

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

Comments from Conseil Français des Investisseurs en Afrique (CIAN) (Commission Anti-corruption)

Preamble

The CIAN Anti-corruption Commission welcomes the opportunity the OECD gives it to respond to the conclusions drawn by the Working Group on bribery of foreign public officials in international business transactions ten years after the signature of the Convention. The CIAN Anti-corruption Commission is indeed convinced the fight against international corruption can be efficient only through an enhanced synergy of the efforts delivered by international bodies, national public authorities and the private sector.

QUESTIONS FOR CONSULTATION

Question 1: What are your general impressions concerning the effectiveness and implementation of the OECD anti-bribery instruments over the last ten years?

1. The state of corruption in the world

The CIAN Anti-corruption Commission considers the corruption offer has increased in the world and notes that the amounts involved are higher than they used to be. As a consequence, a number of companies from the OECD area tend to withdraw from weak governance countries. The Anti-corruption Commission also notes that the number of undue solicitations has increased, especially during tax inspections, customs procedures or regulatory operations. In addition, it observes that the members who try to resist are, in certain countries, the object of serious, repeated and sometimes violent retaliatory measures, ranging from the seizure of bank accounts to the company premises being put under seals, passport confiscation, and the non-renewal of residence permits or even physical intimidation of individuals... In such a context, companies which opted for integrity pay a high price, because of the retaliatory measures they face in the field or because they are forced to abandon countries or sectors they hence consider as unmanageable.

The CIAN Anti-corruption Commission does not consider this situation is due to the inefficiency of the OECD Convention in itself, but rather that it derives from the emergence of new economic stakeholders from non-OECD countries and from the increasing number of weak governance countries or countries experiencing civil or military unrest.

Generally speaking, the Anti-corruption Commission observes that its members firmly committed themselves to combat bribery and developed adequate prevention policies and related strategic decisions.

Position no.1: The CIAN Anti-corruption Commission considers the OECD Convention is not sufficient to reduce the impact of bribery on the African continent; however its ambition should not be revised downwards but rather reinforced. The CIAN Anti-corruption Commission considers the assessment of the OECD Convention on bribery of foreign public officials in international business transactions' effectiveness cannot be delivered independently from other international conventions (Council of Europe, United Nations). These instruments are meant to remedy certain shortcomings (the non-criminalization of passive corruption) and limits (the small number of State Parties to the OECD Convention) while highlighting the originality of its follow-up mechanism.

2. The issue of passive corruption criminalization

Although the CIAN Anti-corruption Commission deplored the absence of criminalization of passive corruption in the OECD Convention provisions right from the beginning, it considers this shortcoming is

less prejudicial today as criminalization is addressed by the Criminal Law Convention of the Council of Europe and the United Nations Convention against Corruption. Certain countries such as France are hence in a position to sue and sanction foreign public officials who entered corruption pacts.

It is essential to criminalize passive corruption on two grounds: on the one hand because it is part of the elements allowing to resist undue solicitations companies are often faced with in a number of emerging countries, and on the other hand because without this equity dimension, it is difficult for companies to justify the merits of fighting bribery if one of the actors involved in the offence enjoys a de facto impunity given the laxity of justice in certain countries.

Position no. 2 : The CIAN Anti-corruption Commission considers the criminalization of passive corruption is essential in order to combat undue solicitations companies are faced with, and that this shortcoming of the OECD Convention is usefully balanced in countries where the Criminal Law Convention of the Council of Europe and the United Nations Convention against Corruption have been transposed in the meanwhile.

3. The issue of the limited number of State Parties to the OECD Convention

When the OECD Convention was signed nearly all exporting companies belonged to the OECD area, whereas ten years later a great number of companies operating on international markets come from countries which did not sign the OECD Convention and are still in a position to use bribes to win or retain contracts in weak governance countries without running too much of a risk. The CIAN Anti-corruption Commission took note of the moves made towards certain non-signatory exporting countries and considers it is a top priority to encourage them to sign, ratify and transpose the OECD Convention. The fact that companies from emerging countries are not necessarily sued for international contract-related bribes induces serious competition distortions (to the detriment of companies that chose integrity) while impeding the reduction of corruption in weak governance countries.

In theory, the United Nations Convention should remedy this situation but the number of signatures to date conceals the poor numbers of effective ratifications. Moreover, the absence of a proper follow-up mechanism, such as this of the OECD, significantly mitigates its efficiency. However, the Commission welcomes the OECD initiatives intended to third countries, such as the OECD Anti-corruption Network for Eastern Europe and Central Asia, the anti-corruption Istanbul Action Plan or the Good Governance for Development programme (MENA).

Position no. 3 : The CIAN Anti-corruption Commission considers that the absence of the main exporting emerging countries among the State Parties to the Convention is a major hindrance to the efficiency of the latter, and that the OECD should urgently accelerate and broaden its diplomatic and technical efforts towards these countries in order to remedy this shortcoming.

4. The issue of the OECD Convention follow-up mechanism

Although the limits of the effectiveness of the follow-up mechanism showed in some OECD countries that proved particularly reluctant to effectively implement the Convention, this mechanism remains the only hope of gradual harmonization of proceedings and sanctions, and in the long run of efficiency of the OECD instruments to combat bribery while avoiding competition distortions.

A greater media exposure of the assessments by country should allow the OECD to gain the support of public opinions favorable to the fight against corruption, support that certain governments currently grant it.

Furthermore, the imminent accession of new non-OECD State Parties to the Convention, the administrative or legal structures of which are sometimes very different from the average of State Parties, requires the reinforcement of the follow-up mechanism.

Finally, the OECD follow-up mechanism appears as a pioneer and thus rightly remains the example for other international instruments signed at the Council of Europe and United Nations. In such a context, any improvement in terms of efficiency will act as a lever for other international authorities.

Position no. 4 : The CIAN Anti-corruption Commission considers the follow-up mechanism is crucial in terms of OECD Convention effectiveness, and that it is the only means available to prevent business distortions related to the heterogeneous implementation of the Convention. The Commission states that a greater media exposure of the assessments by country would improve its efficiency, and that the role and means of the follow-up mechanism should be enhanced as a consequence of the imminent accession of new State Parties, the administrative and legal structures of which are sometimes very different from the average of State Parties.

QUESTIONS FOR CONSULTATION

Question 2: What additional insights do you have on any of the specific issues raised in the consultation paper?

Question 3: What steps do you believe should be taken to address any of the specific issues raised in the consultation paper?

The follow-up mechanism should in particular address the three following aspects: i) the harmonization of the sanctioning modes related to plea bargaining in respect of the competition distortions between criminal and non-criminal sanctions, ii) the identification of international good practices implemented by companies and their acknowledgment by the public authorities, and iii) the importance of a global approach in fighting corruption when it comes to development aid policies and business policies.

5. The issue of the harmonization of sanctioning modes related to plea bargaining

The CIAN Anti-corruption Commission notices great disparities between the OECD countries concerning the implementation of sanctions. In certain countries, the legal authorities accept that a company should “plea bargain” for a bribery offence and, in return for its cooperation with the legal authorities and implementation of reinforced audit and compliance programmes, should be entitled to a mitigation of penal sanctions, at least concerning the manager’s responsibility. In other countries such as France plea bargaining is only possible in the form of an “appearance upon prior plea of guilty” and limited to offences punished by less than five years’ imprisonment. This difference is significant in terms of deployment of a rigorous corruption prevention programme:

In countries where plea bargaining is not accepted, a manager discovering a case of corruption he was not aware of is not encouraged to reveal it to the legal authorities because his penal responsibility might be at stake. And in case he decides to improve its corruption prevention system, he might be tempted to do so progressively so as not to attract attention or suspicion. It is worth noting that the absence of plea bargaining in certain countries does not shorten the duration of proceedings that often take years, which is prejudicial to the image of justice in the country and to the company’s reputation. Given that plea bargaining implies cooperating with the legal authorities, they would help to reduce the duration of legal proceedings.

On the other hand, in countries where plea bargaining is possible, a manager discovering a case of corruption he was not aware of is encouraged to reveal it to the legal authorities and use examples of such cases and legal injunctions to deploy a rigorous corruption prevention programme.

Let us bear in mind that within the OECD area, companies faced with the American legal authorities because of bribery in international transactions that chose plea bargaining are today among those with the most rigorous and exhaustive corruption prevention systems.

Moreover, the lack of harmonization of the modalities related to plea bargaining implies two concrete problems as shown by the two examples below:

In case the headquarters of a company decide to use plea bargaining in a jurisdiction where it is possible to do so, it becomes a major issue for subsidiary managers in countries where plea bargaining is not possible. Either the staff will decide to entirely and voluntarily reveal the case in response to the injunctions of the headquarters' jurisdiction - its penal responsibility might thus be involved in the face of the jurisdiction of the subsidiary's host country. Or it will refuse voluntary disclosure thus putting the headquarters in a difficult situation in the face of their own jurisdiction, and the headquarters might be inclined to take disciplinary measures against uncooperative staff.

In case one of the companies of a consortium decides to use plea bargaining to a corruption offence before the headquarters' jurisdiction, such a decision would de facto put the other companies with headquarters in a country where plea bargaining is not possible in a delicate situation.

Position no. 5: The CIAN Anti-corruption Commission considers that within the framework of its assessment processes, the Working Group should review the way plea bargaining i) encourage companies to disclose corruption offences more often than in countries where it is not possible, ii) encourage companies to develop rigorous corruption prevention programmes following these legal decisions and iii) allow legal authorities to deliver judgments more quickly and as a result to deal with more cases over one year. As a consequence and in so far as the OECD Convention deals with offences in international transactions, the CIAN Anti-corruption Commission considers that the issue of the harmonization of sanctioning modes related to plea bargaining is crucial and deserves further consideration.

6. The issue of the identification and acknowledgement of international good practices to prevent bribery

On several occasions the report underlines the responsibility of companies in implementing corruption prevention systems in accordance with international good practices. However, except for a limited number of countries, corruption prevention devices are rarely considered by legal authorities as exculpatory elements showing the actual will of the company's management to ban corruption from its business practices. The development of a corruption prevention system is costly in financial terms and because the management needs time to reorganize procurement and monitoring procedures. Given that a prevention device will not prevent – as for industrial accidents – an isolated individual from committing a fault, many companies tend to consider a *minimum* device is sufficient, as developing broader mechanisms could appear way too costly in comparison with the way legal authorities tackle them. The overall effectiveness of a prevention device being directly related to the rigor and exhaustiveness of the means employed, it is advisable that all legal authorities of State Parties officially accept that companies equipped with rigorous devices should enjoy a mitigation of the penal responsibility of the management, following the example of the United States and Italy.

Similarly, it is surprising to note that when donors launch calls for tenders, no information is explicitly required about the nature of corruption prevention devices in place, whereas companies are

generally required to prove everything is in order with their national tax administration and social organizations. As a consequence, while international aid increasingly develops, new competitors emerge: companies from countries which did not sign the OECD Convention and are in a position to use bribes to win calls for tenders launched by development-related administrations without running any penal risk in their country, while the countries of these administrations forbid their national companies to use this type of undue commissions. The obligation of disclosing corruption prevention devices should be a prerequisite for companies to be shortlisted for calls for tenders and should apply to all multilateral development banks, the main shareholders of which are the OECD-area countries. The CIAN Anti-corruption Commission does not understand why these banks are reluctant to do so while claiming that fighting corruption is one of their top priorities.

Finally, it is obvious that international good practices often mentioned by the OECD report are sometimes difficult to define given the diversity of sectors and organizational structures of the companies. In this respect, the issue of the different methods of payment of intermediaries is significant. Comparatively, very little data is available on this topic at the international level, and the OECD could usefully encourage professional organizations such as the International Chamber of Commerce, the BIAC, etc. to deliver recommendations on this topic, and could organize forums on a regular basis to allow companies to discuss the prevention actions they implement and the difficulties they are faced with.

Position no. 6 : The CIAN Anti-corruption Commission considers that by explicitly mitigating the penal responsibility of managers who implemented rigorous corruption prevention devices, the legal authorities of State Parties to the Convention would directly contribute to the effectiveness of prevention policies. The Commission suggests this topic should be part of the assessments conducted within the framework of the follow-up mechanism. The CIAN Anti-corruption Commission also thinks that the way donors require companies to be equipped with corruption prevention systems as part of the short listing criteria should be reviewed within the framework of these assessments. Finally, the CIAN Anti-corruption Commission considers the Working Group could organize useful debates on the corruption prevention good practices implemented by companies.

7. The issue of combating corruption as a global approach

Few international entities enjoy the competence and authority of the OECD in terms of governmental action. But fighting corruption requires a global approach: it must be part of international trade, aid and public management policies. The works delivered by the OECD on these issues are scattered and do not appear to be truly coordinated. It is not certain fighting corruption is a priority of aid policies, which in the eyes of the CIAN Anti-corruption Commission is paradoxical given that bribery is a major hindrance to the investment of OECD countries in weak governance countries. It is also surprising that the ratification and effective transposition of an international anti-corruption convention are no *sine qua non* conditions to any bi or multilateral trade liberalization negotiation.

The OECD Working Group should act as a leader for governmental action as a whole when it comes to combating international corruption, particularly since its follow-up mechanism would enable it to assess its cross-industry implementation.

Position no. 7: The CIAN Anti-corruption Commission considers fighting bribery requires a global intergovernmental approach the OECD is in a position to manage and thinks its Working Group should act as a leader as its follow-up mechanism allows it to deliver assessments of State Parties to the Convention.

APPENDIX: THE FRENCH COUNCIL OF INVESTORS IN AFRICA (CIAN) AND ITS' ANTI-CORRUPTION COMMISSION

The French Council of Investors in Africa (CIAN) is an independent, professional organization made of about a hundred companies operating on the African continent via their 1000 subsidiaries.

The CIAN members are major French companies investing in Africa among others, and companies specializing in Africa. The CIAN organizes geographical working sessions (Western, Central Africa...) and sessions by topic (sustainable development, health with "Sida-Entreprises", anti-corruption...).

Relying on about thirty years of existence, the CIAN shares its expertise of Africa and more particularly of the relations between the private sector and development. The European and African public authorities often consult the CIAN.

For example, its Deputy Chairman has a seat on the board of directors of the Agence Française de Développement (AFD) and the British authorities consulted the CIAN while preparing the African section of the Gleneagles G8 Summit. Various African presidents and ministers regularly meet with the CIAN when they travel to Paris. The CIAN is part of the *European Business Council Africa- Mediterranean (EBCAM)* gathering its European counterparts.

Every year, the CIAN publishes an annual report based on surveys conducted with its members. For the first time, the 2008 report produced a general corruption-related index in different countries and a map of undue tax solicitations, thus appearing as a real barometer of economic life in these countries.

The Anti-corruption Commission was set up in 2002 to give its members the opportunity to discuss current legal events related to bribery, international good practices and the issue of undue solicitations in certain African countries. The Commission acts as a spokesman to convey its members' concerns to the (French) national and international public authorities.

Philippe Montigny, Chairman of ETHIC Intelligence, has been chairing the CIAN Anti-corruption Commission since its creation.

For further information go to: www.cian.asso.fr