

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

### Comments from the International Monetary Fund (Staff)<sup>1</sup>

#### *Introduction*

**From the start, the IMF has recognized the OECD Convention on Combating the Bribery of Foreign Public Officials as potentially a powerful tool in tackling international corruption.** IMF Executive Directors have encouraged Fund staff to use this tool for paying more attention to the two-sided nature of corruption.<sup>2</sup> Fund staff followed up by sending the Board in 2001 an information paper on the genesis and content of the Convention.<sup>3</sup> Subsequently, during the ratification process and Phase 1 monitoring, IMF country reports informed regularly on the status of implementation by OECD countries. On several occasions, IMF Management publicly referred to the important role of the Convention bolstered by its monitoring arrangement. Finally, the 2006 Global Monitoring Report, by the staffs by the World Bank and the IMF, featured the Convention as a critical link in the system of global governance checks and balances.<sup>4</sup>

An important attraction of the Convention for the Fund is the help it offers developing countries. By attacking the supply side of corruption, and placing responsibility for implementation largely on industrial countries, it helps developing countries overcome some of the weaknesses in their judicial capacity as they fight corruption in public finance. Fund staff is further interested in the Convention because of its connections with the Anti-Money Laundering framework, in the implementation and monitoring of which the Fund plays an active role.

**The IMF has over the past decade developed its own approach to promoting good governance and combating corruption** which relies on a range of instruments, several of which indirectly support the implementation of the Convention. The basis for this approach was the 1997 Guidance Note on Governance.<sup>5</sup> The Note describes a broad role for the IMF in governance despite the limitations implicit in its mandate and expertise. It stipulates that the IMF may get involved in governance issues only when they have a significant current or potential impact on macroeconomic performance. The IMF must further limit itself to economic aspects of corruption.

**Transparency plays a substantial role in the Fund's efforts to promote good governance.** In the late 1990s, the Fund introduced two policy transparency codes—one for fiscal policy and another for monetary and financial policies—as well as a standard on the dissemination of economic data.<sup>6</sup> Designed to aid countries in accessing international capital markets, the policy transparency codes have also proven very useful to countries striving for greater accountability in public sector management. Both are

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<sup>1</sup> These comments were collected from individual IMF staff familiar with the Convention. They should not be attributed to the IMF or its Executive Directors. Queries can be directed to Mr. Anton Op de Beke at aopdebeke@imf.org.

<sup>2</sup> See <http://www.imf.org/external/np/sec/pn/2001/pn0120.htm>

<sup>3</sup> See <http://www.imf.org/external/np/gov/2001/eng/091801.htm> .

<sup>4</sup> See

<http://web.worldbank.org/WBSITE/EXTERNAL/EXTDEC/EXTGLOBALMONITOR/EXTGLOBALMONITOR2006/0,,contentMDK:20810084~menuPK:2199415~pagePK:64218950~piPK:64218883~theSitePK:2186432,00.html>

<sup>5</sup> The Role of the IMF in Governance Issues: Guidance Note, July 25, 1997 (see <http://www.imf.org/external/pubs/ft/exrp/govern/govindex.htm> )

<sup>6</sup> For the transparency codes and associated documents, see <http://www.imf.org/external/np/fad/trans/index.htm> and <http://www.imf.org/external/np/mae/mft/index.htm>

accompanied by manuals that illustrate good and best practices, and Fund staff produce Reports on the Observance of Standards and Codes (ROSCs) that record progress achieved at the country level.<sup>7</sup> Transparency in government procurement and licensing is a key component of the fiscal policy transparency. It is backed up by the principle that all contractual arrangements between the public and private sector should be publicly accessible. As this principle takes hold, it should further enhance the effectiveness of the OECD Convention. The fiscal policy transparency code was also supplemented by a special guide on resource revenue transparency.<sup>8</sup>

The Fund also conducts “Safeguards Assessments” of central banks to ensure proper use of Fund resources and to promote good governance of central banks as a general matter.<sup>9</sup> The framework Fund staff uses in conducting these assessments is consistent with the framework used by the OECD for implementing the Convention (i.e., encompassing company controls, international accounting standards, internal audit, and independent external audits). While not specifically targeting bribery prevention, the IMF’s Safeguards Assessments do seek to promote good governance and transparency in central bank financial management and reporting that should nonetheless support efforts by central banks to resist, or offer, bribes in the conduct of their work.

### ***General Comments***

IMF area department staff working on developing countries find the OECD foreign bribery convention potentially very useful for their countries which have to address the possibility of bribery with a weak national administration, an underdeveloped government audit capacity and grossly deficient judiciary. It is of particular importance to the fast growing number of developing countries with significant revenues from natural resources such as oil, gas, and mining. Because of the associated rents, these sectors harbor especially great opportunities for bribery that developing country governments are often ill-equipped to deal with on their own.

Nonetheless, area department staff report that there appears to be little familiarity among local officials of the Convention and its potential usefulness. It was suggested that the usefulness of the OECD Convention for developing countries could be enhanced by an awareness campaign among officials on how the Convention can support them in combating corruption, and in particular what steps they would need to take in order to obtain the necessary legal assistance from the Party country that is home to a foreign company suspected of having attempted or engaged in bribery.

### ***Specific Comments***

## **Chapter II: Criminalisation**

### ***Section II.5: Investigative and Prosecutorial Discretion***

Staff notes a public perception that enforcement of the Convention is still weak (see, for instance, Transparency International’s Progress Report 07)<sup>10</sup>. This undermines its credibility and discourages use of the legal options it affords. One way of addressing this problem might be a stepped-up information campaign on the enforcement that is actually taking place. Another way would be to step up the enforcement itself. We therefore strongly support the Working Group’s intention to focus on enforcement

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<sup>7</sup> See <http://www.imf.org/external/np/rosc/rosc.asp> .

<sup>8</sup> See <http://www.imf.org/external/pp/longres.aspx?id=4176> .

<sup>9</sup> See <http://www.imf.org/external/ns/cs.aspx?id=156>

<sup>10</sup> See [http://www.transparency.org/publications/publications/3rd\\_oecd\\_progress\\_report](http://www.transparency.org/publications/publications/3rd_oecd_progress_report) .

as one of the key cross-cutting issues during the next monitoring phase, including encouraging the right degree of prosecutorial activism across all countries Party to the Convention.

### *Section II.7: Money Laundering*

Given the linkages between Convention and the Anti-Money Laundering/Combating Financing of Terrorism (AML/CFT) framework, which is in place in all Parties to the Convention, it is of concern that “very few Parties have detected foreign bribery through their AML systems”. The IMF participates in the Financial Action Task Force (FATF) meetings as an observer organizations, and provides policy and technical advice to its members on the AML/CFT frameworks, including through AML assessments. In that context, staff will continue to look with interest at proposals for enhancing the effectiveness of the AML/CFT framework discussed in the FATF.

It is a great challenge for banks to detect a bribery and/or a money laundering offence committed by a client through their transaction monitoring systems given the large volume of payments and transfers. Moreover, customers can typically provide plausible justifications for—usually complex—foreign operations. It could therefore be worthwhile to conduct further empirical and theoretical research into making the transactions monitoring systems more effective.<sup>11</sup> Other areas that could benefit from a review would be the effectiveness of implementation of FATF Recommendation 6 on Politically Exposed Persons (PEPs)—the Fund’s AML/CFT assessments show generally a low level of implementation—and complementary actions on the enforcement side. The latter might extend, for instance, to cases in which assets held by public officials, including of non-Party countries in Party countries, are clearly disproportionate to their regular income. Where the cooperation of an originating non-Party country is not fully assured, innovative approaches may be called for.

### *Section II.9: Mutual Legal Assistance*

Fund staff welcome the proposals for exploring ways to increase the efficiency of mutual legal assistance (MLA), such as regional cooperation; bilateral MLA treaties as provided for in the UN Convention against Corruption (UNCAC); and pro-active use of informal MLA. Once in place, they would facilitate the investigation and prosecution of foreign bribery cases. Moreover, adequate cooperation by non-Parties under MLA treaties could be monitored and become a device for demonstrating official commitment to good governance.

### *Section II.10: Monitoring and Follow-up*

Our impression is that the Convention has benefited from a fair but rigorous monitoring system. It provides Parties with incentives to properly implement the Convention and functions as a mutual assistance mechanism. Moreover, the monitoring reports disseminate information on the Convention widely to domestic and international practitioners. Because it is critical to the effectiveness of the Convention, we strongly support the plans for continued monitoring once Phase 2 is complete.

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<sup>11</sup> See, for instance, the suggestions based on an analysis of US data in *The Theory of “Crying Wolf”: The Economics of Money Laundering Enforcement*, Elöd Takáts, IMF Working Paper 07/81, April 2007, at <http://www.imf.org/external/pubs/cat/longres.cfm?sk=20623.0>

## **Chapter III: Detection and Prevention**

### *Section III.4: Role of Internal Company Controls and External Audits*

Internal company controls, internal audits and external audits are all essential for the detection of bribery, and possibilities for strengthening them mentioned in the Paper deserve to be explored. Controls, accounting and auditing should be improved at the company level but also at the government level, for purposes of the Convention especially in procurement and licensing, and particularly in non-Party countries. As noted above, for all countries requesting IMF financing, the IMF requires an assessment of the safeguards at the central bank against misuse of those funds, notably its accounting, internal controls, independent auditing and transparency.<sup>12</sup> These assessments can have a spill-over effect and improve accounting and auditing in related sectors.

It should be borne in mind that the responsibility of external auditors in the audit of financial statements--which is probably the most likely type of engagement by which they might detect fraud or illegal acts-- is limited to fraud cases that have a material impact on the financial statements. External audits of financial statements, accordingly, do not provide a guarantee that all instances of fraud will be detected.

In paragraph 109 the Paper refers to International Standards on Auditing No. 240, which, inter alia, sets the rules for auditors' communications with regulatory authorities. This standard was redrafted in 2004 and the current version of the standard provides clearer guidance regarding client confidentiality and reporting requirements. Specifically, the reference to "ordinarily precludes reporting fraud and error.." has been replaced with "may preclude...". Also, in some countries, the auditor has a duty to report misstatements to authorities when management and those charged with governance fail to take corrective action. The related standard No. 250 on reporting non-compliance with laws and regulations may also be of relevance to this work; it is currently being re-considered by the standard-setter.

### *Section III.5: Public Procurement*

Public procurement procedures have a significant bearing on the likelihood of detecting bribery, and thus the effectiveness of the Convention. As the Paper rightly notes, enhanced due diligence offers a way for strengthening procurement. In this context the adoption, in Party and non-Party countries of transparent practices, including timely dissemination via the internet of comprehensive information on tenders and tender results, may warrant greater emphasis. The IMF's fiscal transparency code with accompanying manual and guide strongly advocate transparency across all public financial management activities, including procurement and the licensing for the exploitation of natural resources, growing rapidly in importance and in many respects analogous to procurement.<sup>13</sup> In particular they recommend full disclosure of contracts between the government and public and private entities as best practice. Full disclosure would expose contracts to broad scrutiny, by experts inside and outside the government, and considerably increase the chance of detection of any bribery.

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<sup>12</sup> See <http://www.imf.org/external/ns/cs.aspx?id=156>.

<sup>13</sup> See the IMF's Code of Good Practices on Fiscal Transparency and accompanying Manual and Guide on Resource Revenue Transparency at <http://www.imf.org/external/np/fad/trans/index.htm> . Specifically on contract disclosure, see Manual paragraphs 91, 100, and 101, and Guide paragraphs 6-11.