



The impact of the OECD Anti-Bribery Convention

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I) Background

Globalisation and competitive challenges have resulted in the adoption and application of new rules and regulations in international business transactions. A number of legally binding as well as non-binding instruments have been developed at the regional and international levels to improve trade and investment and promote integrity.

Implementation and enforcement of the recently developed regional and international anti-corruption standards have far reaching consequences on investment, international ratings as well as on loan policies. Indeed, they impact on countries' anti-corruption laws, rules and policies both repressive as well as preventive; they also call for accompanying measures in the private sector.

While businesses look for business opportunities worldwide they increasingly need to evaluate their operations under a variety of criteria. Business will seek to generate wealth in the light of the domestic and foreign laws and regulations to which they must abide. However, they increasingly pay attention to the more general social and economic environment. Indeed, companies' conduct is more and more submitted to reputational and opportunity costs caused by divestment due notably to public pressure and high-profile lawsuits (in their homecountries) as well as high management and security costs at the field site.

This note describes the provisions and the consequences of the "*Convention on Combating Bribery of Foreign Public Officials in International Business Transaction*" (OECD Anti-Bribery Convention) which came into effect in early 1999. The note also highlights the need for international cooperation which should be facilitated in the framework of the United Nations Convention against Corruption (UNCAC).

II) The OECD and the fight against bribery of foreign public officials

The Organisation for Economic Cooperation and Development (OECD), an intergovernmental organisation grouping 30 countries², seeks to promote economic growth, prosperity, and employment through co-operation and policy dialogue between members. The organisation mostly develops non-binding recommendations and decisions to promote rules of the game in areas where multilateral agreement is necessary. But the organisation has also developed a number of binding instruments.

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² OECD Members include Australia, Austria, Belgium, Canada, Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Korea, Luxembourg, Mexico, Netherlands, New Zealand, Norway, Poland, Portugal, Slovak Republic, Spain, Sweden, Switzerland, Turkey, United Kingdom, and United States

Since the entry into force of the OECD Anti-Bribery Convention³ the fight against bribery has been a priority of the organisation. Indeed, the Convention has generated change. Bribery of foreign public officials is no longer accepted and an increasing number of lawsuits are the result of the new regulatory environment.

1) Why is the OECD fighting bribery? The impact of corruption goes far beyond the specific misbehaviour of the actors involved. Its repercussions sweep across entire economies and their populations. Bribery may de-rail development plans and leads to unnecessary, unsuitable, uneconomic or incoherent investment decisions as well as sometimes dangerous projects which cost the lives of many. Unfinished roads, crumbling schools and crippled health systems are but a few serious examples which illustrate the impact of bribery and corruption.

The OECD fights a very specific form of corruption. Parties to the OECD Anti-Bribery Convention are committed to combat the supply of bribes by their nationals (individuals and companies) to foreign public officials i.e. also officials operating in countries not Party to the Anti-Bribery Convention (also referred to as “supply-side” bribery or “active” bribery). The main objectives are to limit unfair competition in international business transactions and support development.

2) The response by the OECD to an international phenomenon. The OECD Anti-Bribery Convention was adopted in 1997 and entered into force in 1999. As of January 2008, thirty-seven countries have ratified this Convention, namely 30 OECD member and 7 non-member countries, (Argentina, Brazil, Bulgaria, Chile, Estonia, Slovenia and South Africa). The Convention is an open instrument and Parties hope that other countries will join this initiative. In particular emerging economies which once were buyers of goods and services are now increasingly the homes to businesses that sell in the international market.

3) Standards to fight bribery in International Business Transactions: Parties to the Convention have made bribing of foreign public officials in international business a criminal offence according to the “functional equivalence” approach. As the Convention is not self-executing, an enforcing law is required. This means each country transposes the agreed standards in line with its own legal tradition. The Convention’s most significant provisions require Parties to:

- Criminalize bribery of foreign public officials in international business transactions.
- Set a definition of a foreign public official.
- Impose effective, proportionate and dissuasive sanctions for natural and legal persons.
- Establish territorial and nationality jurisdiction over the offence according to Parties jurisdiction.
- Establish the bribery of foreign public officials as a predicate offence to money laundering.
- Disallow economic and political considerations in investigating and prosecuting the offence.
- Set accounting and auditing standards for prohibiting the use of accounting documents for bribing.
- Facilitate mutual legal assistance and extradition.

³ For more information see www.oecd.org/daf/nocorruption

- Provide for systematic monitoring.

The OECD Anti-Bribery Convention is complemented by a set of OECD recommendations which set forth general provisions aimed at deterring, preventing and combating international bribery. Countries are for instance recommended to establish transparency in book-keeping and auditing practices, encourage the adoption of internal company controls, including standards of conduct as well as adopt sound procurement rules and practices.

4) *Systematic self- and mutual monitoring ensures that each country meets its commitments:*

Compliance of all Parties is essential and needs to be ensured everywhere. Representatives of each of the 37 countries that have ratified the Convention compose the OECD Working Group on Bribery in International Business Transactions, the body in charge of effectively controlling the implementation and enforcement of the agreed anti-bribery standards. Members of the Group work year-round through a rigorous peer-review mechanism to ensure that all countries meet their commitments as laid out in the Convention.

5) *Impact of the OECD Anti-Bribery Convention:* The Convention has changed the rules of the game. It has increased visibility of corruption of foreign officials; it has brought bribery to the fore. Today, there are more than 150 ongoing foreign bribery investigations. Approximately 40 individuals and companies that committed foreign bribery have been penalized, in some cases with hefty multi-million dollar fines.

Consequences of involvement in bribery of foreign officials:

The regulatory changes have important consequences. Companies may be prosecuted in multiple jurisdictions, chief executives may face extradition and hefty fines can be imposed.

The following example is an illustration of a case which was handled by more than one jurisdiction: Norway fined its state oil company an equivalent of over \$ 3 million in 2004 for paying bribes to an Iranian government official to obtain a contract to develop the South Pars gas field in Iran. After that, the Securities and Exchange Commission (SEC) of the US began its own investigation and fined the company over US \$ 10 million and forced the company to disgorge a further US \$ 10 million of profits and required the company to undergo a compliance review.

The United States prosecutes more offences than most other countries bound by the OECD Anti-Bribery Convention. It vigorously attacks corruption at the payment stage and also at the accounting stage. The Foreign Corrupt Practices Act (FCPA) applies wide jurisdiction. It applies to foreign and domestic companies and individuals that bribe foreign public officials in the United States as well as US companies and individuals and foreign companies listed on the US stock exchange when they bribe overseas. The US will also prosecute foreigners who have used the US banking or mail/wire system as a conduit for illegal payments.

The uncovering of bribery and corruption in one area might lead to further investigations as those malpractices may be suggestive of other misconducts in the company. The case of a major German company is very illustrative. A report on bribery of that company refers to different investigations across the world, including for violations of anti-trust laws.

6) All stakeholders have a role to play: Of course, governments' primary objective is not to put CEOs into jail but to make sure that integrity is increased and that contracts are awarded on fair grounds.

Businesses, their associations and industry federations are making valuable contributions to promoting best practices. These actors play a fundamental role in developing and enforcing preventive, self-regulatory measures to eliminate malpractices and fraud. Over the last decade, a wide range of self-regulatory tools have been elaborated.

Business tools to raise awareness and prevent malpractice include⁴:

- Codes of conduct mirror a company's values. In relation to anti-corruption, codes will generally reflect the company's commitment to obey the laws and regulations, prohibit the giving or receiving of bribes, restrict and guide the giving or receiving of gifts, restrict donations to political parties; etc.
- Compliance programmes ensure that the values of the company are strongly supported by top management, that staff is trained and educated, that guidance exists for situations requiring judgment, that effective information and reporting within and by the company is granted etc.
- Integrity pacts.

Too little is known about the actual implementation and enforcement of these very valuable tools and this might require further communication and implementation efforts by the private sector. The invitation by the OECD Working Group on Bribery to comment on its public consultation paper on the "Review of the OECD Anti-Bribery Instruments"⁵ may provide an excellent opportunity to further strengthen mutual relations and intensify the dialogue to learn more about these business instruments.

OECD is engaged in a dialogue with business, trade unions and civil society. These actors participate in the implementation and enforcement of the OECD Anti-Bribery Instruments, in particular by raising awareness and providing information on countries' progress to the Working Group's monitoring process. They also take an active role in examining salient anti-bribery issues discussed during the Working Group's regular consultations with civil society representatives. Furthermore, they help develop and implement policies and practices to combat corruption in non-member economies through their involvement in OECD's regional anti-corruption initiatives.

III) International co-operation

International co-operation is one of the key aspects. Indeed, corruption is a crime that knows no boundaries and evidence will often be found in another country. For example, company headquarters are often based in one country and their subsidiaries are based and operate in several others. Hence, counting on an efficient international co-operation system, coupled with the

⁴ All the measures which regulate the behavior within a company can also guide relations with clients, suppliers, associates and public administrations.

⁵ The link to the online versions of the Consultation Paper:

http://www.oecd.org/document/58/0,3343,en_2649_34855_39802234_1_1_1_1,00.html

establishment of multi-based jurisdiction, is of vital importance. Systems must guarantee that no corrupt person will find asylum anywhere in the world.

Two essential forms of international cooperation are extradition and mutual legal assistance. Extradition is the surrender by one state, at the request of another, of a person who is accused of or has been sentenced for a crime committed within the jurisdiction of the requesting state (or in another state if the request is based on the application of nationality jurisdiction). Mutual legal assistance in criminal matters (MLA) is a formal process to obtain and provide assistance in gathering evidence for use in criminal cases. In some instances, MLA can also be used to recover proceeds of corruption. Both extradition and MLA are indispensable means of international cooperation in criminal law enforcement.

Countries may adopt different types of legal frameworks to address the need for effective extradition and MLA in corruption cases. Some are based on bilateral treaties. Others, more recently, may have placed great emphasis on multilateral instruments. A number of countries have signed and ratified the OECD Anti-Bribery Convention and the United Nations Convention against Corruption. Countries have enacted domestic legislation that complements these treaty-based arrangements.

The OECD Anti-Bribery Convention is instrumental in ensuring cooperation among Parties. As a leader in forging alliances and building networks, the OECD has also established support associations to fight corruption in various regions of the world through which enhanced international cooperation has developed.

The OECD has worked with governments of the Middle East and North Africa (activities carried out so far are annexed), and with Latin American countries to promote anti-corruption activities and provide constructive forums where government, business, and civil society voices can be heard, questions and concerns can be discussed, and sound policies can be developed and reviewed. These initiatives should be further developed to resemble more mature initiatives. The Anti-Corruption Network for Transition Economies, which supports the anti-corruption efforts of 20 countries in Eastern Europe and Central Asia, launched a monitoring programme in 2003 to enhance exchange of experiences with the Working Group on Bribery. The Asian Development Bank/OECD Anti-Corruption Initiative for Asia-Pacific brings together 28 Asian and Pacific economies to design and implement sound anti-corruption policies according to the standards under the OECD Anti-Bribery Convention and the UNCAC. Process is guided by the Anti-Corruption Action Plan for Asia-Pacific. The Initiative provides members with practical assistance through policy dialogue, by measuring progress and providing analysis, and through a capacity building program. Progress on reform is assessed through comprehensive reviews in all relevant areas including the core issues under the OECD Anti-Bribery Convention and the UNCAC.

The OECD Anti-Bribery Convention and the UNCAC being complementary and mutually reinforcing they provide opportunities for international cooperation. The UNCAC, which relied on regional initiatives in its development, is the latest and broadest adopted anti-corruption Convention. With about 70 articles, the convention provides a comprehensive framework encompassing prevention and prosecution of corruption. The UNCAC has the widest geographical

coverage of all international anti-corruption instruments. According to the UN web site 140 countries are signatories and 107 have ratified it (in early 2008).

The UNCAC Convention sets forth some mandatory provisions which all countries have to implement, such as the criminalization of active and passive bribery of public officials, embezzlement, money laundering, obstruction of justice.⁶

IV. Conclusions

Considering the detrimental nature of bribery and corruption for all, it is important to build strong partnerships among different stakeholders and all economies. Different tools are in place which provide for individual and collective actions to prevent and sanction these malpractices.

Despite the complexities to track foreign bribery, it is clear that companies will increasingly seek to reduce exposure to illegal payments and seek to ensure compliance to safeguard themselves from penalties and fines. They will wish to avoid having to engage in transactions which generate illegal payments which can trigger investigations.

Governments also need to reinforce their actions and their cooperation to fight corruption. Last November, on the occasion of the 10th Anniversary of the adoption of the OECD Anti-Bribery Convention, Parties pledged to intensify their efforts to fight bribery of foreign public officials.⁷ To that effect, they committed to a number of measures by government including encouraging and supporting initiatives by the business sector to prevent and detect foreign bribery. They also committed to actively support the ratification and implementation of the United Nations Convention Against Corruption by all countries.

⁶ Another six criminal behaviours stated in the Convention were not mandatory. Illicit enrichment, trading in influence and passive bribery of foreign public officials are examples of a criminal conduct that State Parties have been recommended to criminalize. The optional criminalization of such conducts was due to the fact that some countries may have already established those offences in their domestic law; other countries would be unable to do the same, often because of constitutional impediments.

⁷ On the occasion of the 10th anniversary the 37 Parties to the Convention adopted a “Statement” which can be found at: www.oecd.org/bribery/anniversary.

Annex 1:

MENA OECD Task Force on Combating Bribery of Public Officials

- First meeting of the MENA OECD Task Force on Combating Bribery of Public Officials, Manama, Bahrain, 27-28 June 2005. The Task Force, which brought together senior anti-corruption officials from 9 Middle Eastern and North African (MENA) countries (Bahrain, Djibouti, Egypt, Iraq, Jordan, Kuwait, Morocco, Qatar and Yemen) was jointly organised by the Jordanian Chair of the Task Force and the OECD in partnership with Bahrain. The Task Force met ten months after MENA countries had initiated it at a regional meeting in Amman, Jordan, as part of an overall MENA OECD work programme in support of governance and investment for development in the region. The dialogue focused on ways in which corruption of public officials by local, regional and international businesses can be more effectively combated and led to the development and a preliminary agreement on draft "Common elements of anti-bribery legislation and related actions to promote business integrity in the Middle East and North Africa" for endorsement at a regional ministerial meeting. The meeting also discussed the first ever regional inventory of anti-bribery policies prepared by the Secretariat.
- MENA Investment Ministerial Meeting, 13-14 February 2006, Dead Sea, Jordan. The Ministerial Meeting adopted a Declaration on Principles and Good Practices for Attracting Investment to the MENA region and requested the Anti-Bribery Task Force to continue its work in and outside the region. It also provided a progress report on ways to improve the investment climate including anti-bribery measures.
- "Business Ethics and Anti-Bribery Policies in Selected Middle East and North African Countries: An Overview of Policies and Trends in Seventeen Middle Eastern and North African Countries and Jurisdictions" (Algeria, Bahrain, Djibouti, Egypt, Iraq, Jordan, Kuwait, Lebanon, Morocco, the National Palestinian Authority, Oman, Qatar, Saudi Arabia, Syria, Tunisia, the United Arab Emirates, Yemen). The report was made available on CD-ROM to participants to the February 2006 Dead Sea Conference and to the general public on the OECD website, is the region's first inventory report on anti-bribery policies. Developed against a set of criteria, namely the OECD 1997 Revised Recommendation and the UN Convention against Corruption, the report provides an overall picture of the legislation and policies relevant to the fight against bribery of public officials in business transactions and suggests areas for reform.
- Second meeting of the MENA OECD Task Force on Combating Bribery of Public Officials, 4-5 July 2006, Bahrain. To follow up on the February 2006 Ministerial, high-level anti-corruption officials from 12 Middle East and North African jurisdictions (Algeria, Bahrain, Djibouti, Egypt, Iraq, Jordan, Kuwait, Lebanon, Morocco, the National Palestinian Authority, Qatar and Yemen) finalised the "Common Elements of Anti-Bribery Legislation and Related Actions to Promote Business Integrity in the Middle East and North Africa" developed by the Task Force since its first Bahrain meeting in June 2005 and agreed upon an Implementation Mechanism.