attract investment and facilitate economic growth it is essential that states address the problem of bribery of public officials in business transactions and promote business integrity.

For over ten years the Organisation for Economic Cooperation and Development (OECD) has been actively involved with tackling bribery from the supply side and promoting the adoption of ethical practices by businesses since the mid 1990s. The OECD Convention on Combating Bribery of Foreign Public Officials (the OECD Convention)² has harnessed a vast amount of knowledge and experience through the monitoring and follow-up processes it has adopted in this area and is attracting ratifications and accessions by countries from all the five continents. Within Africa, South Africa is a party to this Convention. The African Development Bank (AfDB), a major contributor to good governance and anti-corruption in Africa, has joined with the OECD to strengthen the anti-bribery framework and practices and promote business integrity to provide an attractive environment for investment and sustained growth in the African region.

At the end of 2008, the African Development Bank (AfDB) and the Organisation for Economic Co-operation and Development (OECD) signed a declaration introducing a Joint Initiative to Support Business Integrity and Anti-Bribery Efforts in Africa. This Initiative aims to assist African countries in their fight against bribery of public officials in business transactions and to improve corporate integrity and accountability, while sustaining growth through an environment conducive to attracting foreign investment. The overall objectives of the Joint Initiative are to increase the capacity for effective anti-bribery enforcement, reinforce global anti-bribery efforts, enhance public sector integrity and contribute to the opening of a new era of transparent and accountable business in Africa.

Despite existing reforms that have yielded some positive results for African economies, African countries still face significant obstacles to economic development. Corruption and lack of transparency and accountability in business transactions remain high on the list of investment risks in Africa. Specific measures to promote private sector transparency, accountability and ethics, prevent conflicts between private profit and public interest, deter active bribery of public officials, and ensure the effective prosecution of bribe takers and givers are ways to help overcome these obstacles that have hampered Africa's economic development and progress towards achieving the Millennium Development Goals.

²

The OECD Convention entered into force on 15 February 1999.

The Joint Initiative seeks to highlight and enhance the complementarities between the African Union Convention on Preventing and Combating Corruption, the UN Convention Against Corruption and the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. Within a framework of strong African ownership and leadership, the OECD and AfDB will work together to design and help put in place effective policies to combat the bribery of public officials that draw from all of these instruments. Through the involvement of African business and industry, and policy-makers, the Joint Initiative will also focus on providing technical support to Africa's private sector with a view to improving standards of corporate integrity and accountability.

This study is a Stock-taking Report of Business Integrity and Anti-Bribery Legislation, Policies and Practices (including international and regional initiatives) to combat bribery of public officials in business transactions in Twenty African Countries: Benin, Burkina Faso, Cameroon, Ethiopia, Ghana, Kenya, Madagascar, Malawi, Mali, Mauritania, Mozambique, Niger, Nigeria, Rwanda, Senegal, Sierra Leone, South Africa, Tanzania, Uganda and Zambia. The report aims at identifying the main trends in these Countries and concludes with a set of recommendations for supporting Countries business integrity and anti-bribery efforts, and strengthening their existing frameworks and practices. It will form the basis of developing a Course of Action to be endorsed at the first Regional Meeting of the Initiative in the first half of 2010. An Anti-Bribery and Business Integrity Task Force for Africa will also be established to be composed of senior African government officials, business and industry experts, and members of civil society, who will serve as the national focal points for implementing the Course of Action.

The Report finds that all of the twenty countries have been engaged in enacting new laws on bribery and corruption, amending their penal codes to meet the requirements of the conventions to which have ratified or acceded. Despite these efforts some gaps remain in the countries' anti-corruption laws. These include, for example, the lack of a definition of 'public official' in some cases or a definition of 'public official' that is too narrowly; the lack of a provision concerning active bribery of a foreign public official; as well as the lack of a provision holding legal persons liable for bribery.

Most of the countries studied in this Report have importantly focused on preventive measures at the public administration level to curb bribery. This is especially apparent by the enactment of legal frameworks for public procurement. Challenges, however, remain and the lack of awareness of public procurement rules and their thorough implementation remain an area for further improvement. Ensuring the integrity of public officials is another area of focus, and many of the countries have introduced laws on asset declaration and illicit enrichment. However, monitoring procedures is one of the main challenges in this context.

The Report finds that much progress has been made in nearly all the twenty countries in setting up specialised anti-corruption agencies entrusted with fighting bribery. The mandates of these agencies vary, though all are required to raise public awareness. Their mandates notably do not always extend to prosecution, making co-operation with other agencies difficult. This Report further finds that many countries have yet to strengthen their laws on detection and that the introduction of whistleblower protection and access to information laws widely remain an area for further development.

In contrast to the reforms that have been adopted in relation to public procurement and ensuring integrity of public officials, the progress in raising business integrity notably through accounting and auditing standards has been slow. As a result, the accounting and auditing standards of many countries do not reflect the international standards that could help deter bribery. Most of the countries have left the formulation and adoption of business codes of conduct to the private sector and there is evidence of some progress in this area. However, local chambers of commerce seem to have played a limited role in initiating business codes so far.

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There are indications that civil society organisations (CSOs) are contributing to the anti-corruption efforts, as well as the media. There are examples of where CSOs have engaged in formulating proposals for improvement, including in relation to the need for legislation on freedom of information and whistleblower protection. However, there remains an element of caution amongst policy-makers, state agencies and businesses to engage with CSOs in monitoring policies and practices within anti-corruption agencies and businesses.

While significant efforts are being made to combat bribery there are areas that could be strengthened further to meet the common goal of attractive investment and achieving sustained growth in Africa. Chapter VI of this Report makes a number of recommendations in respect of strengthening (1) anti-bribery legislation; (2) effective implementation of anti-bribery and related laws, co-operation across agencies and increasing reviews; (3) awareness of anti-bribery laws in state departments and agencies; (4) business integrity and accountability and (5) promoting the involvement of the public and the media. This stock taking study and the suggested recommendations will provide a platform for further discussion, exchange of ideas and the adoption of a Course of Action to be followed in the region under the umbrella of the AfDB/OECD Initiative.

RECOMMENDATIONS

This study is a stocktaking exercise of the anti-bribery and associated laws and practices aimed at curbing bribery of public officials in business transactions and raising business integrity adopted in twenty countries in sub-Saharan Africa. The developments within the business sector in fighting bribery in response to initiatives such as the OECD Guidelines for Multinational Enterprises and the UN Global Compact, as well as the role of civil society and the media in the fight against bribery of public officials in business transactions were also examined in these twenty countries.

The study of the legal frameworks and practices revealed gaps, loopholes and lack of clarity in some of the offences created. Some of the countries are yet to fully implement the anti-corruption convention(s) that they have ratified. The study also found that most of the agencies charged with powers to investigate bribery do not have powers to prosecute and, in turn, must send files to the Director of Public Prosecutions or the Attorney General for further action. This is a process that can cause significant delays in the investigation and prosecution of bribery.

The study further finds that public procurement policies and practices are another area which could benefit from further review and refinement. While there are sufficient laws in place to ensure accountability and transparency in the processes, the annual reports from the public procurement oversight authorities in some of the countries reported that many of the procurement entities were still unaware of the procurement rules and did not apply them. There was also lack of clarity about effective co-operation between the different agencies – e.g. the specialised anti-corruption agency and the Attorney General's

office, the public procurement oversight authority, the financial intelligence units and the specialised anti-corruption agencies.

A number of recommendations set out below highlight areas for further attention and action on the part of the governments, private sector and civil society with the support of the AfDB and the OECD.

Recommendation I.: Strengthening Anti-Bribery Legislation

Effective anti-bribery laws are essential for attracting investment and for economic growth. The national legislation of the twenty countries studied contain a range of offences aimed at combating bribery of public officials in business transactions that are also found in the legal systems of OECD countries.

However, some gaps and loopholes remain, and countries could strengthen their legislation by taking into account the following issues:

1. Offences in respect of active and passive bribery found in some anti-bribery laws do not mention the subjective element (intentionality) of the offence. ‘Intentionality’ is an important constituent in the bribery offences in the UNCAC (articles 15, 16) and the OECD Anti-Bribery Convention (article 1(1)).
2. Not all countries have made active bribery of foreign public officials an offence (see article 16 UNCAC). Article 16 of the UNCAC is a mandatory provision and countries which have not already done so are recommended to enact legislation with dissuasive sanctions that effectively criminalise the bribery of foreign public officials in international business transactions.
3. International standards for the criminalisation of bribery require a broad definition of “public official”. The legislation in many of the countries studied do not meet this requirement and either provide a narrow definition of “public official” or do not define the term. Countries are therefore recommended to broaden the definition of “public official” in their anti-bribery legislation to ensure that it covers bribery of persons holding legislative, executive, administrative or judicial office; persons exercising a public function or providing a public service; persons who perform public functions in a public agency or enterprise ; and persons defined as a public official under domestic law. Both the UNCAC (article 2(a)) and the AUC (article 1) define the term.
4. Most of the countries do not contain a specific provision on the liability of legal persons for the offence of bribery (see article 2 OECD Anti-Bribery Convention, article 26 UNCAC) and where provisions are included, it is unclear how they will be applied in practice. In countries based on the common law system, the ‘directing mind’ test is used which is unsatisfactory in current day company practices where the decision-making is often diffused. International standards now clearly require countries to impose adequate criminal, civil or administrative sanctions against legal persons for bribery, and countries are therefore recommended to enact effective provisions in this regard. Annex I of the OECD Anti-Bribery Convention provides good practice guidance on implementing specific articles of the Convention, including on the responsibility of legal persons, which can also be useful for establishing similar requirements under the UNCAC.

Recommendation II.: Strengthening the Effective Implementation of Anti-Bribery and related Laws; Promote Co-operation across Agencies; and Increasing Resources for the Investigation and Prosecution of Bribery of Public Officials.

The effective implementation of anti-bribery laws is critical in the fight against corruption. However, effective implementation is difficult to assess as in most countries, there is no official data available on the number of complaints, number of investigations and number of prosecutions for bribery of public officials

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in business transactions. Such information is vital to measure the effectiveness of anti-bribery laws in practice, and to establish whether complaints are being thoroughly investigated and whether mechanisms to reveal such information need to be put in place. Cooperation across agencies is also a key element in the effective investigation and prosecution of bribery offences, as well as ensuring that anti-corruption authorities are adequately resourced and staffed. Countries could address these issues by taking into account the following:

1. Improving methods of data collection, including on sanctions imposed, and ensuring their wide dissemination;
2. Implementing mechanisms to keep track of the status of cases, including those that were dropped (and why);
3. Reporting of cases even where a case is heard at the lowest level (e.g. magistrates' courts in countries with a common law influence) and publicly disseminating judgments;
4. Fostering inter-agency co-operation and regular joint training of staff, thereby establishing effective working relationships;
5. Providing appropriate means for exchange of information between different agencies, such as anti-corruption agencies, financial intelligence units and public procurement agencies;
6. Considering giving prosecutorial powers in bribery cases to specialised anti-corruption agencies;
7. Ensuring that the various agencies are adequately resourced and undergo regular training sessions (at national and/or regional level), including in the development of methods for detection and investigation;
8. Conducting regular reviews of anti-bribery laws and practices at national and regional levels.

Recommendation III.: Strengthening Awareness of Anti-Bribery Laws in Government Departments, Agencies and other Institutions

Awareness of laws in all government departments and other state agencies, as well as within educational institutions, is vital in the fight against the bribery of public officials in business transactions. It is also important that public authorities understand how the public procurement rules work and how to implement them. Countries are therefore recommended to take into consideration the following:

1. Training a pool of staff on a regular basis on public procurement rules and their application;
2. Putting in place sound administration systems that enable staff to obtain clarification as and when needed;
3. Regular appraisal and auditing of staff practices in relation to public procurement to ensure that the rules are being applied as intended;

4. Raising awareness of anti-bribery and related laws in educational institutions, including business and law schools.

Recommendation IV.: Strengthening Means of Detecting and Reporting Bribery of Public Officials

Bribery is a clandestine act and anti-corruption authorities must rely on numerous means of detection to ensure that such behaviour is detected, reported and subsequently investigated. Whistleblowers – employees who come forward with information about malpractices and suspicious activities within their places of employment, and concerned members of the public who may have information to impart to relevant authorities – provide a very important means of detection of bribery and corruption. However, few of the countries studied in the Report have enacted specific whistleblower protection laws to ensure that such persons who come forward and report bribery do not suffer reprisals. To facilitate detection and encourage the reporting of bribery, countries are recommended to:

1. Implement effective means to facilitate the detection of bribery, including through public and private sector reporting mechanisms;
2. Establish easily accessible channels for public and private sector employees to report suspicions of bribery and other unlawful activities, and the implementation of measures to protect from discriminatory or disciplinary actions employees who make such reports in good faith and on reasonable grounds to competent authorities.

Recommendation V.: Strengthening Business Integrity and Accountability

Another important cornerstone in the fight against bribery of public officials in business transactions is through legislation aimed at increasing business integrity, transparency and accountability. Businesses can also set guidelines for improving their integrity and put in place mechanisms within their organisations for reporting bribery and training staff on detecting bribery, following good accounting practices and undertaking best practices when engaging in public procurement bids. A number of countries have adopted business codes of conduct but these best practices still need to be widely publicised and adopted across the twenty countries. Countries are therefore recommended to strengthen these initiatives by addressing the following:

1. Adoption of whistleblower legislation that protect employees who report suspicions of bribery or other unlawful activities in good faith and on reasonable grounds to competent authorities from discriminatory or disciplinary actions;
2. Adoption of international accounting and auditing standards similar to the IFRS and IAS, creating effective false accounting offences, and the adoption of dissuasive sanctions for omissions or false expenditure entries to hide payments of bribes to public officials, and putting in place effective compliance mechanisms;
3. Promoting international standards such as the UN Global Compact, the OECD Guidelines for Multinational Enterprises, and other codes of conduct adopted by business associations in the African region;
4. Harnessing local and national chambers of commerce and professional associations to disseminate information and advise businesses, including small and medium enterprises, on codes of conduct, and provide training of business employees and others (e.g. contractors) where required;

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5. Providing safe channels of communication for employees within businesses to report suspicions of bribery;
6. Training of business employees and contractors on national anti-bribery legislation, international best practices in accounting and public procurement processes.

Recommendation VI.: Promoting the Involvement of the Public, Civil Society and the Media

Another cornerstone for success in fighting bribery is to raise public awareness of bribery and related offences and their negative impact. Engagement with civil society organisations is critical in this regard. It is also essential to not only take steps that promote public awareness but to also provide various channels for reporting incidents without fear of reprisals. The media also has an important role to play in the detection and reporting of bribery, and access to information is essential in this regard. Countries are therefore recommended to address these issues by taking into consideration the following:

1. Creating an enabling environment for the media and civil society in the fight against bribery and corruption, and supporting NGOs to raise awareness and possibly act as an optional conduit for members of the public to report cases of bribery of public officials in business transactions;
2. Providing and implementing adequate measures for members of the public and the media to access information, including through the consideration of adoption of right to information legislation and mechanisms;
3. Providing adequate protection to witnesses and informants;
4. Encourage and provide training to the media to report cases of bribery and to widely disseminate news of anti-bribery efforts;
5. Encouraging interaction and co-operation between all stakeholders – NGOs, the public, government agencies, businesses, chambers of commerce, business associations, professional association and the media.