Questionnaires on bribery acts in relation to foreign political parties, party officers and candidates, and on the role of foreign subsidiaries

20 September 2001

Introduction

1. In December 1997, the OECD Council decided that the Working Group on Bribery in International Business Transactions should examine on a priority basis the following five issues: bribery acts in relation with foreign political parties; advantages promised or given to any person in anticipation of that person becoming a foreign public official; bribery of foreign public officials as a predicate offence for money laundering legislation; the role of foreign subsidiaries in bribery transactions; and the role of offshore centres in bribery transactions.

2. Last year, emphasis was placed on corruption issues relating to offshore financial centres and bribery of foreign public officials as a predicate offence for money laundering legislation. This year, the Group is examining the other issues relating to corruption, namely bribery in relation to foreign political parties, or candidates, and the role of foreign subsidiaries in bribery transactions.

3. The Working Group held an informal consultation in February 2001 on “Bribery Acts in Relation to Foreign Political Parties, Officials and Candidates”, with civil society, the private sector, and trade union representatives. The purpose of the meeting was to discuss the potential problem areas due to the non-coverage by the 1997 Bribery Convention of bribery in relation with foreign political parties and party officers as well as advantages promised or given to any person in anticipation of that person becoming a foreign public official.

4. Previous work has confirmed that the Convention would cover bribery of a public official who is also a party official, and the bribery of a public official where a political party/party official is involved as an intermediary or third party beneficiary¹. The remaining gap that is relevant to the issue of influence over government decision-making is the bribery of a foreign political/party official for the purpose of influencing government decision-making. The Group acknowledged that this is potentially a serious problem and that there is a need to determine its scope. Following the special meeting, there was broad agreement that the non-coverage of certain acts involving a quid pro quo in relation with foreign political parties, party officials or candidates might represent a potential gap in the coverage of the Convention.

¹ The Working Group convened an informal meeting of experts held in Milan in October 1998. This meeting was based on signatories responses to a 1998 questionnaire on four out of five issues identified by the OECD Council as needing to be examined on a priority basis, including the issue of bribery in relation to foreign political parties and candidates, and the role of foreign subsidiaries in bribery transactions [C/MIN(99)5, Annex2].
5. The Convention does not explicitly address bribe payments through foreign subsidiaries. Previous work showed that the Convention and national implementing laws would cover the cases where company headquarters had authorised the bribe, and where nationals of the company headquarters were involved in the bribery transaction using the nationality basis of jurisdiction. For other cases, the applicability of the Convention was less certain. The Group noted that in the meantime, it would be important for Member countries to find ways to improve their ability to control the actions of their corporations and to encourage companies to take more responsibility for self-policing. At its meeting in February 2001, the Working Group further noted that it could gain experience by ascertaining the nature and the extent of the issues concerning bribery transactions that involve foreign subsidiaries.

6. Concerning bribery transactions involving political parties and foreign subsidiaries, the Group decided that it was necessary to assess the importance of such acts as well as the extent to which these acts are covered by the Convention and implementing legislation, or by existing national criminal or non-criminal statutes. It therefore decided to gather information by way of questionnaire to determine the scope of the problem.

7. This revised note reflects comments made by delegates during the Group’s June 2001 meeting on the two draft questionnaires. It is submitted to delegates for comments and approval by written procedure. The final questionnaires will be circulated to all Working Group participants after the June meeting, with replies due by April 2002 so that the preliminary findings can be included in the 2002 Report to Ministers. Based on countries’ replies, the Group will evaluate the significance of these issues and formulate recommendations for possible follow-up action to be submitted to the 2003 Ministerial meeting.

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**Explanatory note**

The questions below are intended to determine the scope of application of the Convention in cases of bribery acts in relation to foreign political parties, party officers and candidates, as well as bribery acts involving a foreign subsidiary of a domestic enterprise. These questions refer to the actions taken by the authorities of the country of the briber. The Working Group expressed its interest in also sharing information about the actions taken by the country of the person bribed, or alleged to have been bribed. Questions A7, B7 and 9 are intended to solicit such information. The replies to the questionnaires should be precise and provide sufficient detail to permit an assessment of the actual application of the Convention’s implementing legislation or Parties other national laws to the issues of bribery acts in relation with foreign political parties and advantages promised or given to any person in anticipation of that person becoming a foreign public official and of the role of foreign subsidiaries in bribery transactions.

Countries are not expected or required to disclose information otherwise protected by a country’s laws and regulations.

Replies should be submitted in either English or French and preferably in electronic format. Copies of relevant laws, regulations, administrative guidance, or court decisions should also be provided in English or in French, where appropriate.

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2. Experts were of the opinion that the issue of how to deal with foreign subsidiaries is linked to how countries deal with notions of corporate responsibility in their national company laws. See documents DAFFE/IME/BR(2000)22, DAFFE/IME/BR(2000)23 and DAFFE/IME/BR(2001)12.

3. See footnote 1, above.
Questionnaire on bribery acts in relation to foreign political parties, party officers and candidates

A. Laws, Procedures and Practices concerning bribery acts in relation with foreign political parties, party officers

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<tr>
<th>Typology of cases:</th>
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<tr>
<td>1. Bribery acts involving a foreign political party or party officer acting as a co-author, an intermediary or a third party beneficiary in the bribe transaction.</td>
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<td>2. Bribery acts involving a foreign party officer who is also a public official as defined in the Convention (e.g. Member of Parliament).</td>
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<tr>
<td>3. Bribery acts involving a foreign political party or party officer from a one-party state.</td>
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<tr>
<td>4. Bribery acts to a foreign political party or party officer for the purpose of obtaining an act or decision of the party or official in its/his/her own capacity.</td>
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<td>5. A bribe to a foreign political party or party officer for the purpose of inducing it/him/her to influence an act or decision of a foreign public official.</td>
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A.1. Have your authorities investigated any cases in your country, which fall under the above typology? If so, please describe the facts as fully as possible. If not, please answer question A.6.

A.2. Please explain the steps taken by your authorities to address the act(s). In particular, have they been able to collect sufficient evidence? Have they prosecuted the act(s) and did this result in conviction(s)? Please explain the underlying reason(s) for the possible absence of prosecution or conviction.

A.3. Under which statute did your authorities investigate and prosecute the act(s)? By criminalising under a general statute? By applying the Convention’s implementing legislation? By applying other relevant criminal and non-criminal legislation such as laws on trading in influence, on the misuse of company funds, or on national party financing (applied extraterritorially)? Please explain.

A.4. If addressed through the application of the Convention’s implementing legislation, please explain how the elements of the offence were applied, including the definition of a “foreign public official”, the interpretation of the offence in cases involving foreign political parties as intermediaries or third party beneficiaries. Please clarify whether, in certain circumstances, the notion of “attempt” may apply.

A.5. Please indicate whether your authorities have made or received requests for Mutual Legal Assistance in relation to bribery cases involving a foreign political party or party officers.

A.6. Is the absence of cases due to a difficulty in collecting evidence and/or a lack of criminal and non-criminal legislation which could apply to such cases? If your country has no provisions in relation to such cases, are any amendments envisaged and which ones?

A.7. Have your authorities investigated any cases involving the bribery of a political party or party officers in your country by a foreign legal or natural person?
B. Laws, Procedures and Practices concerning advantages promised or given to any person in anticipation of that person becoming a foreign public official as defined in the Convention (candidates)

**Typology of cases:**

1. A promise is made to a candidate before election, and payment is made after the candidate is elected (payment is in effect made to a public official).

2. The illegal quo is delivered after the candidate becomes a public official but the payment has been made before.

3. The promise or payment was made before the candidate was elected, no payment was made after the candidate has been elected and no quo was delivered.

4. A promise or payment was made to a candidate but the candidate loses the election.

B.1. Have your authorities investigated any cases in your country which fall under the above typology? If so, please describe the facts as fully as possible. If not, please answer question B.6.

B.2. Please explain the steps taken by your authorities to address the act(s). In particular, have they been able to collect sufficient evidence? Have they prosecuted the act(s) and did this result in conviction(s)? Please explain the underlying reason(s) for the possible absence of prosecution or conviction.

B.3. Under which statute did your authorities investigate and prosecute the act(s)? By criminalising under a general statute? By applying the Convention’s implementing legislation? By applying other relevant criminal and non-criminal legislation such as laws on trading in influence, on the misuse of company funds, or on national party financing (applied extraterritorially)? Please explain.

B.4. If addressed through the application of the Convention’s implementing legislation, please explain how the elements of the offence are applied, including the definition of a “foreign public official” as well as the concepts of intermediaries, third party beneficiaries, etc. Please clarify whether, in certain circumstances, the notion of “attempt” may apply.

B.5. Please indicate whether your authorities have made or received requests for Mutual Legal Assistance in relation to bribery cases involving a candidate.

B.6. Is the absence of cases due to a difficulty in collecting evidence and/or a lack of criminal and non-criminal legislation which could apply to such cases? If your country has no provisions in relation to such cases, are any amendments envisaged and which ones?

B.7. Have your authorities investigated any cases involving a domestic candidate where the active briber was a foreign legal or natural person?
Questionnaire on the role of foreign subsidiaries

Countries are asked to consider under what circumstances their authorities have taken action, criminal or non-criminal, against officers of the corporation headquarters, the corporation headquarters itself, or the foreign subsidiary, in active bribery cases involving a foreign subsidiary of a company and a public official.

**Typology of cases:**
1. company headquarters authorised the bribery of a foreign public official
2. company headquarters “knows” about the bribery of a foreign public official
3. company headquarters has no knowledge of the bribery of a foreign public official, but “should have known” about it
4. company headquarters has no knowledge of the bribery of a foreign public official and could not have known about it.

1. Have your authorities investigated any cases of bribery, which fall under the above typology? If so, please describe the facts as fully as possible.

2. Was it possible to take legal action against the parent company or the officers (or representatives) of the said parent company? Was it possible to take legal action against the foreign subsidiary itself? If you have not been able to bring a case or if you wanted to bring a case but could not, please answer question 8.

3. Please explain the steps taken by your authorities to address the act(s). In particular, have they been able to collect sufficient evidence? Have they prosecuted the act(s) and did this result in conviction(s)? Please explain the underlying reason(s) for the possible absence of investigation, prosecution or conviction.

4. What was the basis of jurisdiction on which action was taken (territorial jurisdiction, jurisdiction based on nationality, other…)? Did the inability to establish a basis of jurisdiction prevent proceedings against the parent company, its officers, or its foreign subsidiary?

5. Under which statute did your authorities investigate and prosecute the act(s)? By criminalising under a general statute? By applying the Convention’s implementing legislation? By applying other relevant criminal and non-criminal legislation? Please explain.

6. If addressed through the application of the Convention’s implementing legislation, please explain how the elements of the offence are applied, including the concepts of intermediaries, accomplices, etc.

7. Please indicate whether your authorities have made or received requests for Mutual Legal Assistance in relation to bribery cases involving a foreign subsidiary. Was the lack of judicial co-operation an obstacle? If so, what were the reasons for lack of co-operation (e.g. the different legal approach in relation to criminal investigation (i.e. continental/common law), the issue of the standards of evidence required)?

8. Is the absence of cases (investigation, prosecution or conviction) due to a difficulty in collecting evidence and/or a lack of criminal and non-criminal legislation which could apply to such cases? If your country has no provisions in relation to such cases, are any amendments envisaged and which ones?

9. Have your authorities investigated any cases involving the bribery of a domestic public official in your country by a foreign subsidiary? Was there adequate assistance from the State where the company’s headquarters are located?