

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

Comments from TUAC (Trade Union Advisory Committee to the OECD)

I. Introduction

1. The Trade Union Advisory Committee to the OECD (TUAC) welcomes the consultation by the OECD Working Group on Bribery in International Business Transactions (*OECD Working Group on Bribery*) on the Review of the OECD Instruments on Combating Bribery of Foreign Public Officials in International Business Transactions Ten Years after Adoption to determine the steps that might be taken to strengthen their implementation.

2. TUAC congratulates the OECD Working Group on Bribery on the comprehensive scope of the Consultation Paper (CP), which forms the basis of the external consultation. This provides for an extremely open process, with stakeholders having the opportunity to comment on a wide range of issues.

3. The remaining elements of this submission are structured as follows:

- *Section II* provides TUAC's views on the overall effectiveness and implementation of the OECD anti-bribery instruments (*Question 1*);
- *Sections III* and *IV* summarise TUAC's position on a selected number of cross-cutting issues for *Criminalisation* and *Prevention and Detection* respectively, under the headings:
 - Additional insights (*Question 2*);
 - Next steps (*Question 3*).
- *Section V* discusses additional key issues identified by TUAC.

II. Effectiveness and Implementation

4. TUAC considers that the OECD Anti-bribery Convention, as the first international instrument focused on the supply-side of corruption, represents a significant landmark in the international fight against corruption and for good global governance.

5. TUAC recognises the valuable work that has been carried out by the OECD Anti-corruption Unit and the OECD Working Group on Bribery. In particular it considers the creation of a rigorous, peer-review-based follow-up monitoring system, which comprises in-country consultations with key stakeholders, including trade unions, to have enhanced the credibility of the anti-bribery instruments and the reputation of the OECD.

6. TUAC considers, however, that there are still key challenges to be overcome:

- prosecutions: the number of prosecutions is still low overall, thus minimising the deterring effect of the Convention;
- awareness: the low level of awareness of the Convention among key constituencies more than ten years after the Convention came into force, represents a major obstacle to improved effectiveness;
- unequal implementation: there is an urgent need to take steps to assure effective and equal implementation levels by all parties. Analysis of the Working Group's own reports (the Phase 2

reports and the Mid-term Review), as well as the Annual Progress reports of Transparency International on the Enforcement of the OECD Convention on Combating Bribery of Foreign Public Officials, reveals a picture of uneven implementation and enforcement. The decision in December 2006, of the UK's Serious Fraud Office to halt the investigation into BAE and the Al Yamamah arms contract has brought this issue into sharp relief. TUAC believes both the reality and perception of unequal response by Parties to be highly detrimental to instruments whose foundations were built on the recognition of the need for multilateral action and whose success depends on uniform multilateral action;

- loopholes: there are a number of well-recognised loopholes in the anti-bribery instruments, identified both during and after the Negotiating Process: the so-called 'five issues'¹, as well as the protection of whistleblowers² and the bribery of foreign private sector representatives.³

7. TUAC urges the Working Group to seize the opportunity of this Review to address the remaining challenges. TUAC recognises the strength of functional equivalence as a flexible and practical approach to the development of the anti-bribery instruments, but calls on the Working Group to be more prescriptive and set minimum standards in those areas where evaluations show the effects of the steps taken by States to be neither effective nor comparable. TUAC also urges the Working Group, building on its past success, to develop a rigorous post-Phase 2 monitoring and follow-up programme, which is targeted, transparent and participatory.

8. TUAC further urges States Parties to the Convention to demonstrate their political commitment by allocating the necessary resources and expertise to ensure that the OECD Anti-bribery Convention succeeds in detecting, prosecuting and ultimately deterring bribery in international trade.

III Cross-cutting Issues: Criminalisation

1. Offence of Bribing a Foreign Public Official

1.1 Bribes paid through intermediaries

Additional insights

9. There is widespread evidence that bribes to foreign public officials are paid through a wide variety of intermediaries including agents, consultants, foreign subsidiaries and political party officials. Indeed it is likely that the use of intermediaries increased as a result of the OECD Anti-bribery Convention. According to a former executive of Alcatel, the effect of the OECD Anti-bribery Convention was to 'pass the problem down the line' to agents and consultants. Whereas in the 1980s, commissions paid to officials were insignificant, in 2000 when France adopted laws outlawing bribery, the problem was

¹ Political party officials and political parties; candidates for public office; Offshore Centres (OFCs); money laundering; and foreign subsidiaries.

² TUAC has long campaigned for the anti-bribery instruments to provide for the protection of whistleblowers.

³ The ICC has been at the forefront of the campaign for the anti-bribery instruments to cover foreign private sector bribery. The text of the 1997 Revised Recommendation instructs the Working Group to examine "the feasibility of broadening the scope of the work of the OECD to combat international bribery to include private sector bribery...".

transferred to agents.⁴ A former employee of Siemens similarly described how bribes, once paid using secret accounts, became formalised through sub-contractors and consulting contracts.⁵

Next steps

10. TUAC considers it imperative that Parties prohibit the payment of bribes through the full range of intermediaries and urges the Working Group to amend the Commentaries to Article 1 to include:

- a broad definition of an intermediary;
- clarification that all parties are required to expressly cover bribery through an intermediary.

1.2 Bribes paid to third parties

Additional insights

11. The analysis presented in the CP states that the Convention requires the coverage of cases where a bribe is offered or given to a foreign public official “*for that official or for a third party*” and that it would be a “*significant obstacle to the effective implementation of the Convention if a briber were able to avoid liability for the foreign bribery offence by transferring the benefit directly to a third party*”.

12. Yet, recent research⁶ into the awarding of infrastructure concessions in Indonesia during the 1990s and early 2000s presents a scenario in which bribes paid for the benefit of third parties fall outside the scope of the OECD Anti-bribery Convention. The research describes how OECD Multinational Companies (MNCs) used the creation of partnerships and joint ventures with relatives and close friends of high level public officials as the means by which to win concessions. The cases fall outside the scope of the OECD Anti-bribery Convention because there was no actual involvement of or direct benefit to the foreign public official.

Next steps

13. TUAC considers it unlikely that this is a one-off example and therefore requests the Working Group to consider how such a scenario might be addressed by amendments to either the Commentaries to Article 1, or to the Revised Recommendation.

14. More broadly, TUAC considers that these shifting patterns of bribery (from slush funds to agents and consultants and ‘gift’ partnerships) point to the need for a periodic analysis of cases (successes and failures) to identify ‘new’ methods for evading foreign bribery laws and their implications for the Convention. It would be timely to conduct such an analysis within the context of the current Review, if this has not already been done.

⁴ Total Telecom, Alcatel bribery probes raise risks in key markets, 3rd December 2004.

⁵ Stern, Ein Ex-Manager erhebt schwere Vorwürfe gegen SIEMENS. Gehört Bestechung dort zur üblichen Praxis? Der Konzern wehrt sich, 8th December 2005

⁶ Moran, Theodore, How Multinational Investors Evade Developed Country Laws, Center for Global Development, February 2006.

1.3 Facilitation payments

Additional insights

15. The exception of facilitation payments provided by Commentary 9 has long been a source of controversy. TUAC contends that it is also a source of potential abuse, confusion and reputational damage:

- first, not all Parties apply Commentary 9 and those that do, do so in a variety of ways;
- secondly, an analysis of the Phase 2 reports shows for the Parties that exempt facilitation payments, these exceptions provide potential sources of breaches of other Convention standards;
- thirdly, the exception presents practical difficulties for employees at the coal face of corporate compliance:
 - A recent article⁷ describes facilitation payments as: “a violation of foreign law (no country permits you to bribe their officials...), an invitation to books and records violations (few employees can bring themselves to record these bribes accurately) and corrosive of good governance more generally”;
 - A host of industry standards require or encourage the elimination of facilitation payments including, since 2005, the International Chamber of Commerce Rules of Conduct and Recommendations to Combat Extortion and Bribery: “It should be noted that during the revision of the Rules in 1996, more time was spent debating the facilitation payments exception than any other subject. This time, there was a consensus among the Commission that the Rules should go one step further and clearly prohibit facilitation payments...”⁸;
- finally, TUAC considers that the exception brings reputational risks. Public sector trade unionists engaged in fighting corruption in developing and transitional countries have questioned the moral and political message sent by the Convention and the OECD in explicitly providing for such an exception.

Next steps

16. TUAC understands that the purpose of the Convention is to tackle grand corruption rather than ‘small’ inducements to carry out official duties and notes that Commentary 9 condemns such grease payments as a “*corrosive phenomenon*”. Nonetheless, TUAC considers that the effect of Commentary 9 is to undermine the integrity of the anti-bribery instruments and considers that the Working Group should remove this exception through the most appropriate means: either the amendment or deletion of Commentary 9.

1.4 Definition of a foreign public official

Additional insights

17. TUAC is concerned that, as discussed in the CP, not all Parties have established an autonomous definition of a public official, relying instead on the (varying and mostly unknown) definition of a public official that exists under the law of the host country.

⁷ Wrage, Alexandra and Vega Matthew, Small Bribes Buy Big Problems, ACC Docket, September 2007.

⁸ <<http://www.iccwbo.org/uploadedFiles/ICC/policy/anticorruption/Statements/revised%20ICC%20Rules.pdf>>.

18. In an interview with Transparency International in February 2008⁹, a senior German prosecutor identified the failure of Parties to adopt a common definition of a foreign public official as a key obstacle to the effective implementation of the Convention:

- “Another point is to define more clearly and to standardise the group of people to be punished for bribing in international business transactions, e.g. who is regarded as a ‘public official’ and who shall be treated alike? The SIEMENS/ENEL case highlighted this problem as ‘public official’ has a different meaning according to the individual definitions of the OECD Convention, German law and Italian law.”

Next steps

19. TUAC considers this to be a high priority and requests the Working Group to expand the Commentaries to Article 1 to make it clear that Parties should adopt a special definition of a public official, in line with the Convention.

1.5 Bribery of foreign political parties and their officials

Additional insights

20. TUAC agrees with the analysis provided in the CP concerning the importance of the payment of bribes paid to political parties or their officials.

Next steps

21. TUAC supports the recommendation of TI that “the OECD should ensure that bribe payments to foreign political parties and their officials are effectively prohibited through its instruments”.

1.6 Bribery of foreign private sector agents

Additional insights

22. TUAC considers the lack of criminalisation of foreign private sector bribery by Parties to the Convention to represent a major loophole. Privatisation has served to blur the boundaries between the public and private sectors with privately owned companies now undertaking what were formerly ‘public functions’ in corruption prone sectors, such as utilities. The lack of criminalisation of bribery of foreign private sector agents means that:

- the bribery of a foreign representative of a privatised utility whose ownership falls outside the scope of the definition of ‘public enterprise’ provided in Commentary 14 is not illegal;
- there is likely to be considerable confusion in cases where Parties have not adopted an autonomous definition of a public official of what constitutes a private or public official:
 - In the SIEMENS/ENEL case, for example, the defendants, whilst admitting making the payments, argued that they were not illegal bribes “*because the Enel managers who got*

⁹ <http://www.transparency.org/publications/newsletter/2008/february_2008/interview>.

them were businessmen and not civil servants...even though Enel was controlled by the Italian state at the time.”¹⁰

Next steps

23. TUAC supports the request made by the International Chamber of Commerce (ICC), referred to in the CP, to either amend the existing, or adopt a new, Revised Recommendation, which strongly recommends Parties to take steps to criminalise foreign private sector bribery.

2. Liability of Legal Persons for Bribing a Foreign Public Official: Form and Standards

Additional insights

24. TUAC is greatly concerned that not all Parties have put in place effective measures for establishing the liability of companies (legal persons). Bribery of a foreign public official is a crime that is almost always committed by employees on behalf of and for the benefit of their companies. According to Professor James Gobert, an expert in corporate liability:

- “Few individuals pay bribes on their own behalf. Companies create the overall context. The company puts the individual in the position to bribe: provides the finance; creates the pressure and the incentives; and either fails to supervise or turns a blind eye to the possibility of illegality...White collar criminals do not consider themselves criminals. They rationalise their behaviour in terms of their company’s benefit...it is the company that is the problem.”¹¹

25. TUAC further notes the case of a State Party being able to claim (correctly) that it is in formal compliance with the Convention even though its legal system for engaging corporate liability is known to be wholly ineffective in the context of the decentralised decision-making structures of today’s companies.

- United Kingdom: in its 2008 consultation on the Reform of the Bribery Laws the Law Commission states that the UK is ‘broadly compliant’ with its international obligations.¹² Similarly, at a seminar on Corporate Liability hosted by the Crown Prosecution Service (CPS) in 2005, a representative of the UK’s Home Office stated that “*The criminal liability of a legal person for a mens rea offence is based on the identification principle, involving finding a ‘directing mind.’ This is the system of liability which is ‘in accordance with’ our ‘legal principles’.* The UK is in compliance with Article 2, so the OECD’s recommendation does not raise a Convention compliance issue”.¹³

26. TUAC recognises that corporate liability is an evolving area of law but draws the Working Group’s attention to emerging best practice. Experts at the above-mentioned seminar recommended establishing a test for liability based on corporate fault or corporate culture, which has the advantage of making the company directly liable (thus addressing the issues raised in paragraphs 27 and 28 of the CP), as well as providing the means for holding parents accountable for the acts of their foreign subsidiaries.

¹⁰ Corruption suspect got 1.8m euro payoff, 18 April 2007, Reuters

¹¹ Professor James Gobert, University of Essex <<http://www.againstcorruption.org/reports/2006-03-UK-CorporateLiabilitySeminar.doc>>.

¹² <<http://www.lawcom.gov.uk/docs/cp185.pdf>>

¹³ <<http://www.againstcorruption.org/reports/2006-03-UK-CorporateLiabilitySeminar.doc>>.

Next steps

27. TUAC welcomes the suggestions made in the CP to assess the effectiveness of the various forms of liability for foreign bribery cases once a sufficient body of enforcement is available and to require Parties to demonstrate that the form of liability chosen is effective:

- TUAC suggests that the Working Group could usefully expand the categories of the OECD report, *Steps taken by State Parties to Implement and Enforce the OECD Convention* and require Parties to provide information on the number of investigations and prosecutions and to indicate whether they involve natural or legal persons or both.

28. TUAC also urges the Working Group to introduce additional Commentaries to Article 2, which provide guidance on standards of liability. These could indicate primary and secondary recommendations thus encouraging the adoption of (emerging) best practice. They could also state which standards of liability would fall short of compliance. For example, for those jurisdictions that recognise criminal liability, the Commentaries could primarily encourage a direct test of corporate liability based on corporate fault. They could also make it clear that a test by which bribery by senior managers only would engage the criminal liability of a legal person, would not comply with the Convention.

3. Monitoring and Follow-up

Additional insights

29. TUAC considers that effective monitoring and follow-up is essential to the successful implementation of the Convention.

30. TUAC commends the Working Group for developing a rigorous, two-phased, peer-review-based monitoring system, comprising country visits including consultations with trade unions, business and other NGOs, publication of detailed reports containing recommendations to governments, and provision for follow-up. In particular, TUAC believes that the country visits provide an opportunity for engaging trade unions and other stakeholders in the work of the anti-bribery instruments, as well as providing a mechanism for vital feedback on the activities of governments and companies.

31. Whilst TUAC considers the OECD monitoring and follow-up process to represent international best practice, it has, in previous submissions to the Working Group, identified the following weaknesses:

- Parties: national level: so far there is little evidence of States Parties putting in place formal structures to engage trade unions, business and NGOs on an on-going basis at national level. Whilst a number of governments have initiated national consultation arrangements¹⁴, overall the involvement of non-governmental actors at national level is limited. The result of this lack of involvement is that the outputs of a strong inter-governmental process are being largely under-utilised at national level. Increasing engagement could potentially yield a range of benefits including raising awareness and national mobilisation around key issues identified in the review reports;

¹⁴ *Japan* set up a series of consultations with civil society during November and December 2006 following a recommendation made by the OECD and in advance of its submission of a follow-up report to the OECD Phase 2bis examination; *Sweden* indicated at the OECD Labour/Management Meeting in January 2006, that it intended to engage with trade unions and other non-governmental actors in advance of the submission of its one year oral report; the *UK* has set up an external stakeholder group that involves business, trade unions, NGOs and others for the purpose of consulting on the United Nations Convention against Corruption (UNCAC) and the UK's Anti-corruption Plan.

- Non-signatory states – no role: to date there is no role in the OECD monitoring process for actors from non-Party States – where many of the foreign bribery offences are most likely to occur;
- Limited transparency: whilst the OECD publishes the final and oral/written follow-up reports, publication of the government response to the standard and country specific questionnaires is discretionary. Furthermore, there is no systematic publication of Phase 1 and Phase 2 country reports or other OECD outputs at national level, and no translation of key outputs into national languages.

Next steps

32. TUAC welcomes the decision of the Working Group to develop a post-Phase 2 monitoring and follow-up procedure that builds on Phase 1 and 2 and urges the Working Group to ensure that it is:

- Targeted: address shortcomings identified in the Phase 1 and Phase 2 reviews, and assess functional equivalence on key horizontal issues;
- Participative: involve consultations in-country and with the OECD Working Group with trade unions and other stakeholders;
- Transparent: provide for a higher level of public reporting on an on-going basis by expanding the categories and the periodicity of the OECD report, *Steps taken by State Parties to Implement and Enforce the OECD Convention* and thereby support monitoring by trade unions, civil society and other stakeholders, as well as peers;
- Include non-signatory states: the OECD should develop structures to provide actors from non-signatory countries with a formal role in the monitoring process.

33. TUAC also urges governments to put in place national monitoring structures, publish and disseminate key documents and translate into national languages.

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

TABLE 1: SUMMARY ON CROSSING-CUTTING ISSUES: CRIMINALISATION

ISSUE	RELATED ISSUES	TUAC RECOMMENDATION	PRIORITY	'FIVE ISSUES'	REVISED RECOMM
OFFENCE OF BRIBING A FOREIGN PUBLIC OFFICIAL					
Bribes paid through intermediaries	<ul style="list-style-type: none"> • Bribes paid to foreign political parties/officials • Bribes that benefit third parties • Foreign subsidiaries 	<ul style="list-style-type: none"> • Amend the Commentaries to Article 1 to include a broad definition of an intermediary and clarification that all parties are required to <u>expressly</u> cover bribery through an intermediary. 	HIGH	/	/
Bribes that benefit third parties	<ul style="list-style-type: none"> • Definition of a public official 	<ul style="list-style-type: none"> • Consider how to address 'gift' partnerships involving close relatives and friends that do not directly involve the foreign public official; • Conduct a periodic analysis of cases (successes and failures) to identify 'new' methods for evading foreign bribery laws and their implications for the aims of the Convention. 	HIGH	/	/
Facilitation payments	<ul style="list-style-type: none"> • Foreign subsidiaries 	<ul style="list-style-type: none"> • Remove this exception through the most appropriate means: either the amendment or deletion of Commentary 9. 	HIGH		
Definition of foreign public official	<ul style="list-style-type: none"> • Private sector bribery 	<ul style="list-style-type: none"> • Expand the Commentaries to Article 1 to require Parties to adopt a special definition of a public official, in line with the Convention. 			
Bribery of foreign political parties <u>and their officials</u>	<ul style="list-style-type: none"> • Bribes paid through intermediaries • Bribes that benefit third parties • Definition of a foreign public official • Trading in influence • Lobbying 	<ul style="list-style-type: none"> • TUAC supports the recommendation made by Transparency International and discussed in the CP that "<i>the OECD should ensure that bribe payments to foreign political parties and their officials are effectively prohibited through its instruments.</i>" 	HIGH	YES	
Bribery of foreign private sector agents	<ul style="list-style-type: none"> • Definition of a foreign public official • State-owned companies 	<ul style="list-style-type: none"> • TUAC supports the request made by the International Chamber of Commerce (ICC) to either amend the existing, or adopt a new, Revised Recommendation, which strongly recommends Parties to take steps to criminalise foreign private sector bribery. 	HIGH		YES

ISSUE	RELATED ISSUES	TUAC RECOMMENDATION	PRIORITY	'FIVE ISSUES'	REVISED RECOMM
CORPORATE LIABILITY					
Form of Liability		<ul style="list-style-type: none"> • TUAC supports proposals to assess the effectiveness of forms of liability for foreign bribery offences and that each Party to the Convention demonstrate that the form of liability chosen is effective. • TUAC suggests that States Parties report on the number of investigations and prosecutions and to indicate whether they involve natural or legal persons or both. 			
Standard of Liability	<ul style="list-style-type: none"> • Foreign subsidiaries 	<ul style="list-style-type: none"> • Introduce additional Commentaries to Article 2, which provide guidance on <u>standards of liability</u> including encouraging the establishment test for liability based on corporate fault or corporate culture, which has the advantage of making the company <u>directly</u> liable, as well as providing the means for holding parents accountable for the acts of their foreign subsidiaries. 	HIGH		
MONITORING AND FOLLOW-UP	<ul style="list-style-type: none"> • <u>All</u> 	<p><u>OECD Working Group level:</u></p> <ul style="list-style-type: none"> • Develop a targeted, transparent and participatory post-phase 2 assessment procedure. <p><u>Country level:</u></p> <ul style="list-style-type: none"> • Parties should establish structures for national monitoring and report on these in the OECD Working Group report, <i>Steps taken by State Parties to implement and enforce the OECD Convention</i>. • Key documents should be translated into national languages 			
OTHER KEY ISSUES¹⁵					
FOREIGN	<ul style="list-style-type: none"> • Intermediaries 	<ul style="list-style-type: none"> • TUAC considers it essential that bribes paid by foreign subsidiaries are covered 	HIGH	YES	

¹⁵ These are two of the original 'five issues' that are not explicitly discussed in the CP, although foreign subsidiaries are addressed as part of the discussion on other issues.

ISSUE	RELATED ISSUES	TUAC RECOMMENDATION	PRIORITY	'FIVE ISSUES'	REVISED RECOMM
SUBSIDIARIES	<ul style="list-style-type: none"> • Corporate liability • Accounting provisions 	by the Convention. This can be achieved through a combination of measures, some of which have been discussed above including: establishing a broad definition of intermediaries; requiring all parties to <u>expressly</u> cover bribery through an intermediary; establishing direct corporate liability based on corporate fault or culture; and requiring companies to adopt corporate compliance programmes that apply to their controlled subsidiaries.			
CANDIDATES FOR OFFICE AS A PUBLIC OFFICIAL	<ul style="list-style-type: none"> • Trading in influence • Intermediaries • Definition of a public official 	<ul style="list-style-type: none"> • TUAC considers it essential that candidates for public office should be covered by the Convention. 	HIGH	YES	

IV Cross-cutting Issues: Detection and Prevention

1. Need for Increased Awareness of Foreign Bribery

Additional insights

34. TUAC shares the concerns expressed in the CP over the low level of awareness of the anti-bribery instruments amongst key stakeholders, the ‘*serious consequences*’ for implementation and enforcement and the impact on public complacency.

35. TUAC confirms that the awareness of trade unions remains low in both party and non-party States:

- **Parties:** In May 2007, the UK’s Department for International Development (DFID) and the Trades Union Congress (TUC) co-organised a seminar on “*Strategies for Tackling International Bribery*” that targeted primarily¹⁶ trade unionists from defence, construction and engineering and extractive. Attendees included workers from companies, as well as national and international trade union officers. The discussions confirmed that there was no awareness of the anti-bribery agenda, despite representing corruption-prone industries, which had created business-led anti-corruption forums.
- **Non-Parties:** The OECD and TUAC arranged an OECD Labour/Management Programme meeting in January 2006, which was attended by trade unionists from developed, developing and transitional countries. Trade unionists from developing and transitional countries similarly stated that there was simply no awareness of the OECD Anti-bribery Convention in their countries and regions:
 - a trade unionist from Sierra Leone commented that “The OECD Anti-Bribery Convention may not be well-known in Africa, but corruption is...”.¹⁷
 - a trade unionist from Romania observed that “there is very little knowledge of the OECD Anti-Bribery Convention in Eastern Europe in general. It needs to be made better known, not just to trade unions but also to officials in these countries. International tools are vital and people should be aware of them”.¹⁸

Next steps

36. TUAC considers that increasing awareness is vital for the future success of the anti-bribery instruments in both party and non-party States:

- **Working Group:** TUAC urges the Working Group to amend the 1997 Revised Recommendation and include an instruction to the Working Group to develop a three-year Promotional Strategy

¹⁶ The seminar of around 100 participants was attended by trade unionists as well as business, government and enforcement agency representatives.

¹⁷

<[http://appli1.oecd.org/olis/2006doc.nsf/43bb6130e5e86e5fc12569fa005d004c/68934591ca0acb3ac12571b6003a34e9/\\$FILE/JT03212291.PDF](http://appli1.oecd.org/olis/2006doc.nsf/43bb6130e5e86e5fc12569fa005d004c/68934591ca0acb3ac12571b6003a34e9/$FILE/JT03212291.PDF)>.

¹⁸

<[http://appli1.oecd.org/olis/2006doc.nsf/43bb6130e5e86e5fc12569fa005d004c/68934591ca0acb3ac12571b6003a34e9/\\$FILE/JT03212291.PDF](http://appli1.oecd.org/olis/2006doc.nsf/43bb6130e5e86e5fc12569fa005d004c/68934591ca0acb3ac12571b6003a34e9/$FILE/JT03212291.PDF)>.

working with TUAC, BIAC, TI and other key stakeholders in coordination with other OECD instruments, including the OECD Guidelines for Multinational Enterprises, the OECD Policy for Investment, and other OECD initiatives, including the Asia Development Bank/OECD Anti-corruption Initiative for Asia-Pacific and the Anti-corruption Network for Eastern Europe and Central Asia.

- Parties: TUAC supports the suggestion made in the Mid-term review that the Working Group should consider establishing a minimum standard of awareness-raising. TUAC suggests that Parties be requested to report on these activities in the OECD report, *Steps taken by State Parties to Implement and Enforce the OECD Convention*.

2. Detecting and Reporting of Foreign Bribery in the Public Sector

2.1 Officials from agencies with contractual relationships with business: ODA and ECAs

Additional insights

37. TUAC welcomes the efforts made to strengthen the guidance on the reporting of foreign bribery to law enforcement authorities by official export credit support officials made in the recommendations of the OECD Working Group Phase 2 Reports, the 2000 Action Plan and then the OECD Council Recommendation on Bribery and Officially Supported Export Credits of 14th December 2006.

38. TUAC notes, however, that the 2006 Recommendation requires members to develop and implement “*procedures to disclose to their law enforcement authorities instances of credible evidence...*”. TUAC is surprised that the Recommendation sets such a high reporting threshold especially given that the CP reports that “(a) *Almost half of the Parties provide an express statutory requirement...for reporting suspicions of foreign bribery directly to the law enforcement authorities;*” and that “(b) *some Parties provide a non-statutory reporting obligation; ...*”.

Next steps

39. TUAC urges the Working Group to clarify the discrepancy between the guidance to ECA officials that they must only report credible evidence of bribery to the reporting authorities, and the wider obligation on public officials to report suspicions of bribery.

2.2 Reporting by public officials from agencies not having contractual relations with businesses: Whistleblower protection

Additional insights

40. TUAC agrees with the analysis in the CP that “in the absence of comprehensive whistleblower protections, public officials are unlikely to report suspicions of bribery of foreign public officials...” and is gravely concerned that a number of parties do not provide adequate protection.

41. TUAC also notes the widespread recognition of the role of whistleblowers more generally in the fight against international bribery:

- According to past experiences they [whistleblowers] play an essential role. In contrast to other crimes, there are no direct victims with an interest in detection and prosecution in corruption cases. So many cases would not have been uncovered without the help of insiders”.¹⁹

¹⁹ <http://www.transparency.org/publications/newsletter/2008/february_2008/interview>.

Next steps

42. TUAC considers that the OECD Anti-bribery Convention is out of step with other international anti-corruption instruments by failing to encourage Parties to protect whistleblowers from retaliation. It urges the Working Group to amend the 1997 Revised Recommendation such that Parties are strongly recommended to²⁰:

Provide effective and proportionate protections for reprisals against persons who report in good faith to:

- a) their employer,
- b) an appropriate authority, or
- c) where justified and reasonable, the wider public
- d) that in their reasonable belief an offence of bribery of a foreign public official has occurred, is occurring or is likely to occur

3. Foreign Bribery in Relation to Official Export Credit Support

Additional insights

43. TUAC notes that none of the Working Group's anti-bribery instruments expressly refers to foreign bribery in relation to official credit support.

Next steps

44. TUAC requests the Working Group to consider incorporating the 2006 OECD Council Recommendation on Bribery and Officially Supported Export Credits into the 1997 Revised Recommendation. The precedent has already been set with the incorporation of the DAC recommendation in 1997. Such a step would help promote coherence within the body of OECD instruments.

4. Co-operation with Non-Parties to the Convention

4.1 Solicitation

Additional insights

45. TUAC considers that a key strength of the OECD Anti-bribery Convention is its focus on the supply-side of the bribery of foreign public officials.

46. In relation to the role of the Working Group in addressing solicitation, TUAC highlights two recent examples of prosecutions of companies for foreign bribery offences in the home country triggering investigations of public officials in the host country:

- Siemens (Germany): "President Umaru Yar'Adua ordered an investigation after a German court fined Siemens 201 million euros in October for bribes paid to Nigerian, Russian and Libyan officials by a former manager of one of the group's telecoms equipment units. Details of the Munich court ruling were not made public at the time but the Wall Street Journal published them

²⁰ This clause was prepared by Public Concern at Work, a UK-based whistleblower support organisation.

a month later, naming five Nigerian former ministers and two other officials as recipients of the bribes.”²¹

- Wilbros (USA): “ABUJA, Nov 7 (Reuters) - Nigeria will investigate senior government officials implicated by a U.S. oil executive who has pleaded guilty to bribery, the justice minister said on Wednesday.”²²

47. TUAC understands that the current anti-corruption climate in Nigeria, to some extent, makes it a special case. Nonetheless, it believes that these examples illustrate the potential impact that Convention enforcement could have on solicitation (to the extent that high profile prosecutions of public officials in the host country will have some sort of deterring effect).

Next steps

48. TUAC urges the Working Group to give further consideration to how the network of prosecutors established at the 10th Anniversary meeting in Rome in November 2007, as well as OECD initiatives in Asia and Eastern Europe, could be used to strengthen links between prosecutors in both party and non-party States, so as to establish a basis for cooperation that results in the prosecution – and thereby the deterrence – active and passive bribery.

4.2 Accession

Additional insights

49. TUAC notes recent allegations of foreign bribery involving companies of China, India²³ and Russia:

COUNTRY	COMPANY	HOST COUNTRY	DATE
China	ZTE	The Philippines	2007
India	Arcelor-Mittal	Kazakhstan	2008
Russia	UC Rusal in Nigeria	Nigeria	2004

Next steps

50. TUAC urges the Working Group to involve China, India and Russia in their activities as a key priority.

²¹ <http://africa.reuters.com/wire/news/usnL1118126.html>

²² <http://africa.reuters.com/wire/news/usnL07655824.html>

²³ These corruption allegations do not specifically concern the gaining of ‘improper advantage’.

TABLE 2: SUMMARY ON CROSSING-CUTTING ISSUES: DETECTION AND PREVENTION

ISSUE	TUAC RECOMMENDATION	PRIORITY
NEED FOR INCREASED AWARENESS	<ul style="list-style-type: none"> • Amend the 1997 Revised Recommendation to include an instruction for the Working Group to develop a Promotional Strategy in conjunction with its institutional stakeholders. • Establish minimum awareness-raising standards for Parties. 	HIGH
DETECTING AND REPORTING OF FOREIGN BRIBERY IN THE PUBLIC SECTOR		
Officials from agencies <u>with</u> contractual relationships with business: <u>official export credit support</u>.	Clarify the discrepancy between the requirement in the 2006 OECD Council Recommendation on Bribery and Officially Supported Export Credits for officials of ECAs to report <u>credible evidence</u> of bribery to the reporting authorities and the obligations of public officials more generally to report <u>suspicious</u> .	
Officials from agencies <u>not</u> having contractual relationships with business: <u>whistleblower protection</u>	Amend the 1997 Revised Recommendation as follows ²⁴ : <i>It is strongly recommended that each Party provides effective and proportionate protections for reprisals against persons who report in good faith to</i> <i>a) their employer,</i> <i>b) an appropriate authority, or</i> <i>c) where justified and reasonable, the wider public</i> <i>that in their reasonable belief an offence of bribery of a foreign public official has occurred, is occurring, or is likely to occur.</i>	HIGH
FOREIGN BRIBERY IN RELATION TO OFFICIAL EXPORT CREDIT SUPPORT	TUAC requests the Working Group to consider incorporating a reference to the 2006 OECD Council Recommendation on Bribery and Officially Supported Export Credits into the 1997 Revised Recommendation.	

²⁴ This clause was prepared by Public Concern at Work, a UK-based whistleblower support organisation.

ISSUE	TUAC RECOMMENDATION	PRIORITY
CO-OPERATION WITH NON-PARTIES		
Solicitation	TUAC urges the Working Group to give further consideration to how the network of prosecutors established at the 10th Anniversary meeting in Rome in November 2007, as well as OECD initiatives in Asia and Eastern Europe, could be used to strengthen links between prosecutors in both party and non-party States so as to establish a basis for cooperation that results in the prosecution of active and passive bribery.	
Accession	TUAC considers that the Working Group should take urgent steps to involve China, India and Russia in its activities.	

V Additional Issues identified by TUAC

TABLE 3: ADDITIONAL ISSUES²⁵

<i>ISSUE</i>	<i>TUAC RECOMMENDATION</i>	<i>PRIORITY</i>
REPORTING BY PARTIES	Expand the categories and the periodicity of the OECD Working Group report, <i>Steps taken by State Parties to Implement and Enforce the OECD Convention</i> . The report should include the following: <ul style="list-style-type: none"> • Awareness-raising activities; • Resources allocated to investigating and prosecuting foreign bribery; • Numbers of investigation and prosecutions of natural and legal persons respectively; • Number of MLA requests received, answered and outstanding; • National reporting structures/initiatives. 	HIGH
PUBLIC REPORTING OF ALLEGED FOREIGN BRIBERY OFFENCES TO THE ENFORCEMENT AUTHORITIES	All Parties should provide, where possible, one central contact point for the public to use to report allegations of foreign bribery offences. The information should be easily accessible on the internet with key information translated into the main international languages. Where there is more than one reporting point, information should be provided to guide users on the role of each. ²⁶	HIGH
MEASURES FOR DEALING WITH POTENTIAL BREACHES OF THE CONVENTION	TUAC is concerned that recent events in the UK – the halting of the investigating into the Al Yamamah arms deal – have created a crisis of confidence in the Convention. It asks the Working Group to review the extraordinary measures available to it for dealing with possible breaches by parties of the Convention, to ensure that these are adequate for preserving the integrity of – and Parties’ and public confidence in – the Convention.	HIGH

²⁵ These issues are not discussed in the Consultation Paper, but are discussed here due to TUAC’s view of their importance.

²⁶ The Anti-corruption NGO, the Corner House, is currently developing a web site (www.reportbribery.org) that will bring together the reporting points of the thirty-seven Parties to the Convention.