

Fighting Bribery in International Business Deals

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Introduction

Bribing public officials to obtain international business raises serious moral and political concerns, undermines good governance and economic development, and distorts international competitive conditions.

The OECD has played a leading role in the battle against bribery and corruption in international business deals for more than a decade. The fight gathered momentum in 1999 with the entry into force of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions ("the Convention"). The Convention makes it a crime to bribe a foreign public official in exchange for obtaining, or retaining, international business.

By the end of 2003, the Convention had been ratified and transposed into domestic legislation by all the original signatories – the 30 OECD member countries and four non-members (Argentina, Brazil, Bulgaria and Chile). Slovenia, which acceded in September 2001, is in the process of adapting its national legislation to the standards of the Convention. The OECD is now ensuring that all Parties fully implement the Convention.

The Convention represents a landmark in international co-operation to fight bribery and corruption. For the first time, the world's largest trading and investment partners, which together account for more than 70% of world trade and 90% of foreign direct investment, are acting in concert to halt the flow of bribes to foreign public officials in international business transactions.

The Convention embodies the result of an ambitious undertaking that began with the development by the OECD Working Group on Bribery in International Business Transactions of various instruments – the Recommendations of 1994, 1996 and 1997. The overall purpose of these instruments is to prevent bribery in international business transactions by requiring countries to establish in their national laws, the criminal offence of bribing a foreign public official, and to have in place adequate sanctions and reliable means for detecting and enforcing the offence. They also include non-criminal rules for preven-

tion, overall transparency and co-operation between countries. In addition, parties are also required to deny the tax deductibility of such bribes.

But outlawing bribery is not enough. Businesses themselves must play a role, by changing the corporate culture that allows bribery to continue. The OECD Guidelines for Multinational Enterprises include a chapter on measures that enterprises should take to prevent bribery and addresses passive and active corruption. The OECD Principles of Corporate Governance, in calling for more disclosure and financial transparency, also provide a framework that discourages bribery.

The OECD's work in public governance addresses the broader issues of preventing, detecting and penalizing misconduct by public officials. Activities with non-member countries aim at assisting countries in domestic policy reform and in raising international anti-corruption standards. The OECD is also contributing to implementation of the Convention through its work on official export credits and credit guarantees, including an action statement that calls for members to take appropriate measures to deter bribery before export credits are granted. This Policy Brief focuses on the Convention, its implementation and enforcement. ■

Why fight corruption?

Instances of corruption around the world are reported on an almost daily basis. There is no scarcity of scandals that illustrate the depth and pervasiveness of corruption: bribes to high-level officials for major export contracts in many countries, the plundering of national assets, and the endemic confusion between private and public funds in some developing and transition economies.

Corruption in awarding business contracts has social, political and economic costs, which no country can afford. If public officials take bribes when awarding contracts to foreign businesses for public services such as roads, water or electricity supplies, this inflates the price, distorts allocation of resources and undermines competition. It has a devastating effect on investment, growth and development. Furthermore, such corruption exacts an inordinately high price on the poor by denying them access to vital basic services. Increasing

intolerance of these effects has led to mounting pressure from citizens and financial markets for an international fight against corruption. The Convention is one response. ■

How does the Convention combat bribery?

Countries that accede to the Convention agree to make bribing foreign public officials in international business transactions a criminal offence. They also accept the OECD Revised Recommendation on Combating Bribery in International Business Transactions (the "revised Recommendation"), which contains broader measures to prevent and combat transnational bribery. These measures include eliminating the tax deductibility of bribes, ensuring the transparency of book-keeping and auditing practices, and adopting preventive and repressive measures against corruption in public procurement systems.

The Convention provides that legislation making bribery of a foreign public official a criminal offence must apply to all persons (natural persons and companies) and that it must cover the offer or promise, as well as the giving of a bribe. It is an offence regardless of whether the bribe is done through an intermediary or whether the advantage is for a foreign public official or a third party.

The offence must prohibit all forms of bribes, including tangible or intangible as well as pecuniary and non-pecuniary advantages. The Convention covers bribery for the purpose of obtaining or retaining "business or other improper advantage in the conduct of international business." This applies not just to obtaining contracts, but also obtaining regulatory permits, or preferential treatment in taxation, customs, or judicial and legislative proceedings.

Bribery remains an offence even if the person concerned was the best-qualified bidder and should in any case have been awarded the contract purely on merit. And it does not matter whether the bribe achieved the desired result, or if bribery is tolerated or even widespread in the country concerned.

The Convention defines a "foreign public official" as any person holding a legislative, administrative or judicial office of a foreign country, whether appointed or elected; any person exercising a pub-

lic function for a foreign country, including for a public agency or public enterprise; and any official or agent of a public international organisation.

In addition, the Convention requires each Party to:

- establish effective, proportionate and dissuasive criminal penalties for the foreign bribery offence. Where a country's legal system does not apply criminal responsibility to enterprises, they shall be subject to effective, proportionate and dissuasive non-criminal penalties;
- establish its jurisdiction over the foreign bribery offence when the offence is committed in whole or in part in its territory. Where a Party has jurisdiction to prosecute its nationals for offences committed abroad, it shall establish such jurisdiction over the foreign bribery offence according to the same principles;
- establish a money laundering offence in relation to the bribe and/or proceeds of foreign bribery if it already has such an offence for domestic bribery;
- prohibit accounting and auditing practices that make it easier to conceal foreign bribery;
- provide prompt and effective legal assistance to other Parties in the investigation and prosecution of foreign bribery offences. The bribery of a foreign public official shall be deemed an extraditable offence under the laws of the Parties and the extradition treaties between them.

To comply with the revised Recommendation, Parties also pledge to take a number of related measures to deter, prevent and combat international bribery. These measures should:

- encourage the introduction of sound internal company controls, including standards of conduct. Companies responsible for bribing foreign public officials should be suspended from future bids for public contracts.
- ensure that procurement contracts funded by bilateral aid include anti-corruption provisions and promote the proper implementation of anti-corruption provisions in international development institutions. They also agree to work closely with development partners to combat corruption in all development co-operation efforts. ■

How are implementation and enforcement monitored?

To ensure the effective implementation of the Convention and of the revised Recommendation, Parties adopted a monitoring process based on the OECD peer-review principles.

The monitoring process is divided in two main phases.

Phase 1 evaluates whether the legal texts through which State Parties implement the Convention meet the standard set by the Convention.

Phase 2 studies the structures put in place to enforce the laws and rules implementing the Convention and the Revised Recommendation and to assess their application in practice. This includes reviewing national investigations and prosecutions and conducting "on site" interviews with government and regulatory authorities and other persons concerned with application of the Convention.

The OECD Working Group on Bribery in International Business Transactions (the "Working Group") is in charge of monitoring the implementation of the Convention and the related instruments.

The Phase 1 reviews, which began in April 1999 when the Convention was ratified, are almost completed, with 33 countries having been examined by the Working Group. These reviews have found that overall, national standards are in line with the Convention; where necessary, remedial measures were recommended. Several Parties have taken action to implement these recommendations. Others are in the process of amending their legislation.

The Phase 2 reviews started in 2001 and are scheduled to be completed for all 35 Parties to the Convention by 2007. At the end of 2003, eight countries, including four G7 countries, had been reviewed. ■

What is the role of civil society and the private sector?

Civil society plays a key role in fighting corruption, and several civil society and private sector organizations work with the OECD in implementing the Convention.

Monitoring enforcement of the convention

Once the OECD has reviewed a country's anti-bribery legislation to ensure it conforms to the Convention (Phase 1) it turns its attention to how the law is being applied in practice (Phase 2). This involves reviewing each country's performance, publishing the results and following up to see whether the country is carrying out any recommended changes. The Phase 2 reviews also offer a chance to evaluate the successful prosecution of alleged foreign bribery cases.

The monitoring and follow-up for both the Convention and the Recommendation is carried out by the OECD Working Group on Bribery in International Business Transactions, made up of government experts from the 35 countries which are Parties to the Convention. The Working Group has developed a monitoring mechanism under which all Parties are examined according to a formal, systematic and detailed procedure that includes self-evaluation and mutual review.

The monitoring procedures are similar for the Phase 1 and Phase 2 examinations. For each country reviewed, the OECD secretariat prepares a draft report, based on information provided by the country under examination as well as information col-

lected by the OECD Secretariat and two other countries from the Working Group who act as "lead examiners". In Phase 2, the information gathering includes an on-site visit to the country examined, during which consultations with representatives from various government departments as well as from the private sector, trade unions, civil society, journalists and practitioners such as lawyers and accountants take place.

The report of the review is put to the Working Group for final adoption, and is also shown to the country under review for comment. The country under review may express a dissenting opinion, which is reflected in the final report, but it cannot prevent the Working Group from adopting the report. The document, which contains an evaluation of the country's laws and practices to combat foreign bribery, is published by the OECD and is also posted on its website (www.oecd.org/corruption).

The examined country is required to provide within a year a detailed report to the Working Group on steps it has taken or is planning to take to implement the review's priority recommendations, and within two years it has to provide a detailed written report which is published as an addendum to the review.

The OECD Working Group on Bribery in International Business Transactions is committed to consulting regularly with non-governmental organizations and to providing information to the public on its work. Civil society, trade union and business representatives are invited to comment on the country reviews. They are in particular consulted during on-site visits by the OECD as part of the Phase 2 monitoring process. This enables examiners to check, for example, whether the law implementing the Convention is well-known to local firms. Feedback from trade unions, non-governmental organizations and journalists can provide an independent perspective on whether their government is doing enough, and can also put pressure on governments to comply with their commitments. All Phase 1 and Phase 2 reports are published on

the internet which gives the public the opportunity to pressure governments for changes.

If the Convention is going to have any real effect, companies must become fully implicated in ensuring compliance with the Convention and with national anti-bribery laws. Some companies have established their own anti-corruption strategies, including the adoption of codes of ethical conduct that include provisions concerning bribery and extortion between the private and public sectors as well as between private companies. These codes express the companies' serious commitment to comply with international efforts to combat corruption, and are intended to modify the corporate culture and attitudes of its employees to reduce the risk of corrupt behaviour. They are often accompanied by the creation of management systems for monitoring and reviewing compliance.

In its chapter on combating bribery, the OECD's revised Guidelines for Multinational Enterprises (non-binding recommendations to enterprises made by the member countries), include rules for combating bribery of public officials, as well as for preventing the channeling of payments through the use of subcontracts, purchase orders and consulting agreements to public officials. ■

What about the tax deductibility of bribes?

Until the mid-1990s, the bribery of foreign public officials was accepted as a normal cost of doing business by many OECD countries. Companies doing business with foreign countries often claimed that they had to pay bribes in order to be favourably considered for the awarding of contracts. Only half of the OECD countries disallowed the tax deductibility of bribes to foreign public officials as a general rule.

The OECD Committee on Fiscal Affairs (CFA) believes that the disallowance of the tax deductibility of bribes to foreign public officials helps to serve as a deterrent, especially when it is combined with the criminalisation of such conduct. It also feels that non-deductibility sends a strong signal to companies that bribery is no longer an acceptable business practice, and serves as a politically visible symbol of the common international commitment to combat bribery.

Since agreeing to the 1996 Recommendation, all OECD countries that had previously allowed the tax deductibility of bribes to foreign public officials have amended their legislation to disallow such tax deductibility. As with the Convention, the success of these legislative changes depends on their effective implementation. In 2002, the OECD designed a Bribery Awareness Handbook for Tax Examiners to help countries to implement their national legislation denying the tax deductibility of bribes. This handbook provides guidance on the techniques used for bribery as well as tools to identify bribes during tax examinations. It has been translated into several languages and disseminated in the tax administrations of OECD member countries as well as a growing number of non-OECD economies. In addition, the relevant tax laws are being examined by the Working Group on Bribery in International

Business Transactions, in co-operation with the Committee on Fiscal Affairs, in the course of its Phase 1 and 2 examinations of Parties' implementation of the Convention and the 1997 Recommendation. ■

What lies ahead?

The rapid entry into force of the Convention and its ratification and implementation is a clear signal of its success in advancing the fight against international bribery. But there is still much work to be done, not least completing the Phase 2 reviews for all 35 Parties to the Convention. If new countries join the Convention, the implementation and application of their laws will also need to be carefully evaluated.

In terms of future action, OECD ministers at their annual meeting in May 2002 asked countries to consider whether there are gaps in the Convention - for instance bribery relating to foreign political parties - and if so, how to close these gaps.

New questions might also require further consideration by the Working Group on Bribery in the future, including whether to extend the Convention to cover private sector bribery, strengthening its accounting and auditing rules and reducing obstacles to co-operation between police and judicial authorities of different countries.

The Convention has also set an international benchmark for non-OECD countries' reform efforts and it is essential that the OECD maintains its role as a driving force in the fight against international corruption. The Organisation is continuing its policy dialogue with non-members. Some of these activities have developed Action Plans, through which participating countries commit to analysis, self-evaluation and peer review and to undertaking remedial action in areas of concern. The Anti-Corruption Network for Transition Economies, which also includes the sub-regional Baltic Anti-Corruption Initiative (BACI) and a new initiative for seven NIS countries, the Stability Pact Anti-Corruption Initiative for South Eastern Europe (SPAI), the ADB/OECD Asia-Pacific Anti-Corruption Initiative as well as the Governance and Anti-Corruption Forum for Latin America will continue to help work towards meeting international anti-corruption standards and enhance the capacity of participating countries to

fight corruption. These initiatives will also continue to bring together donors, governments, private enterprise and civil society to provide mutual support to share successful experiences and techniques to curbing corruption.

For the fight against international bribery to succeed, it is essential that there is sustained political commitment and involvement of organizations positioned to play a key role. For this reason it is important to acknowledge the invaluable contributions made by many organizations. Several international bodies have become involved, including the United Nations, the International Labour Organisation, International Monetary Fund, the World Bank, the Asian Development Bank, the World Trade Organization and the World Customs Organisation. Regional organisations and inter-governmental structures include the Council of Europe, the European Union, the European Bank for Reconstruc-

tion and Development, and the Organisation of American States.

Non-governmental organizations, such as Transparency International and the Open Society Institute, as well as international aid providers, both governmental and private, help raise public awareness of the dangers of corruption and provide technical assistance to countries in designing effective anti-corruption strategies. The involvement of companies, business associations and trade unions remains essential. Likewise, the contribution of free and independent media is vital to exposing corruption and to encouraging accountability of public officials. ■

For further information

For more information on the OECD's work in implementing the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, contact daf.contact@oecd.org. ■

Countries having ratified/acceded to the Convention^a

	Country	Date of Ratification
1.	Iceland	17 August 1998
2.	Japan	13 October 1998
3.	Germany	10 November 1998
4.	Hungary	4 December 1998
5.	United States	8 December 1998
6.	Finland	10 December 1998
7.	United Kingdom	14 December 1998
8.	Canada	17 December 1998
9.	Norway	18 December 1998
10.	Bulgaria	22 December 1998
11.	Korea	4 January 1999
12.	Greece	5 February 1999
13.	Austria	20 May 1999
14.	Mexico	27 May 1999
15.	Sweden	8 June 1999
16.	Belgium	27 July 1999
17.	Slovak Republic	24 September 1999
18.	Australia	18 October 1999
19.	Spain	14 January 2000
20.	Czech Republic	21 January 2000
21.	Switzerland	31 May 2000
22.	Turkey	26 July 2000
23.	France	31 July 2000
24.	Brazil	24 August 2000
25.	Denmark	5 September 2000
26.	Poland	8 September 2000
27.	Portugal	23 November 2000
28.	Italy	15 December 2000
29.	Netherlands	12 January 2001
30.	Argentina	8 February 2001
31.	Luxembourg	21 March 2001
32.	Chile	18 April 2001
33.	New Zealand	25 June 2001
34. (accession)	Slovenia**	6 September 2001
35.	Ireland	22 September 2003

a. In order of ratification/accession received by the Secretary-General

*** Slovenia has not yet enacted full implementing legislation.*

For further reading

- Phase 2 country reports (*forthcoming*);
www.oecd.org/corruption
- Fighting Corruption: What Role for Civil Society? The Role of the OECD
available at: www.oecd.org/corruption
- OECD Anti-corruption Unit Internet site:
www.oecd.org/daf/nocorruption/
- No Longer Business as Usual: Fighting Bribery and Corruption, 2000
ISBN: 92-64-17660-8, US\$38, €39
- Effective Prosecution of Corruption, Asian Development Bank; Organisation for Economic Co-operation and Development, Manila, November 2003.
Download online version at:
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They are published under the responsibility of the Secretary-General.

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