This meeting is aimed at bringing together experts with wide expertise on the role of intermediaries in foreign bribery.

Subsequent to the meeting, and based on the exchange of information, the Secretariat will draft a typology report. The draft typology report will be submitted to the Working Group on Bribery for its approval in March 2009.

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INFORMAL EXPERT MEETING

A TYPOLOGY ON “THE ROLE OF INTERMEDIARIES IN FOREIGN Bribery”

THEMATIC FOCUS

Commercial intermediaries in the broad sense often have a crucial and fully legitimate economic role. Natural or legal persons such as agents, sales representatives, consultants or consulting firms, suppliers, subcontractors, joint venture partners, subsidiaries and other business partners including lawyers carry out various business functions of behalf of companies, in particular when the latter have no local representation.

Case materials, bribery allegations and limited research on the issue of intermediaries however also show that these same persons may play a key role in the bribing of foreign public officials. The majority of cases detected so far by Parties to the Convention involve one or more intermediaries who organise and/or transfer the bribe. This may lead to the belief that intermediaries are purposely or recklessly hired by a company to engage in bribery and corruption and help conceal the deeds. Indeed, some intermediaries have the sole role of transferring the bribe from a company to a foreign public official, without any commercial involvement.

The Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, which prohibits the direct or indirect giving, offering and promising bribes to foreign public officials, is concerned with the use of intermediaries.

The Convention’s Article 1 (1) defines the bribery offence as “the act of offering, promising or giving any undue pecuniary or other advantage, whether directly or through INTERMEDIARIES, to a foreign public official, for that official or for a third party, in order for him to act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business”.

On the basis of Article 1 (2) “complicity, incitement, aiding and abetting or authorisation of an act of bribery of a foreign public official shall be a criminal offence”.

Article 1 (3) defines a “foreign public official as any person in a foreign country, who holds a legislative, administrative or judicial office, or who exercises a public function, including a public agency or enterprise, and any official of an international organisation”.

A central issue for the Convention’s enforcement is whether the offence of foreign bribery can be effectively identified, detected, investigated and prosecuted if carried out through one or several intermediaries.

PURPOSE OF THE MEETING

The aim of this typologies meeting is to bring practitioners and policy makers together to discuss case material as well as the ongoing research work conducted by experts to advance, through the exchange of information and intelligence, the understanding on prevailing trends on foreign bribery through intermediaries.
The Working Group has determined that studying and bringing to light information about intermediaries is of major interest. So far, limited research has been done on the role of intermediaries in international business and their responsibility in foreign bribery transactions.

Delineating the roles and functions that are fully justifiable economically as opposed to activities of intermediaries connected to bribery, bringing to light mechanisms used to involve intermediaries in bribery deals, as well as the techniques put in place to seek to escape liability in relation to bribery, are some of the issues to be debated during the meeting. The exchange among experts on these and related questions should help participants understand whether and to what extent the OECD Anti-Bribery Convention and State Parties’ legislation apply to intermediaries and the appropriateness of countries’ provisions to prevent, detect and sanction bribery of foreign officials by intermediaries.

OUTCOME OF THE MEETING

The main purpose of this typology exercise is to promote better knowledge over the bribery acts of foreign officials through intermediaries. The functional and process based analysis should help improve the overall understanding of the logic of the bribery offence through intermediaries. The typology should also contribute to outlining the role of different actors (e.g. intermediaries, agents, bribers, bribees). An essential benefit of a typology exercise is the development of analytical issues linked to the examined crime, including definitions and terms associated with this crime, and the determination of the magnitude of the problems. Ultimately, the typology exercise could allow the review and assess the effectiveness of the existing counter-measures.

Following the ad hoc expert meeting, the Secretariat will draft a typology report, in consultation with the Co-Chairs and the assistance of the participating experts. This report will outline experts’ findings as well as the key elements that emerge during the expert meeting. The draft report is aimed at being submitted in March 2009 for approval to the Working Group. The latter may, depending upon the outcome of the typology report, decide whether and how to subsequently disseminate the typology report or parts thereof.

PARTICIPANTS

The meeting will bring together government officials that have expertise in law enforcement or bribery prevention and detection.

Officials with relevant knowledge and expertise from the European Commission, the Organisation for American States, the European Investment Bank, the European Bank for Reconstruction and Development as well as the World Bank have also been solicited to participate.

Non-Government representatives have also been invited to attend the meeting in the afternoon.

STRUCTURE OF THE MEETING

The expert meeting will be articulated around four core sessions:

1. Session I will be dedicated to presentations and discussion of case materials involving intermediaries in foreign bribery offences. The presentations of these cases will include a functional and process based analysis of the bribery acts which should allow identification of key characteristics of each offence.

2. Session II will address the main characteristics identifiable regarding intermediaries, their employers, the sectors and countries in which they operate. Participants will seek to determine methods, trends and patterns that can be deduced from the cases presented.
3. Session III will aim at identifying the “modus operandi” of intermediaries and their contractors to obscure bribery pacts and transactions as well as the related difficulties faced by investigators and prosecutors. It will also seek to bring to light obstacles in the Convention’s enforcement due to legal differences among Parties and with non-parties’ legislative provisions.

4. Session IV will be addressed by non-government representatives, who will report on their experience relating to intermediaries and their role in transnational bribery.

During each session, experts will make presentations (of maximum 10 minutes each) that will be followed by a general discussion. During the general discussion period, participants will be given the opportunity to ask specific questions and discuss in further depth issues of particular interest.

PRACTICAL ARRANGEMENTS

The meeting will be held on 8 December 2008 at OECD Headquarters, 2 rue André-Pascal, 75016 Paris. It will start at 9h15 and end at 18h. Participants are invited to present themselves for registration between 8h45 and 9h00.

The working languages are English and French, with simultaneous interpretation.

Note on confidential case material: Conscious of the delicate and difficult nature of the exercise, Parties to the Convention agreed to collect and submit concrete cases which would constitute the basis for a comprehensive discussion among experts. The typology exercise should be based on concrete cases which are relevant under the Convention. Case materials should ideally be anonymised, i.e. neither the origin of the case, the persons (natural/legal) or countries involved should be identifiable¹. Submitted cases will be circulated to government experts and will be subject to strict confidentiality. The cases selected should contribute to a better understanding of the offence of bribery by intermediaries.

¹ Undisguised cases submitted to the typology on bribery in public procurement were used during the discussion among experts, but were not included in the subsequent publication.
DRAFT AGENDA

Chairs: Mrs Claire DAAMS and Mr Puk VAN DER LINDE

9:15 - 9:45 Welcoming and Opening remarks

- Mr. Patrick MOULETTE, Head, OECD Anti-Corruption Division
- Mrs. Claire DAAMS, Procureur fédéral suppléant, Office of the Attorney General of Switzerland
- Mr. Puk VAN DER LINDE, Policy Advisor, Ministry of Economic Affairs, The Netherlands

9:45 - 10:30 Session I: Presentation of Bribery Cases Involving Intermediaries

- Mr. Philippe BOURION, Vice-procureur, Tribunal de Grande Instance de Paris, France
- Ms. Xavière SIMEONI, Vice-président à l’instruction, Tribunal de Grande Instance de Paris, France
- Mr. Georgi TAFROV, Prosecutor, Bulgaria
- Ms. Claire DAAMS, Procureur Fédéral Suppléant, Office of the Attorney General of Switzerland
- Ms. Izabela MOREIRA CORRÊA, Directorate for Corruption Prevention, Office of the Federal Controller-General, Brazil
- Mr. Mark MENDELSOHN, Deputy Chief, US Dept. of Justice, United States

Speakers will make short presentations of anonymised cases. The latter should allow functional and process based analysis of the foreign bribery acts as well as identification of key characteristics of each case. Speakers may also have the subsequent sessions in mind and wish to identify elements for consideration in Sessions II and III.

Participants will be welcomed to complement case presentations by providing complementary observations and relevant features.

10:30 – 10:45 Coffee Break
During this session participants shall seek to define who qualifies as an intermediary and outline their main characteristics.

Discussions between experts will seek to bring to light: (i) how and why intermediaries get involved in business transactions; (ii) the nature of their relations with different other actors such as the contractor, other business partners including financial intermediaries, the public administration and its officials. Exchanges should also help clarify the circumstances in which there is a bribery risk in association with an intermediary (e.g. when the intermediary is acting independently, when acting outside the limits set by the contract, when the intermediary acts knowingly or unknowingly upon instruction of the legal provisions etc.). The discussions will furthermore aim at verifying different risk factors associated with various types of intermediaries, the business service or transaction delivered the business sector or region in which the intermediary operates, etc.

The different issues in this session will be introduced by experts identified below; other participants are invited to complement the introductory presentations by supplementary information based on either their personal experience or their analysis of the case materials. The presentation and subsequent exchange shall seek to bring to light evidentiary and legal challenges that the use of intermediaries pose for the detection, investigation and prosecution of the foreign bribery offence. To the extent possible, participants are also invited to report on counter-measures to overcome the identified challenges.

Session III. A: “Modus operandi” to conceal the bribe:

- Ms. Patricia DUFOUR, Conseiller-Secrétaire Générale, SCPC, France
- Mr. Paul-Lachal ROBERTS, Advisor to the Director General, OLAF (European Commission)
- Prof. Mark PIETH, Chairman of the Working Group on Bribery, University of Basel, Switzerland

The presentation and discussion will determine whether the reality and the legitimacy of intermediaries’ involvement in transactions can be established and the associated fees justified. The session will also consider how intermediaries and their employers proceed to obscure their identity. The difficulties linked to the determination of the involvement of
intermediaries in the establishment of hidden financial circuits meant to prevent judicial complications for all involved in the bribery “pact” will be debated.

Session III. B.: **Risks that intermediaries and their employers escape liability:**

- Mr. Tony FERRIES, Magistrate, Working Group delegation of the United Kingdom
- Mr. Gerhard NEL, Prosecutor, South Africa
- Mr. Mark MENDELSON, Deputy Chief, US Department of Justice, United States

Investigating complex and lengthy business transactions is difficult; it requires a lot of information from abroad which may be virtually impossible to obtain when involving intermediaries. Different Parties may use different provisions with the differentiated application by Parties representing an obstacle to the Convention’s application. Is the absence of an express provision concerning intermediaries in countries’ legislation an obstacle in the application of the foreign bribery offence? What if an intermediary is not considered as an active briber or accomplice but rather fall under trading in influence provisions? How can or should investigators deal with requirements set by certain countries that specific, mostly local, intermediaries intervene in the transfer of funds? Could such an obligation provide a defence or exception in some Parties to the application of the foreign bribery offence?

13:00 - 15:00 Lunch

15:00 - 15:15 Opening of the meeting to non-government representatives

Welcoming remarks and summary of key observations made during the morning by

- Ms. Claire DAAMS, Procureur Fédéral Suppléant, Office of the Attorney General of Switzerland
- Mr. Puk VAN DER LINDE, Policy Advisor, Ministry of Economic Affairs, The Netherlands
15:15 - 16:45  **Session IV: Compliance methods – achievements and limits**

- Mr. Peter CLARK, Senior Partner, Cadwalader, Wickersham & Taft
- Mr. Jean-Pierre MÉAN, BIAC
- Mrs. Kirstine DREW, Policy Advisor TUAC and UNICORN Coordinator
- Mr. François VINCKE, Chair, ICC Anti-Corruption Committee
- Mr. Peter WILKINSON, Transparency International

Non-government representatives will report about experiences relating to intermediaries and the roles the latter have in transnational bribery. They will also discuss the efficiency of the specific provisions to prevent corruption through agents and intermediaries set out in the various non-governmental initiatives aimed at fighting corruption (e.g. the Rules of Conduct and Recommendation by the International Chamber of Commerce, the Partnering Against Corruption Principles for Countering Bribery, Transparency International’s Business Principles for Countering Bribery).

16:45 - 17:15  **Coffee break**

17:15 - 17:30  **Session V: Post-meeting report**

- Mrs. Nicola EHLERMANN-CACHE, OECD Anti-Corruption Division

Presentation of 1) the outline typology reports; 2) procedural drafting issues; 3) presentation at the Working Group on Bribery.

17:30 - 18:00  **Conclusions and Follow-up: identification of main findings to be presented to the Working Group on Bribery**

- Mrs. Claire DAAMS, Procureur Fédéral Suppléant, Office of the Attorney General of Switzerland
- Mr. Puk VAN DER LINDE, Policy Advisor, Ministry of Economic Affairs, The Netherlands

The Chairs will summarise the discussions; participants may, if necessary, make specific recommendations for concrete follow-up.