

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

Comments from the International Chamber of Commerce (ICC Commission on Anti-corruption)

1. ICC welcomes the opportunity, through the Consultation Paper, to cooperate once again with the OECD Working Group on Bribery.

2. You will find hereunder the comments made by the ICC Anti-Corruption Commission with a view to evaluating the effectiveness of the OECD Anti-Bribery Instruments (the “Instruments”) and to providing suggestions, based on the experience of world business, for the further strengthening of the Instruments’ implementation.

We have structured our input, in conformity with your request, along three lines:

- (a) ICC’s evaluation of the effectiveness and implementation of the Instruments.
- (b) ICC’s insights on specific issues mentioned in the Consultation Paper.
- (c) Suggestions on steps to be taken to address the specific issues raised in the Consultation Paper, including possible revisions of the Instruments.

3. ICC’s evaluation of the effectiveness and implementation of the Instruments

a. From a business perspective, it clearly appears that the adoption of the Instruments and the work performed by the Working Group during a period of more than ten years has produced substantial and irreversible effects on the way international bribery is treated: the criminalization of bribery of foreign public officials is now general in the OECD area and tax deductions for bribe payments are generally disallowed.

b. There should be no way back on these fundamental results. The effective, continuous and thorough monitoring of the Instruments’ implementation, conducted by the Working Group should guarantee the consolidation and enhancement of what has been achieved up to the present date. The monitoring process played a determining role in the recognition by State Parties of their obligations and responsibilities under the Instruments.

c. The results from the Phase 2 country examinations have however revealed notable differences in the way State Parties enforce their national anti-foreign bribery laws. We therefore encourage the Working Group to pursue with the same determination as before, specially under the Phase *2bis* examinations, its monitoring activity with a view to equalizing the conditions between the different jurisdictions and in particular the way legal enforcement is pursued. For its part, business reaffirms its readiness to contribute, in any appropriate capacity, to the success of the monitoring of the Instruments.

d. The Instruments’ effectiveness can be evaluated by the number of enquiries, investigations and convictions of corruption cases, made on the basis of the national implementing laws adopted by the State Parties¹.

¹ Increasing numbers of fraud can in part be explained by the “fraud controls paradox”, meaning that when controls are implemented, the number of frauds detected increases almost immediately, while the deterrent effect of controls takes time to become visible. PricewaterhouseCoopers, Investigations and Forensic Services, Martin-Luther University, “Economic Crime: people, culture and controls, 4th biennial Global Economic Crime Survey”, March 2007, p.4.

ICC believes however that the effectiveness of the Instruments should also be measured by the considerable work accomplished, since the adoption of the Instruments, by the private sector through corporate codes of conduct aiming at complying with the standards, laid down in the Instruments, and through integrity programs².

Indeed, significant self-regulatory work has been accomplished at three levels in the business world: (i) at a global level, by the United Nations Global Compact, the International Chamber of Commerce, the Partnering Against Corruption Initiative (PACI) of the World Economic Forum and Transparency International (these four organizations cooperating more and more frequently on a number of cross-cutting anti-bribery issues), (ii) at a sectoral level, by *e.g.* the Extractive Industries Transparency Initiative (E.I.T.I.) and the Common Industry Standards for the European Aerospace and Defense (CIS) of the AeroSpace and Defense Industries Association of Europe (ASD)³ and (iii) at the level of the individual enterprises⁴. ICC sees no trend of a reduction of the compliance efforts of the companies at any of those levels in the future, even if business has the impression that its efforts are not properly recognized.

e. As the Working Group has noted in the Consultation Paper, there have been a number of developments outside the OECD area that have an impact on the fight against international corruption and one is referring here more specifically to (i) the international instruments, which address all forms of corruptive practices (including passive corruption and private-to-private corruption) and to (ii) the emergence of countries, which are not party to the Instruments, as major economic players and which are not bound by the restrictions included in the Instruments.

This raises the question of the outreach of the Instruments to these emerging economies. ICC can only but encourage the Working Group, in order to promote the Instruments' effectiveness, to pursue its outreach program in the direction of the emerging countries in order to make these countries aware of the prohibitions embedded in the Instruments and to encourage them to adopt the Instruments' standards.

f. The Instruments have benefited from a strong focus but have missed an important point of the corruption equation: the demand side (*i.e.* bribe solicitation and extortion). This detracts from the Instruments' effectiveness in creating a level playing field and puts OECD business in an awkward position, as numerous company executives, frequently exposed to extortion, will confirm⁵. Recent

² This point is accurately reflected in § 99 of the Consultation Paper.

³ The CIS were approved by the ASD Board on June 14, 2007 and presented on October 4, 2007 to the ASD National Associations, in Barcelona at the First Meeting of the European Defense Industry Anti-Corruption Forum. Nearly all ASD National Associations have signed an "Endorsement Sheet" and are presently in the process of encouraging their individual member companies, large, medium and small alike, to sign a "Company Statement of Adherence".

⁴ In its study titled "A Survey into Fraud Risk Mitigation in 13 European Countries", Ernst and Young observes that 62 % of the respondents' companies had a code of conduct and that, where a code is in place, 62 % of the respondents consider that it is useful in preventing and detecting fraud, bribery and corruption.

⁵ According to the PricewaterhouseCoopers Survey (pp. 31 and 32) mentioned *supra*, 20 % to 30 % of the companies surveyed reported that outside Western Europe and North America, they encountered circumstances where they were asked to pay a bribe. In comparison, 21 % to 54 % of companies from the E7 reported encountering circumstances where they were asked to pay a bribe. Further, across the E7 markets, over one third of companies (34 %) believed that they had found themselves in a position where they lost a business opportunity to a competitor, which they thought may have paid a bribe, compared with a global average of 24 %. This is significantly higher than the developed markets of North America (6 %) and Western Europe (14 %), which, according to the Survey, "have well-established anti-corruption conventions that are supported by a culture that rejects corruption".

evolution shows that economic crime is not diminishing and it may be feared that the worsening of the world economic conditions will only exacerbate this situation⁶.

4. ICC's insights on specific issues mentioned in the Consultation Paper

a. Bribes through intermediaries (p. 7)

(i) Intermediaries continue to play an important role in international business. Even for very large enterprises it is difficult to have own personnel in all countries where they want to transact business. While recognizing the significant role of the intermediaries, ICC takes the view that recourse to them should be handled with great care and that, in particular, companies should not utilize intermediaries to channel payments to governmental officials⁷. Additionally, any payment to an intermediary should represent no more than the appropriate remuneration for legitimate services rendered; the intermediary should explicitly agree not to pay bribes; the agreements with intermediaries should include a clause allowing the principal to terminate the contractual relationship if a bribe is paid and the principal should keep a record of the names, terms of employment and payments.

(ii) In the ASD Common Industry Standards, mentioned *supra*, substantial attention is given to intermediaries. In particular, it is provided that:

- a. companies will perform, before hiring (and periodically renew), a due diligence examination of the (candidate) intermediaries by surveying all available sources of information, including the intermediary's history, education, ethical behavior, technical and financial background and the intermediary's knowledge of the principal's environment and products;
- b. the candidate intermediary shall be made aware of the principal's integrity policies, the legal provisions containing the incrimination of foreign public officials pursuant to the OECD Anti-Bribery Convention, the United Nations Anti-Bribery Convention and the ASD Common Industry Standards;
- c. the agreement with the intermediary shall be in writing; no part of the intermediary's fees will be passed on as a bribe; the agreement will contain a clause allowing the principal to terminate the contractual relationship if a bribe is paid and a clause obliging the intermediary to regularly report;
- d. fees payable to an intermediary shall correspond to an appropriate remuneration for legitimate services effectively rendered; no payment shall be made in cash;
- e. the principal shall reserve the right to perform an audit/verification on the intermediary.

⁶ The same PricewaterhouseCoopers Survey reveals that despite the attention of regulators and companies' investment in controls, the actual level of economic fraud and the associated financial damages have not decreased: of the 5.428 companies in 40 countries that took part in the research project, over 43 % reported suffering one or more significant economic crimes during the last two years [2006 and 2007], which is an essentially static level compared with 2005 and an increase of six percentage points over 2003, *Ibidem*, pp. 2 and 4.

⁷ Article 1 § 1 and § 2 (c) of the ICC Rules of Conduct and Recommendations.

b. Bribes through foreign subsidiaries (p.7)

(i) ICC has always considered that, in order for the prohibition of bribes to foreign public officials to be fully effective, it should encompass the payment of bribes through controlled subsidiaries, foreign or domestic.

(ii) This is why ICC has included in the definition of “enterprise” under its Rules of Conduct and Recommendations not only the “parent company” but also “its controlled subsidiaries”⁸. ICC further recommends that enterprises implement comprehensive policies or codes, reflecting ICC’s Rules of Conduct and Recommendations, which should be made applicable to all controlled subsidiaries, foreign or domestic⁹.

c. Facilitation payments (p.8)

(i) On the matter of facilitation payments, the ICC Rules of Conduct and Recommendations have substantially changed, as the perception of these payments by the business community evolved.

In 1996, ICC was still saying that “Small payments to low-level officials to expedite routine approvals are not condoned. However, they represent a lesser problem. When extortion and bribery at the top levels is curbed, government leaders can be expected to take steps to clean up petty corruption”.

Since 2005, ICC says that “Enterprises should not make facilitation payments. In the event an enterprise determines, after appropriate review, that facilitation payments cannot be eliminated entirely, it should establish controls and procedures to ensure that their use is limited to small payments to low-level officials for routine actions to which the enterprise is entitled” and that “The need for the continued use of facilitation payments should be reviewed periodically with the objective of eliminating them as soon as possible”.

(ii) This change in attitude is explained as follows:

- a. More and more enterprises decide not to treat facilitation payments as an exception, either for ethical or for practical reasons.
- b. These enterprises consider that, even if the economic impact of one single payment may be limited, the impact of repeated and continued payments can be huge and can thereby seriously distort competition.
- c. There is no uniform treatment of facilitation payments throughout the OECD area, making the definition of a general policy by companies in this context particularly difficult.
- d. If an enterprise determines however it cannot avoid facilitation payments in certain circumstances, it should make sure that such payments are only made under rigorous policies put into place by the enterprise.

(iii).- Within the OECD area, there is a wide (and confusing) variety of ways facilitation payments are treated: (i) certain State Parties do not allow for their exemption, like France¹⁰ and the United Kingdom,

⁸ Introduction of the ICC Rules of Conduct and Recommendations, § 3.

⁹ Article 7, item d) of the ICC Rules of Conduct and Recommendations.

¹⁰ France has criminalized any payment to a foreign public official whatever the amount may be. Philippe MONTIGNY, «L’entreprise face à la corruption internationale», Paris, Ellipses, 2006, p. 111.

(ii) other State Parties expressly exempt them, like the United States, Denmark, Iceland and Sweden¹¹ (iii) other State Parties again, like Austria, Germany and Switzerland¹², only criminalize (small) payments which are made with a view to obtaining from a foreign public official that an act be performed in breach of the official's duties (or to obtain a discretionary act), which in practical terms exempts facilitation payments and (iv) finally, some State Parties, like the Netherlands, criminalize facilitation payments, but leave it to the discretion of the prosecutor to decide whether to prosecute or not, it being understood that prosecution of facilitation payments will only rarely occur¹³.

d. Solicitation by foreign public officials (p.9)

(i) The problem of solicitation is probably the single biggest ethical threat confronting corporations in foreign countries¹⁴. As research indicates¹⁵, in many instances enterprises are faced with illicit demands and are subject to extortion or demands, leaving them bear hands in front of greedy public officials.

(ii) It is recognized that criminalizing passive corruption in the context of an international convention raises a number of vexing questions in terms of extension of jurisdiction, but the evolution of the practice under other international instruments, which address the issue of active corruption, such as the Inter-American Convention against Corruption of the Organization of American States, the Council of Europe Criminal Convention on Corruption and the United Nations Anti-Bribery Convention may provide new alternatives, without waiting for the full implementation of the United Nations Anti-Bribery Convention¹⁶.

e. Bribery of foreign political parties (p.9)

ICC fully endorses the comments made by Transparency International on this matter in its submission of March 5, 2008 on pages 5 and 6.

f. Bribery of foreign private sector agents (p.11)

(i) The subject matter of private-to-private bribery has been an overriding issue for the International Chamber of Commerce. Right from the start of ICC's involvement in the fight against bribery, *i.e.* 1977, the world business organization has stated that it was condemning all forms of corruptive practices in the market, making no substantial difference between corruption of public officials and corruption of members of the private sector (board members, directors, officers and employees). ICC estimates that the detrimental economic impact of private-to-private corruption is in substance the same as for corruption of public officials, as it equally disturbs competition and renders therefore more difficult the reaching of the level playing field, which business is aiming for.

(ii) It is with this in mind that ICC has addressed the two letters to the OECD, which are extensively referred to on page 11 of the Consultation Paper. They contain precise and detailed suggestions for a

¹¹ Mark PIETH, Lucinda A. LOW and Peter J. CULLEN, "The OECD Convention on Bribery, A Commentary", Cambridge University Press, 2007, p. 145.

¹² *Ibidem*, p. 144.

¹³ See for instructions on prosecutorial policy, the guidelines provided by the College of General Attorneys of June 11, 2007, *Staatscourant*, July 2, 2007, nr. 124, p. 14.

¹⁴ This point is explicitly discussed in the Consultation Paper, § 132.

¹⁵ See *supra* under footnote 5.

¹⁶ As is implicitly indicated in the Consultation Paper, § 133.

revision of the 1977 Revised Recommendation. ICC asks the Working Group to revert to the content of these letters, as it can maintain all and every item contained in them.

(iii) Addressing at this stage, after more than ten years following the adoption of the Instruments, the important issue of private-to-private corruption will not detract from the Instruments' effectiveness and will, on the contrary, sharpen their impact, while ensuring their efficiency in the reality of the market.

g. Additional civil or administrative sanctions (p.14) and disqualification, suspension and termination (p. 36)

(i) A State Party may impose additional civil or administrative sanctions upon a person subject to sanctions for the bribery of a foreign public official. One of these sanctions may be the temporary or permanent disqualification of an enterprise from contracting opportunities with the government. The Consultation Paper points to the fact that such type of sanction may hit companies much harder than a fine sanction.

(ii) While ICC does not disagree with this appreciation, it wishes to stress that disqualification (temporary and permanent) may hit not only the interests of the person at the origin of the prohibited behavior but also all the (possibly) innocent members of the enterprise, who may face temporary or permanent loss of employment due to a situation for which they bear no responsibility. ICC therefore recommends that one would resort to this type of sanction, especially permanent disqualification, only in such a way as to preserve the proportionate character of the sanction.

h. Consulting and cooperating to reconcile overlapping jurisdiction (p.17)

(i) Investigations and proceedings in more than one jurisdiction may expose a company to an unduly burdensome administrative workload, limiting its capacity to conduct business.

(ii) ICC would favor solutions which would keep multiple investigations and proceedings in such limits as to not unduly overburden the conduct of business, not to become overly expensive and not to be unduly restrictive of the rights and interests of defendants.

i. Need for increased awareness of foreign bribery (p. 25)

(i) The Consultation paper rightly points to the fact that overall, small and medium-sized enterprises (SME's) lack sufficient awareness.

(ii) ICC is aware of this situation and tries to contribute to possible solutions to this issue¹⁷. Several of ICC's National Sections are actively engaged in awareness raising programs directed to the SME's in their different countries.

(iii) Other avenues are open:

1. In sectoral programs, SME's can be encouraged to participate directly in sector programs through the execution of so-called company statements of adherence (see for an example *supra* under footnote 3).

¹⁷ See ICC Publishing, "Fighting Corruption, a Corporate Practices Manual", Chapter on Compliance by Small and Medium-Size Enterprises (SME's).

2. One can also promote the inclusion of anti-corruption (or ethics) clauses in commercial agreements and general conditions¹⁸, whereby a company subjects the conclusion of any purchasing, sales, service or other contract to the acceptance by the (potential) contracting party (and the subsequent subcontractors) of stringent anti-corruption provisions. By cascading such requirements down the line, all contracting parties, large, medium or small, are made aware of their anti-corruption obligations and the supply chain is secured¹⁹.
3. As indicated *supra*, the hiring of an intermediary can be made subject to the acceptance of anti-corruption provisions, which, if they are not complied with, make it possible for the principal to terminate the contract.

j. Whistleblower protection (p.28 and p. 32)

(i) Paragraph 90 of the Consultation Paper discusses whistleblowing by public officials, while § 102 briefly touches upon whistleblowing in enterprises. ICC comments hereunder on whistleblowing in the private sector.

(ii) Whistleblowing can have a significant role in the detection of economic fraud in enterprises²⁰. It has however not become general practice²¹ in the companies yet, especially in Europe, as there are some resistances in certain countries based on cultural and social habits²².

(iii) Companies are aware however that they can benefit from whistleblower systems as a valuable risk assessment and prevention tool and like to promote flexible reporting systems which can be adapted to the various legal constraints in the different jurisdictions where they are active. For any whistleblowing system to be efficient, there is a need to have an effective protection of *bona fide* whistleblowers against retaliation.

k. Internal company controls (pp. 31 to 33)

(i) The Consultation Paper recognizes the progress made in the companies in adopting and publishing codes of ethics and other forms of internal compliance.

¹⁸ The Mexican ICC National Section has proposed an anti-corruption clause to be included in contracts concluded with business partners, which reads as follows: “The parties declare that during the negotiations and the conclusion of the present agreement, they have complied with the Rules of Conduct on Combating Extortion and Bribery of the International Chamber of Commerce (the Rules). They commit to comply with the same Rules during the performance of the agreement in their relations with the other contract parties as well as with third parties. The parties expressly acknowledge that the violation of the preceding declarations or of the Rules will constitute a substantial breach under the agreement”.

¹⁹ This solution is also mentioned in the Consultation Paper, § 123.

²⁰ According to a study conducted in 2007 by KPMG Forensic, “Profile of a Fraudster, Survey”, 2007, p. 26, not less than 25 % of the occurrences of fraud revealed in the enterprises surveyed came to light thanks to whistleblowing. This figure is particularly high and is even more impressive when it is compared with the mere 10 % attributable to internal control systems.

²¹ A study, conducted by Ernst and Young and referred to *supra* under footnote 4, reveals that only 33 % of the respondents state that their company has a hot-line, that only 55 % of these persons believe that their colleagues use the company’s hotline and that 41 % estimate that their company’s agents, suppliers and clients are able to use the hotline. Moreover, 57 % of the people would feel free to report a case of suspected fraud, bribery or corruption.

²² As a result, certain jurisdictions do not accept compulsory whistleblowing.

(ii) Certain State Parties have encouraged the adoption of effective integrity programs by companies²³ by allowing them to use the implementation of these integrity programs as a defense or as a mitigating factor in sentencing²⁴.

(iii) It would be a major encouragement for companies, if other State Parties would also, through comparable measures, recognize the value of codes of conduct and integrity programs. It would, in particular, be a strong inducement for SME's to install integrity programs.

5. Suggestions on steps to be taken to address the specific issues raised in the Consultation Paper, including possible revisions of the Instruments

a. Bribes through intermediaries (p.7)

ICC suggests that it be required that national implementing laws specifically prohibit bribery through an intermediary, as this is the stated intention of the State Parties.

The Commentaries on the Convention should be expanded in order to reflect good corporate practice in relation with intermediaries.

b. Bribes through foreign subsidiaries (p.7)

The Instruments should be made applicable, either by revision or by a change of the Commentaries, also to the payment of bribes to foreign public officials through controlled subsidiaries, foreign or domestic.

c. Facilitation payments (p.8)

The difference in treatment of the facilitation payments throughout the OECD area confronts business with many question marks. State Parties should try to formulate a more uniformly applicable solution than the one which is prevailing now.

d. Solicitation by foreign public officials (p.9)

More information should be provided to States non members of the OECD about the prohibition of international corruption.

State Parties should continue to provide support and help to companies (potentially) exposed to the heaviest threats of passive corruption.

State Parties should follow closely the practice under the other international conventions, which address passive international corruption and continue their efforts under the outreach program especially in the direction of the emerging economies.

²³ The Evian 2003 G-8 Summit in particular states in its declaration "Fighting corruption and improving transparency", that the G-8 "will encourage the private sector to develop, implement and enforce corporate compliance programs relating to [the G-8] domestic laws criminalizing foreign bribery".

²⁴ See for instance the Italian Legislative Decree n° 231 of June 8, 2001, Provisions governing administrative liabilities of legal persons and the US Sentencing Commission Guidelines Manual, Chapter 8, § 8B2.1.

e. Bribery of foreign political parties (p.9)

ICC suggests covering under the Instruments both situations referred to in the Consultation Paper *i.e.* trading of influence and the bribery of a foreign political party (or of a party official).

f. Bribery of foreign private sector agents (p.11)

ICC suggests a revision of the 1977 Revised Recommendation with a view to covering private-to-private corruption under the Instruments. ICC is referring to the organization's precise and detailed proposals as laid down in the letters of June 2005 and September 2006.

g. Additional civil or administrative sanctions (p.14)

State Parties having recourse to temporary or permanent disqualification should only do so in a way as to preserve the proportionate character of the sanction.

h. Consulting and cooperating to reconcile overlapping jurisdiction (p.17)

State Parties should consult with each other with a view to finding solutions to keep multiple investigations and proceedings in such limits as not to unduly overburden the conduct of business, not to become overly expensive and not to be unduly restrictive of the rights and interests of defendants.

i. Need for increased awareness of foreign bribery (p. 25)

ICC suggests further cooperation with the OECD and the State Parties to explore diverse avenues to raise awareness with SME's.

j. Whistleblower protection (p.28)

State Party legislation should ensure an adequate protection of *bona fide* whistleblowers against retaliation.

k. Internal company controls (pp. 31 to 33)

State Parties should adopt measures giving either a defense or providing mitigation in sentencing to companies which conduct a fully fledged and genuinely implemented integrity program.