

RESPONSES TO THE CONSULTATION PAPER ON THE REVIEW OF THE OECD ANTI-BRIBERY INSTRUMENTS

Comments from GRECO (President, Group of States against Corruption, Council of Europe)

Thank you for your invitation to respond to the consultation paper on Review of the OECD Instruments on Combating Bribery of Foreign Public Officials in International Business Transactions Ten Years after Adoption. The consultation paper raises a number of interesting issues, many of which are also addressed in the context of the Third Evaluation Round of the Group of States Against Corruption (GRECO), which is currently underway. This Round focuses in part on the corruption offences established under the Council of Europe's Criminal Law Convention on Corruption (ETS 173) and therefore looks *inter alia* at the offence of bribery of foreign public officials, solicitation of public officials (and in this connection, effective regret), bribery through intermediaries, bribes for the benefit of third parties, jurisdiction over bribery offences and statutes of limitation. As 27 out of the 46 member states of GRECO are also members of the OECD Working Group on Bribery in International Business Transactions, we have a common interest in avoiding overlap and in ensuring that interpretations of the Council of Europe's anti-corruption instruments and the OECD anti-bribery instruments do not impose conflicting obligations upon their members. As regards the latter point, I welcome the references in your consultation paper to the Council of Europe's Criminal Law Convention on Corruption (ETS 173); moreover your useful glossary of international criminal standards laid down in ETS 173, the United Nations Convention against Corruption (UNCAC) and the OECD Convention will further support states in implementing these standards.

As regards the first question raised in the consultation paper, the OECD anti-bribery instruments have no doubt been instrumental in increasing awareness of the fact that bribery of foreign public officials is not a normal way of doing business. That is in itself a major feat, and has thus also facilitated the work of GRECO in this area. Furthermore, the evaluations of both the Working Group on Bribery and GRECO as well as the recommendations these two bodies have issued to their members, underline that effective review is a cornerstone of the implementation of international legal instruments in the fight against corruption, a message that was once again communicated by GRECO to the Second Session of the Conference of States Parties to the United Nations Convention Against Corruption in January of this year.¹

However, it should be recognised that one cannot monitor the same instruments *ad infinitum* without decreasing the effectiveness of such monitoring and contributing to monitoring fatigue. GRECO has largely managed to avoid this problem by selecting different themes from the six anti-corruption instruments of the Council of Europe² for each evaluation round, allowing for an in-depth evaluation of a wide diversity of issues relevant to the fight against corruption, but I realise that the mandate of the Working Group on Bribery would not as readily allow it to do the same. In light of this, I take the view that to push the international anti-corruption agenda further it would certainly be beneficial for many countries, including members of GRECO, if certain issues arising in connection with the OECD's anti-bribery instruments would be elaborated upon further. In this context, I have looked at the issues raised in the consultation paper very much from the perspective of how the work of the OECD/Working Group on Bribery and that of GRECO can mutually reinforce each other. This perspective may well be different from that of other stakeholders, but it may therefore perhaps be all the more valuable.

¹ "Communication on review of implementation of the United Nations Convention against Corruption in view of the Second Session of the Conference of States Parties to the Convention" (Greco (2007) 21E Final)

² GRECO has a mandate to monitor the following six anti-corruption instruments of the Council of Europe: Criminal and Civil Law Conventions on Corruption (ETS 173 and ETS 174), Additional Protocol (ETS 191) to the Criminal Law Convention; Resolution (97) 24 on the twenty guiding principles for the fight against corruption, Recommendation No. R (2000) 10 on codes of conduct for public officials and Recommendation Rec(2003)4 on common rules against corruption in the funding of political parties and electoral campaigns.

Issues in connection of which a review of the OECD anti-bribery instruments and subsequent monitoring by the Working Group on Bribery might have the most added value for GRECO members are, in my view:

- bribery of foreign party officials (and bribery through the intermediary of a foreign political party or party official), in recognition of the fact that the Criminal Law Convention on Corruption (ETS 173) does not contain an autonomous definition of (foreign) public officials and that under the autonomous definition of foreign public officials of the OECD, foreign party officials are not necessarily covered (if these party officials do not hold a legislative, administrative office or exercise a public function). As the involvement of foreign party officials in bribery offences is not unlikely, consideration of extending the applicability of the OECD anti-bribery instruments to bribery of foreign party officials would in my view be advisable;
- bribery of foreign private sector agents. Although private sector bribery is an offence under the Council of Europe's Criminal Law Convention on Corruption, the convention allows parties to reserve the right to establish this as a criminal offence (contrary to what is stated in your consultation paper, I would thus not define private sector bribery as a mandatory offence). Given that the work carried out in this area is in its infancy compared to public sector bribery and that privatisation has further blurred the distinction between the private and public sector in many instances, this matter would certainly warrant further attention;
- application of liability of legal persons to state-owned/controlled companies, in recognition of the fact – as highlighted in the consultation paper - that such companies often operate in high risk sectors;
- mutual legal assistance. I recognise that the Working Group on Bribery has traditionally focused on mutual legal assistance from the perspective of prosecuting the supply-side of bribery. However, considering that the members of the Working Group on Bribery include some of the major international financial centres, it may well be useful if in the review of the OECD's anti-bribery instruments the provision of legal assistance by Working Group members in recovering the assets from corruption, would be examined.

As regards the other issues raised in your consultation paper, concerning in particular solicitation of (foreign) public officials (and in this context, effective regret), bribery through intermediaries, bribes for the benefit of third parties, jurisdiction over bribery offences and statutes of limitation, the Working Group might wish to draw on GRECO's Third Round Evaluation Reports as they are adopted. These reports will no doubt provide additional input to your work.

Finally, as regards your third question, I am aware that the Working Group on Bribery is likely to discuss the merits of amending the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions versus adding footnotes, additional commentaries, revising the existing Commentaries and/or 1997 Revised Recommendation. In this connection, I would like to stress that in the context of GRECO's monitoring, so-called soft law instruments (such as Resolution (97) 24 on the twenty guiding principles for the fight against corruption or Recommendation Rec(2003)4 on common rules against corruption in the funding of political parties and electoral campaigns) have turned out to be as 'hard' in providing a basis for addressing recommendations to GRECO members as the Criminal Law Convention on Corruption (ETS 173) and its Additional Protocol (ETS 191). It would therefore be inappropriate to consider conventions as being the only international legal instruments of real relevance in the fight against corruption.

I hope that these comments will assist the Working Group in its review of the OECD anti-bribery instruments. I wish you every success with this endeavour and will follow the ensuing debate with interest.

Let me also take this opportunity to congratulate you warmly on your receipt of the Transparency International Integrity Award.