

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

Comments from the Prometheus Foundation (France)

The OECD Working Group on Bribery released the 11th January 2008 a consultation document relating to the “Review of the OECD Instruments on Combating Bribery of Foreign Public Official in International Business Transactions Ten Years after Adoption”, and invited all stakeholders with expertise in combating bribery to give their comments.

Thus, the Prometheus Foundation wishes to propose its assessment on the current system (I), and submit to the OECD Working Group, its propositions to enhance the OECD plan to fight bribery.

I. The OECD Convention on Combating Bribery: a tool of limited efficiency.

The efficiency of the OECD Convention on Combating Bribery is limited because of four structural problems, which have been identified by the consultation paper provided by the OECD Working Group.

a. Geographical limits of the scope of the Convention

Thirty-seven States have ratified and transposed in domestic law the 1997 Convention. However in 2008, these thirty-seven states represent only a part of international commercial and financial flows. Therefore, companies which are domiciled in a member state of the 1997 Convention suffer from important distortions of competition in relation to companies which are domiciled in non-member states. These situations generate significant commercial damages at the expense of companies of the OECD area, which have engaged in the path of integrity.

b. Various implementation of the Convention by Parties

The concept of “functional equivalence”, in the heart of the implementation of the Convention, has considerably underestimated the differences between juridical environments of each Parties, both from the point of view of the modalities of juridical pursuit and sanctions as well.

The monitoring mechanism of the Convention is supposed to rectify this situation, but its impact on the harmonization of legislation is now limited. More accurately, this mechanism appears particularly vulnerable when faced with certain Parties that claim the best interest of the Nation, either to stop investigations, or to not adapt their legislation accordingly.

c. Lack of incrimination of passive bribes

Absence of incrimination of passive bribes within the OECD Convention is a major problem. If incrimination of passive bribes is now possible within states that have transposed the so-called “Merida Convention”, its generalization is essential, not only from the point of view of the equity of juridical pursuit, but particularly because that is an important element of resistance to fight situations of solicitation of bribery that companies face.

d. An approach more repressive than preventive

The document rarely mentions the importance of prevention policies to fight bribes, and emphasizes principally the repressive dimension linked to incrimination; it says nothing about how stringent and efficient prevention policies could limit penal responsibility of high-level managers who have conceived and implemented such policies, while this is the case in, at least, two Parties.

II. Suggestions

Considering this assessment, and with a view to strengthen efficiency of the Convention, the Prometheus Foundation suggests the priority lies in reducing the gap that exists between legislations of member states on the one hand and, on the other hand, with the major non-member exporter states of the Convention.

As a response, the Prometheus Foundation recommends:

- a. To seek more actively a harmonization of modes of incrimination among states-Parties, and notably, to analyze the impact of plans such as the *patteggiamento* can have on the development and strengthening of prevention plans of bribery within companies.
- b. To accelerate the process of integration of the main non-member exporters states of the OECD Convention.
- c. To begin a global reflection on the modalities of procurement of international public markets, and particularly the ones under international financial institutions to integrate, on the one hand, clauses requiring tenderers to give details on their anti-corruption plans, and on the other hand, by allowing tenderers, who would refuse to give up unwarranted solicitations, to resort to insurance clauses linked to the loss of market. The Prometheus Foundation suggests that this work has to be leaded within the OECD¹, and in conjunction with the World Bank and the European Commission.

¹ Especially with the Secretariat of Public Governance and Territorial Development.