

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

## Comments from BIAC (Business and Industry Advisory Committee to the OECD)

### *I. Introduction*

BIAC welcomes the opportunity to comment on the OECD consultation paper. In our view the OECD paper provides a useful synthesis of potential issues to be addressed during the review which appear to mainly a summary of the material results of the Phase 1 and Phase 2 reviews concerning the implementation of the OECD Anti-Bribery Convention. The OECD paper has also clarified some of the questions and issues that BIAC raised in the consultation with the Anti-Bribery Working Group on 20 June 2007 concerning the exact scope of the OECD anti-bribery instruments. However, we find in the OECD document provides only rather few indications regarding the thinking of the OECD Anti-Bribery Working Group concerning priorities for the review of instruments.

In this submission we provide our views concerning the questions posed by the OECD in its consultation document. We raised several of our points included in this submission already at the aforementioned consultation in last June. Some of suggestions go beyond the immediate realm of the OECD anti-bribery instruments and include for instance public governance issues. Nevertheless, we would hope that also these comments and suggestions will be taken into account by the Anti-Bribery Working Group as well as other parts of the OECD dealing with anti-corruption issues. They reflect that fighting bribery and corruption effectively inevitably requires a holistic approach across a number of policy areas. We stand ready to provide additional OECD business input as the Anti-Bribery Working Group's discussions about the review of instruments advance.

### *II. OECD questions and BIAC responses*

#### *OECD Question 1:*

***What are your general impressions concerning the effectiveness and implementation of the OECD anti-bribery instruments (i.e. the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, the 1997 Revised Recommendation of the Council on Combating Bribery in International Business Transactions, and the 1996 Recommendation of the Council on the Tax Deductibility of Bribes to Foreign Public Officials) over the last ten years?***

#### **BIAC comment:**

The OECD has been leading the international fight against corruption. Through the Convention and its related instruments, the bribing of public foreign officials has become illegal in all signatory states and bribes can no longer be deducted from taxes. This important step forward in the fight against bribery has led to a more level playing field between OECD businesses.

The implementation of the Convention has helped to change the perception of the problems raised by bribery not least because prosecutions can detract considerably from the positive public image of a company. This is seen by companies as a risk factor, independent from the occurrence of actual investigation and prosecution in a specific case. The clear focus of the convention as well as the peer review mechanism, including the system of functional equivalence, are important factors for ensuring the credibility of the instrument within the business community and for the creation of a level playing field among OECD companies. The credibility of the Convention has fostered business confidence in governments' determination to curb corruption.

Based on this confidence, companies have undertaken measures that would have been less likely without an established framework. Often they have taken voluntary steps to go beyond what compliance

with the Convention and the respective implementation legislation at the national level requires. Some business sectors have established mechanisms to resolve the situation where companies have become aware of foreign bribery by their competitors to the mutual satisfaction of all companies in the sector. Moreover, many businesses, in particular larger companies and firms in highly-exposed sectors have stepped up their anti-corruption efforts through the development of codes of conduct as well as internal compliance programs. Besides, business engages in co-ordinating efforts either with key players in specific industrial sectors or on a horizontal business federation level to prevent bribery through developing and adopting common standards in the form of codes of conduct which also provide guidance for SMEs. The initiatives undertaken by business are crucial to the success of the Convention. Only the combined effort of business and governments can lead to a significant reduction in the occurrence of bribery.

In BIAC's view the following features of the Convention have particularly contributed to its success. They need to be preserved, and if possible strengthened in the future.

Focus: The Convention addresses one aspect of corruption - the bribing of public foreign officials. This clear focus has allowed the Convention to become a recognized international standard against which the performance of governments can be benchmarked.

Reach: All OECD countries and six non-member economies have ratified and implemented the Convention. The 36 parties to the Convention represent more than 70% of global trade and 90 % of global outward FDI. This high coverage of global trade and investment is critical for the instrument's high relevance.

Monitoring: The monitoring processes in the form of peer reviews have been of paramount importance. BIAC noted that several countries have amended their legislation following OECD recommendations that are based on the monitoring. The phase 1 and 2 processes have given the OECD's efforts visibility, impact and credibility. Special attention should be given to ensure effective follow-up to monitoring reports.

Private sector involvement: The OECD has established an informal exchange of views with business and other stakeholders as an integral part of the Phase 2 review process. BIAC regards this dialogue as very relevant to the implementation of the Convention, as it helps to better determine the impact that the laws and enforcement have on actual behaviour. Additionally, BIAC regards this well established dialogue as an asset to the OECD, in comparison to the United Nations that has not yet established nor envisaged any structured stakeholder dialogue on the implementation of the UN Convention against Corruption.

Despite the achievements in the OECD's fight against bribery of foreign public officials, more needs to be done to effectively curb corruption and provide a real level playing field for international business across OECD countries and in particular outside the OECD. The current review of OECD anti-bribery instruments represents an important opportunity to preserve and enhance the effectiveness of the Convention. BIAC suggestions concerning issues to be addressed are presented below in response to the questions 2 and 3.

In addition, to reviewing its anti-bribery instruments the OECD should in BIAC's view focus increasingly on involving major emerging countries into the fight against corruption and also develop initiatives which complement major law enforcement under the Anti-Bribery Convention. As to co-operation with the major emerging economies, BIAC notes that China, India and Russia are not Party to the Convention which has the potential to undermine significantly the OECD efforts to create a more level playing field for international business. We expect that Russia will become a Party during its process of accession to the OECD and that it will make a credible commitment to implement effectively the OECD

Convention. With regards to China and India, we urge the OECD to use its enhanced engagement process with the countries in order to bring them closer to OECD policy standards, and ultimately to work towards their adherence to the Convention as soon as possible. The fact that these countries have signed UN Convention against Corruption (UNCAC) does not provide sufficient remedy. India has not yet ratified the Convention and in any case the UNCAC lacks so far any efficient monitoring mechanism.

BIAC also believes that the OECD must take a more holistic approach towards fighting corruption. Efforts to improve law enforcement under the Convention need to be complemented by initiatives in other policy areas. The quality of public governance and public procurement frameworks and practices are for example factors which have a significant influence on the occurrence of corruption and where integrity must be improved in many countries. Thus, BIAC welcomes recent OECD initiatives to improve integrity in public procurement systems and we encourage the OECD to develop similar initiatives in related areas.

### ***OECD questions 2 and 3:***

***What additional insights do you have on any of the specific issues raised in this Consultation Paper?***

***What steps do you believe should be taken to address any of the specific issues raised in this Consultation Paper, including suggestions regarding the effectiveness of the OECD anti-bribery instruments?***

In following paragraphs BIAC provides its view on selected issues raised by the OECD in its consultation paper. The order in which we raise the issues reflects the order in which they are raised in the OECD paper and does indicate a BIAC priority ranking.

#### ***Definition of foreign public official – the case of state owned enterprises***

BIAC believes that clarification would be very useful to what extent and which circumstances, employees of publicly owned companies in their role as bribers and as somebody receiving a bribe are to be considered as “foreign public official” referred to in the Convention. The definition of foreign public officials includes employees of a “public enterprise” and the Commentary defines a “public enterprise” as one over which a government “directly or indirectly exercises a dominant influence”. The OECD consultation paper notes in paragraph 11 that in some countries the definition of “public foreign official” does not cover indirect control or cases where governments hold only a minority of voting shares but exercise de facto control.

#### ***Bribe solicitation***

The OECD Convention focuses only on the supply side of a bribery transaction and does not address the demand side, i.e. bribe solicitation and extortion by public officials. This in our view a serious loophole of the OECD Convention as requests for facilitation payments, bribe solicitation and extortion are important factors contributing to the occurrence of corruption.

We urge the OECD to reflect about how to effectively address bribe solicitation and extortion in the OECD anti-bribery instruments. Including the demand side of bribery effectively into the OECD instruments would represent a significant step towards a more corruption-free business environment. Such a step would need to be complemented by additional steps outside the realm of the OECD anti-bribery instruments which may include the following:

- Government assistance for companies facing bribe solicitation and extortion (e.g. companies need to be able to report such instances to an agency independent from the prosecuting authorities);

- in the context of development co-operation, requirement of independent audits as a condition for receiving loans or development grants; and
- legal reform and simplification of regulation which reduces the opportunities for demanding bribes.
- establishment of sound procurement codes that require open bidding and tenders to act as a preventative on corruption;

#### *Private-to-private bribery*

BIAC regards corrupt practices within and between private companies as detrimental to the business environment, a distortion of fair competition and a serious offence against business ethics. Private-to-private bribery usually provides an undue advantage to the company of the bribing employee. Consequently, it impacts negatively and unfairly on the business opportunities of competitors. Further, it is detrimental to the company of the bribed employee who in return for the bribe accords a benefit to the bribing company which the latter would otherwise not have received.

Thus, companies are well advised to establish internal policies and procedures which minimize the risk to become involved in private-to-private as well as the bribing of public officials.

While we recognize that private-to-private bribery is an issue that needs to be addressed we question whether the OECD anti-bribery instruments are the means that are best suited to tackle this problem. Inclusion of private-to-private bribery would mean a significant expansion of the scope of the OECD anti-bribery instruments and this would bear the risk to lose focus. We believe the OECD would be well advised to concentrate its limited resources on ensuring more effective implementation of the provisions against the bribery of public foreign officials across countries before expanding its mandate significantly.

#### *Statute of limitations*

The OECD paper (paragraphs 55-57) indicates huge cross-country differences concerning the periods within which a criminal action can be brought (2 to 15 years) and also differences concerning the procedure to which the statutes of limitations are subject to. It appears that very wide differences concerning the statutes of limitations contradict the notion of a level playing field and would believe the issue would merit closer examination by the OECD as indicated in paragraph 57.

#### *Mutual legal assistance*

BIAC agrees with the OECD that lack of mutual legal assistance (MLA) in particular from non-Parties to the Convention seriously undermine the effectiveness of the OECD Convention (paragraphs 68-73). BIAC would welcome any OECD work which would facilitate MLA and we support the OECD Phase 2 recommendations which call for exhausting informal all formal and informal for obtaining MLA from Parties and non-Parties.

#### *Monitoring and follow-up*

Strict monitoring of governments' actions and performance is a pre-requisite for ensuring a level-playing field for business in the signatory states of the Convention and is necessary to ensure that the Convention remains the main international instrument to combat corruption. Thus, BIAC is pleased that the OECD decided to pursue monitoring as a priority issue beyond Phase 2. In our view, it would make sense to start with the post-phase 2 monitoring process after the review of the OECD instruments as been

completed since the material issues covered in the review should play an important role in the monitoring process.

We understand that the OECD is discussion to conduct in the future a combination of horizontal and country specific review. As far as the country specific elements of the review are concerned, BIAC would suggest that these should continue to be conducted in the form of peer reviews as this form of review gives the process higher credibility than country self-evaluations or assessments undertaken by the Secretariat. We would also recommend that future reviews should continue to include on-site visits. Several BIAC members that have been involved in arranging business meetings with the lead examiners have reported that the visits by the review teams have significantly increased awareness for the problem of foreign bribery as well as the legal provisions of the Convention and the national implementation legislation.

Moreover, we urge the OECD to continue to involve business in the monitoring process. The experience of BIAC members that have been fully integrated in the planning and execution of the reviews shows that the Phase 2 monitoring procedures serves also as a stimulant to launch initiatives in countries at the government and business level for taking further concrete steps against bribery.

#### *SMEs and foreign bribery*

The OECD argues in paragraph 100 that small and medium sized enterprises (SMEs) generally lack adequate internal compliance mechanisms and in paragraph 79 the organisation states that SMEs' lack of awareness creates a "serious risk of foreign bribery".

BIAC agrees that SMEs' generally tend to be less aware of the details concerning anti-corruption rules and that compliance programmes tend to be lacking or to be less effective than in larger multinational companies. This reflects the more limited resources that available to smaller companies. It is important for governments and business organisations to help raising SMEs' awareness concerning the legal anti-corruption provisions and to provide guidance concerning the implementation of internal anti-corruption programmes. A number of initiatives have been developed to that effect with active support by business organisations. The recently developed BIAC Anti-Bribery Resource Guide ([http://www.biac.org/pubs/anti-bribery\\_resource/guide.htm](http://www.biac.org/pubs/anti-bribery_resource/guide.htm)) informs about a number of such initiatives.

We would however caution not to over-emphasise the potential impact that insufficient SME awareness may have on foreign bribery. Rather than contribution to large scale foreign bribery SMEs may be involved in facilitation payments and in this context SMEs are the victims of corrupt public officials rather than aggressive bribers.

#### *Development co-operation*

In paragraphs 120 to 124 the OECD stresses the importance of initiatives aimed at ensuring the integrity of procurement funded by official development assistance (ODA). BIAC believes that this is an important area which merits increased attention. Bilateral donors as well as the regional and multilateral development banks must implement best international procurement practices in order to reduce corruption in donor funded projects more effectively. BIAC notes that there is a trend to rely in development co-operation increasingly on the procurement systems in the developing countries. While this potentially increases ownership and accountability by developing countries it may also cause significant challenges concerning the integrity and efficiency of procurement of donor funded projects. Many developing countries have only rudimentary procurement frameworks in place which lack efficiency and are prone to corruption. Donors' accountability to their citizens, taxpayers and parliaments as companies' accountability makes it imperative to ensure the efficient and effective use of funds which must not be jeopardised by the use of procurement systems that do not meet international best procurement practices.

The OECD should strongly advocate the coherent use of best practice standards in development co-operation, including in the context of the Methodology for Assessment of National Procurement Systems which is currently being developed by the DAC Joint Venture for Procurement (OECD, World Bank, bilateral/regional donors, and developing countries) and which does in its current form not promote in a consistent way the use of best international procurement practices.<sup>1</sup>

---

<sup>1</sup> In a recent submission to the OECD BIAC provided a detailed assessment on which elements of the draft Methodology reflect only subpar standards (see “BIAC Statement on Indicators reflecting Best Practices to be included into the draft Methodology for Assessment of National Procurement Systems developed by the Joint Venture for Procurement, 13 February 2008”)