OECD ACTIONS TO FIGHT CORRUPTION

ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT

Paris

56344

Document complet disponible sur OLIS dans son format d’origine
Complete document available on OLIS in its original format
I. Introduction

1. The Recommendation on Bribery in International Business Transactions, adopted by the Council in May 1994, instructs the Committee on International Investment and Multilateral Enterprises (CIME) to review the Recommendation and report back to the Council within three years. Furthermore, when the Council at its 1996 meeting at Ministerial level took the commitment to “criminalise (the bribery of foreign public officials) in an effective and co-ordinated manner”, it asked to receive in 1997 proposals on modalities and international instruments to facilitate criminalisation. The present report by the CIME constitutes the review of the 1994 Recommendation and presents proposals to facilitate criminalisation in response to the mandate of 1996:

-- Section II reports on steps taken by Member countries to implement the Recommendation;

-- Section III reports on the work pursuant to the Recommendation, including activities undertaken by the CIME Working Group on Bribery in International Business Transactions and by the Committee on Fiscal Affairs in relation to the 1996 Recommendation on the Tax Deductibility of Bribes to Foreign Public Officials, and on the work of the Development Assistance Committee to follow-up its 1996 Recommendation to combat corruption in aid-funded procurement;

-- Section IV comments on the relationship between the proposed Revised Recommendation on Combating Bribery in International Business Transactions and the 1994 Recommendation;

-- Section V sets out proposals for future activities.

II. Members’ actions to implement the 1994 Recommendation

2. The 1994 Recommendation calls on Member countries to take effective measures to deter, prevent and combat bribery of foreign public officials in connection with international business transactions, and instructs the Organisation to review Members’ performance. The CIME Working Group on Bribery in International Business Transactions queried Member countries on a full range of laws and
rules that could apply to bribery of foreign public officials, and monitored their actions to implement the Recommendation. Most Member countries have taken some action to follow-up the Recommendation, at a minimum to study how their national laws and rules could apply to international bribery or to set up inter-ministerial committees to co-ordinate action on the Recommendation. (Members which have not responded to the questionnaire are the Czech Republic, Iceland, Ireland, Luxembourg and Poland.) In line with the emphasis of ongoing work in OECD, the most complete information available on laws and actions concerns criminal law and the tax deductibility of bribes.

**Criminal law**

3. A number of Member countries already have a basis in criminal law for the prosecution of bribery of foreign public officials. The United States’ Foreign Corrupt Practices Act is specifically directed at this type of bribery. The anti-bribery laws of some other countries (Canada, Greece, Hungary, Korea, Mexico, Sweden, Turkey, the United Kingdom) are broadly drawn and provide a basis for the prosecution of bribery of foreign officials. New Zealand’s laws provide a basis for prosecution of such bribery in some circumstances.

4. Since the adoption of the 1994 Recommendation, three countries, Belgium, the Netherlands and Norway, have drafted legislation to criminalise the bribery of foreign public officials. In Belgium, draft legislation which will, inter alia, criminalise the bribery of foreign public officials and officials of international organisations has been approved by the Council of Ministers; once the Council of State has given its advice, the draft law will be sent to Parliament. In Norway, legislation will be presented to the Parliament shortly.

5. In addition, OECD Members which are members of the European Union have participated in the negotiation of a convention which would require the criminalisation of the bribery of officials both of the Union and of governments of the Union. Canada, Mexico and the United States participated in the negotiation of the Inter-American Convention Against Corruption which provides, inter alia, for the criminalisation of bribery of foreign public officials. Mexico and the United States have signed the Convention and Mexico is in the process of ratifying it. At the meeting of the Working Group on 7-8 April 1997, France and Germany presented a Proposal for a Convention on Combating Bribery in International Business Transactions.

**Tax deductibility**

6. Member countries’ attitudes towards the deductibility of bribes to foreign public officials vary. Bribes may not be deductible as a general rule either because of the illicit nature of the bribe in the country of the payer (Canada, Czech Republic, Norway, and United States), the illicit nature of the bribe for the payer and the recipient (Poland), or the characterisation of the bribe as an expense which is not deductible for tax purposes such as a bribe, gift or hospitality payment in the United Kingdom or a social expense in Japan. In Finland, Greece, Hungary, Italy, Korea, Mexico, Spain and Turkey, bribes are not deductible because they do not qualify as a deductible business expense. Other countries allow the deductibility of bribes considering them as a business expense (Australia, Austria, Belgium, France, Germany, Ireland, Luxembourg, the Netherlands, New Zealand, Portugal and Switzerland). Even in these countries, a deduction for a bribe is often disallowed upon examination because of insufficient documentation to prove
that it was a necessary expense for the realisation of taxable income and because of failure to identify the recipient.

7. Since adoption in 1996 of the Recommendation on the Tax Deductibility of Bribes to Foreign Public Officials, the Norwegian Parliament passed a law in December 1996 disallowing deductibility of bribes to foreign public officials as well as to foreign private persons. In Switzerland, one of the chambers of Parliament has taken up a proposal which would have this effect. The governments of Belgium and Denmark are preparing new legislation to deny the tax deductibility of bribes. In Australia, the Government has recently requested the Commissioner of Taxation to prepare appropriate legislation after considering foreign legislation, administration costs and compliance costs. A number of countries (Denmark, Finland, Ireland and Luxembourg) report that practice with respect to allowing deductibility of bribes has become stricter. Tax examiners are looking more closely at the documentation of bribes claimed as business expenses challenging more frequently their deductibility. In France, Germany and Luxembourg the question of the tax deductibility of bribes is being studied in a broader context than taxation, and tax treatment would be determined by whether bribes to foreign public officials is made a criminal act. Germany and the Netherlands have changed their laws to deny the deductibility of expenses in connection with illicit activities if a criminal court rules that a criminal offence was committed.

8. The CIME welcomed these steps, but considered that the elimination of tax deductibility of bribes by only one country since the adoption of the 1996 Recommendation represents insufficient progress and the pace of implementation by Member countries which continue to allow this deductibility should be accelerated.

III. Actions by OECD

9. In order to meet the objective of deterring, preventing and combating bribery of foreign public officials in connection with international business transactions, the 1994 Recommendation enjoins each Member country to take concrete and meaningful steps in areas such as criminal law, civil, commercial, administrative law, tax legislation, company accounting requirements, banking provisions, laws and regulations relating to public subsidies, licences, government procurement contracts, etc. The principal activity within the OECD to follow-up the 1994 Recommendation has been to examine these fields in order to develop more specific guidance or commitments on the use of such laws or rules to combat bribery of foreign officials. An important general result has been to deepen mutual understanding of how agreed objectives would be implemented in different legal systems and institutional settings. In a number of important cases analysis revealed that apparent disagreements on objectives, in fact, only reflected differences in the way that countries apply or interpret concepts. The Working Group also benefited from interaction with government practitioners and private sector experts in the various fields who helped ensure that conclusions would be workable.

10. Substantial conclusions have been reached in the fields of criminal law, tax deductibility, accounting and public procurement. The conclusions are set forth in the 1996 Recommendation on the Tax Deductibility of Bribes of Foreign Public Officials and in a draft Revised Recommendation on Combating Bribery in International Business Transactions which is attached to this report.
A. **Criminalisation of bribery of foreign public officials**

11. Priority attention has been given to the criminalisation of bribery of foreign public officials, since it has ramifications for actions in other fields. The Working Group on Bribery began to analyse this issue in Autumn 1995; it held a special meeting with prosecutors responsible for corruption cases in February 1996. On the basis of the initial analysis and the persuasive arguments of the prosecutors, Member countries reached the conclusion -- endorsed at the OECD Ministerial in May 1996 -- that it is necessary to criminalise the bribery of foreign public officials in an effective and co-ordinated manner. The Ministers asked the OECD to further examine the modalities and appropriate international instruments to facilitate criminalisation. An important concern was to ensure that companies face substantially similar rules and penalties for international bribery, no matter what their country of origin, and that the network of laws forged by the combined effort will permit effective enforcement and mutual legal assistance.

12. During Autumn 1996 and Winter 1997, the Working Group on Bribery, assisted by a small group of experts, examined what this could mean in concrete terms. It examined important definitions, for example of the bribery offence or of the recipient, and compared principles by which authorities assume jurisdiction for a crime, the penalties they attach to it or the enforcement effort they put behind it. Member countries have now reached agreement on such definitions and other elements which would constitute a common standard both for national laws to criminalise bribery of foreign public officials and for the ensuing enforcement efforts.¹ These elements are an essential component of the draft Revised Recommendation on Combating Bribery in International Business Transactions, whether criminalisation proceeds on the basis of a recommendation or a convention.

13. The experts and the Working Group also examined possible international instruments to co-ordinate national measures to criminalise bribery of foreign public officials. Two instruments were examined in detail: an OECD Recommendation and an OECD convention (treaty). The Working Group concluded that an instrument should:

   -- embody the common standard for criminalisation and enforcement as described in the elements set forth in the Annex to the draft Revised Recommendation;

   -- be concluded and implemented quickly, in an agreed timeframe;

   -- be accompanied by a procedure for monitoring performance, including self evaluation and peer review.

B. **Tax deductibility of bribes of foreign public officials**

14. In 1996, the Council adopted a Recommendation prepared by the Committee on Fiscal Affairs which encourages those countries which do not disallow the deductibility of bribes to foreign public officials to re-examine such treatment, with the intention of denying this deductibility. The Recommendation states that such action may be facilitated by the trend to treat bribes to foreign officials as illegal. The Recommendation instructed the Committee on Fiscal Affairs, in co-operation with the

---

¹ With respect to the definition of foreign public official contained in the first element, Austria and Germany may be prepared to criminalise the bribery of members of foreign parliaments only in so far as bribery of members of their own parliaments is a crime.
CIME, to monitor the implementation of the Recommendation and to promote it in contacts with non-member countries.

15. A number of delegates expressed concern that the limited progress in the implementation of the Recommendation may result from a certain ambiguity in the text, and the fact that some Member countries have linked its implementation to criminalisation of bribery of foreign public officials. The CIME suggests that future work include examining the adequacy of the Recommendation on tax deductibility.

16. Effective monitoring is required to ensure that countries adopt consistent approaches to the tax treatment of bribes and to permit exchange of experience on ways to overcome practical difficulties in eliminating the deductibility of bribes. The CFA has set in place the following procedures, recognising that countries are at different stages in implementing the Recommendation:

1) Member countries which have not yet begun to re-examine the tax treatment of bribes to foreign public officials will be asked to report on how they plan to implement the Recommendation and set up their review and to provide their timetable.

2) Member countries where the deductibility of bribes to foreign public officials is currently under re-examination will be asked to report on the organisation of the review and on the progress made.

3) Member countries which have re-examined the tax deductibility of bribes to foreign public officials will be asked to report on how they organised and conducted their review, the results and the involvement of the business community in the review process.

4) Member countries which have completed a review or adopted new legislation or rules denying the deductibility of bribes to foreign public officials will be asked to report on their experience in the implementation of the new legislation. At a later stage a system of informal peer reviews will be set up to monitor how the new legislation is implemented.

17. Countries which already deny the deductibility of bribes to foreign public officials will be invited to present their legislation, regulations and administrative practices as well as the way the legislation has been presented to their business community. Discussions of this experience should be useful to countries which are re-examining their laws and rules and could also identify additional problems or obstacles for consideration. This monitoring exercise is now an on-going part of the work programme of the CFA.

C. Accounting requirements, external audit and internal company controls

18. The examination by the Working Group of the potential for accounting requirements, external audit and internal company controls to contribute to the fight against bribery was greatly assisted by the participation in its debates of experts from private companies and professional associations as well as from Member governments. The Working Group considered that these areas present significant possibilities to fight bribery which should be exploited:

-- Proper bookkeeping has a key role because accurate records provide a basis for detecting illegal payments, and the requirement to keep accurate records, coupled with adequate penalties for violations, deters companies from making illegal payments or creating slush funds.
-- The external auditor may have a unique opportunity to subject company records to critical analysis and he or she has a clear responsibility to alert management to potential problems of illegal conduct.

-- An important objective of governments is to create an environment which will stimulate companies to take the necessary measures to ensure that officers or employees do not engage in bribery. Strong internal management controls, in the sense of both accounting controls and broader systems to create an ethical environment and build safeguards into procedures for authorising and supervising payments, form an essential bulwark against corruption.

19. The Working Group agreed on certain principles which would guide the use of these tools in the fight against bribery of foreign officials. These conclusions are presented in section V of the draft Revised Recommendation on Combating Bribery in International Business Transactions.

D. Public procurement

20. Public procurement is particularly pertinent to the problem of bribery of foreign officials in international business transactions: first, because such bribery is likely to occur in the context of a public procurement procedure by a foreign government; secondly, because in some circumstances access to public procurement bidding could be used as an incentive or sanction in relation to corrupt activity. The 1994 Recommendation foresees the possibility of denying advantages, such as access to public procurement, as a sanction against companies which have been found to bribe foreign public officials.

21. Initially, the Working Group on Bribery surveyed bilateral and multilateral efforts to assist or encourage countries to adopt better, more transparent procurement procedures, including the WTO Government Procurement Agreement and activities of the United Nations, the World Bank, the European Union, and non-governmental organisations such as Transparency International. The CIME proposes to underline the importance that Member countries attach to the work underway in the WTO on a possible agreement on transparency in government procurement.

22. Concerning the use of access to procurement as an incentive or sanction related to corrupt behaviour, the Working Group circulated a questionnaire to gather more detailed information on national procurement laws and guidelines. Fifteen countries replied and this provided a basis for considering different aspects of sanctions for corrupt behaviour, including the legal framework and procedures for excluding companies from bidding on public procurement, the basis for exclusion, elements of due process, applicability to bribery of foreign public officials, effects of foreign determinations of corruption, etc. The Working Group also considered relevant provisions of EC Directives on Public Procurement and the newly revised World Bank Guidelines on public procurement. Based on its analysis the Working Group formulated a minimum standard on the denial of access to public procurement bidding when companies have been found to bribe foreign officials which is included in section VI of the draft Revised Recommendation. In view of its open and non-regulated procurement system, New Zealand indicated its preference for a less binding standard which would ask countries only to “consider the possible adoption of laws and regulations”. Several other countries suggested that Member countries’ public procurement contracts should require enterprises to certify that (a) they have complied, and will comply, with all applicable anti-bribery laws with respect to the contract in question; (b) they otherwise conduct their business in compliance with all applicable anti-bribery laws; and, (c) they have in place internal management and accounting practices and controls that are adequate to ensure compliance with all applicable anti-bribery laws.
23. The Working Group also discussed different aspects of an “incentives” approach. But it was concerned that making the adoption of codes of conduct or better internal controls a condition for access to public procurement bidding could raise questions of potential discrimination, particularly with respect to small firms, and also introduce barriers to trade. Such concerns would not apply, however, if companies bidding for certain awards would voluntarily engage in anti-corruption pacts.

E. Development Assistance Committee 1996 Recommendation concerning Anti-corruption Proposals for Bilateral Aid Procurement

24. The DAC/High Level Meeting (HLM) in May 1996 approved a Recommendation on anti-corruption proposals for aid-funded procurement. The Recommendation called on Members, in cooperation with recipient countries and the international development institutions, to introduce or require anti-corruption provisions governing aid-funded procurement.2

25. All DAC Members have reported on the action taken in response to the Recommendation. The reports have been very positive, with twenty Members indicating that they have either already introduced anti-corruption clauses or other provisions in their procurement documentation or that they are well advanced in the process of doing so. The remaining two Members are presently continuing their internal consultation processes with a view to deciding on the most appropriate actions beyond existing provisions.

26. A report on progress, including details on the specific clauses being introduced by Members, was considered by the DAC HLM meeting on 5-6 May 1997. The DAC endorsed this report and agreed to its transmission to the 1997 Meeting of the Council at Ministerial. The DAC also agreed that progress by Members on the introduction of their anti-corruption clauses would in future be a regular feature of the Aid Review process; and that other areas beyond those linked to the 1996 Recommendation in which to carry forward its fight against corruption would be discussed later this year.

F. Co-operation with non-member countries, the private sector and other international organisations

Co-operation with non-member countries

27. The 1994 Recommendation appeals to non-member countries to join with OECD Members in combating bribery in international business transactions and instructs the CIME to explore the possibility of associating non-members with its work. In March 1995, in co-operation with the Development Assistance Committee, the CIME sponsored a Symposium on Corruption and Good Governance. Representatives of numerous non-member countries and other international institutions and private organisations attended and debated the issues together. Since the Symposium a number of non-member countries have expressed interest in adhering to the 1994 Recommendation; Argentina has adhered to the 1994 Recommendation and the 1996 Recommendation on tax deductibility and become a member of the Working Group on Bribery; Chile has fulfilled the necessary requirements and will shortly become a member of the Group; Bulgaria as well as the Slovak Republic (in the process of negotiating accession to the OECD) are in the process of adhering to these Recommendations.

2 DAC Members are: Australia, Austria, Belgium, Canada, the Commission of the European Community, Denmark, Finland, France, Germany, Ireland, Italy, Japan, Luxembourg, the Netherlands, New Zealand, Norway, Portugal, Spain, Sweden, Switzerland, the United Kingdom and the United States.
Consultations with the private sector

28. The Working Group on Bribery held a special meeting with the private sector and non-governmental organisations on 6 November 1996. The purpose was to obtain the views and reactions of the private sector on OECD anti-corruption activities in advance of the review of the 1994 Recommendation, and to consider how the multiple efforts to combat international business corruption -- by governments, business and other private or international organisations -- could best be meshed together. The International Chamber of Commerce and Transparency International, as well as the World Bank, presented their activities to combat corruption in international business. These organisations, BIAC and other representatives of the private sector intervened throughout the day on OECD’s work in progress. Their views were noted and taken into consideration as the Working Group pursued its analysis of possible additional measures to combat international bribery. Representatives of the private sector also suggested that OECD should expand the scope of its work to cover international bribery in the private sector and bribery of foreign officials for purposes other than to obtain or retain business.

Co-operation with other organisations

29. Pursuant to the request in the 1994 Recommendation, a number of international organisations (the Council of Europe, the Organisation of American States, the IMF, World Bank) have been invited to observe the activities of the Working Group; and the Group, in turn, follows closely developments in other international fora. The OECD Secretariat has initiated an informal network which permits the exchange of information on respective anti-corruption activities of a number of international organisations.

IV. A Revised Recommendation on Combating Bribery in International Business Transactions

30. The Revised Recommendation attached to this report is intended to replace the Recommendation adopted in 1994. It preserves the general undertakings of the 1994 Recommendation and, where possible, elaborates more specific commitments on the basis of the conclusions of the substantive analysis in the fields of criminalisation, accounting, and public procurement described above. The Revised Recommendation is thus a consolidated text which should provide an effective platform for public information and for co-operation with non-member countries. It incorporates the 1996 Recommendation on the Tax Deductibility of Bribes to Foreign Officials and urges its prompt implementation. It also refers to the DAC Recommendation to Combat Corruption in bilateral in aid-funded procurement and incorporates its proposals. Inclusion of the anti-corruption proposals for bilateral aid procurement would extend their coverage to all OECD Member countries and to non-member countries which adhere to the Revised Recommendation.

31. The general and more specific commitments contained in the Revised Recommendation would provide the basis for the evaluation of Member country actions to combat bribery in international business transactions. The Revised Recommendation contains follow-up procedures to review Members’ performance, and instructions for further work and co-operation with non-members and with the private sector and other organisations. These procedures and instructions are consistent with the 1994 Recommendation, but in some cases include activities which go beyond its scope in view of the progress achieved over the past three years.
V. Future Activities

Negotiation of a Convention

32. If OECD Members decided to co-ordinate national measures to criminalise the bribery of foreign public officials on the basis of an OECD convention (treaty), with negotiation of this instrument to be completed by the end of 1997, the negotiation would be a priority activity for the remainder of 1997. The negotiation could be concluded in a number of ways. The Working Group could prepare a text which would be a basis for a negotiation to be conducted through one or two sessions of a negotiating conference to which non-member countries could be invited. Alternatively, if it were decided to hold a series of negotiating sessions, it would seem prudent initially to plan for three sessions in order to meet the target completion date.

Review of Performance

33. The CIME Working Group on Bribery would continue to review Members’ performance in combating bribery of foreign public officials, but on the basis of the enhanced commitments pursuant to the Revised Recommendation on Combating Bribery in International Business Transactions. The initial examination of performance would cover implementation of the undertakings on criminalisation of bribery of foreign public officials and the tax deductibility of bribes. The Working Group will examine existing criminal statutes and their enforcement as well as new laws. Examinations will also cover other undertakings such as with respect to accounting requirements, external audit and internal company controls and public procurement. The Working Group would initially examine performance on the basis of a self-evaluation by the Member country concerned. A report on follow-up to the Revised Recommendation could be prepared for the Council in time for its 1998 meeting at Ministerial level.

Analysis

34. A number of issues identified in the 1994 Recommendation have not yet been examined by the Working Group on Bribery. Member countries have expressed particular interest in taking up the question of how civil and commercial law and rules on export credits might be used to combat bribery in international business. As an initial step, the Group on Export Credits has agreed to conduct a survey on Member countries’ rules on export credits which are relevant to the fight against bribery. Business representatives, including the International Chamber of Commerce, BIAC and the Trans-Atlantic Business Dialogue have suggested that OECD should broaden the scope of its efforts to combat international corruption to include both private sector bribery and bribery of foreign officials for reasons other than to obtain or retain business (e.g., bribery of judicial authorities or plant inspectors). The CIME proposes that these questions be taken up in future work.

Co-operation with non-members, the private sector and other organisations

35. The Revised Recommendation on Combating Bribery in International Business Transactions (and an OECD convention on Criminalisation of Bribery of Foreign Public Officials) would provide a more substantial platform for consulting with non-member countries on OECD work to combat such bribery. It is proposed to hold as soon as feasible, and depending on resource availability, one or more conferences or regional events in order to appeal to non-member countries to associate themselves with the Revised Recommendation.
36. Similarly, consultations will be pursued with business representatives and other private and intergovernmental organisations in order to inform them of developments in OECD work and to obtain their views. The Working Group will consider whether additional international or regional organisations should be invited to participate as observers in the Working Group itself and whether more systematic means of consultations with private sector representatives should be developed.

37. The CIME proposes that the Secretariat, in consultation with the Working Group, publish the information and analysis developed thus far by OECD, and that means be developed to regularly provide the public with information on OECD work and Member country actions to fight international bribery in international business.
Revised Recommendation of the Council

on Combating Bribery in International Business Transactions,

[Agreed by the OECD Council on 23 May 1997 and issued as C(97)123/FINAL]

THE COUNCIL,

Having regard to Articles 3, 5a) and 5 b) of the Convention on the Organisation for Economic Co-operation and Development of 14 December 1960;

Considering that bribery is a widespread phenomenon in international business transactions, including trade and investment, raising serious moral and political concerns and distorting international competitive conditions;

Considering that all countries share a responsibility to combat bribery in international business transactions;

Considering that enterprises should refrain from bribery of public servants and holders of public office, as stated in the OECD Guidelines for Multinational Enterprises;

Considering the progress which has been made in the implementation of the initial Recommendation of the Council on Bribery in International Business Transactions adopted on 27 May 1994 and the related Recommendation on the tax deductibility of bribes of foreign public officials adopted on 11 April 1996, as well as the Recommendation concerning Anti-corruption Proposals for Bilateral Aid Procurement, endorsed by the High Level Meeting of the Development Assistance Committee on 7 May 1996;

Welcoming other recent developments which further advance international understanding and co-operation regarding bribery in business transactions, including actions of the United Nations, the Council of Europe, the European Union and the Organisation of American States;

Having regard to the commitment made at the meeting of the Council at Ministerial level in May 1996, to criminalise the bribery of foreign public officials in an effective and co-ordinated manner;

Noting that an international convention in conformity with the agreed common elements set forth in the Annex, is an appropriate instrument to attain such criminalisation rapidly;

Considering the consensus which has developed on the measures which should be taken to implement the 1994 Recommendation, in particular, with respect to the modalities and international instruments to facilitate criminalisation of bribery of foreign public officials; tax deductibility of bribes to foreign public officials; accounting requirements, external audit and internal company controls; and rules and regulations on public procurement;

Recognising that achieving progress in this field requires not only efforts by individual countries but multilateral co-operation, monitoring and follow-up;
General

I. RECOMMENDS that Member countries take effective measures to deter, prevent and combat the bribery of foreign public officials in connection with international business transactions.

II. RECOMMENDS that each Member country examine the following areas and, in conformity with its jurisdictional and other basic legal principles, take concrete and meaningful steps to meet this goal:

i) criminal laws and their application, in accordance with section III and the Annex to this Recommendation;

ii) tax legislation, regulations and practice, to eliminate any indirect support of bribery, in accordance with section IV;

iii) company and business accounting, external audit and internal control requirements and practices, in accordance with section V;

iv) banking, financial and other relevant provisions, to ensure that adequate records would be kept and made available for inspection and investigation; and

v) public subsidies, licences, government procurement contracts or other public advantages, so that advantages could be denied as a sanction for bribery in appropriate cases, and in accordance with section VI for procurement contracts and aid procurement; and

vi) civil, commercial, and administrative laws and regulations, so that such bribery would be illegal.

vii) international co-operation in investigations and other legal proceedings, in accordance with section VII.

Criminalisation of Bribery of Foreign Public Officials

III. RECOMMENDS that Member countries should criminalise the bribery of foreign public officials in an effective and co-ordinated manner by submitting proposals to their legislative bodies by 1 April 1998, in conformity with the agreed common elements set forth in the Annex, and seeking their enactment by the end of 1998.

DECIDES, to this end, to open negotiations promptly on an international convention to criminalise bribery in conformity with the agreed common elements, the treaty to be open for signature by the end of 1997, with a view to its entry into force twelve months thereafter.

Tax Deductibility

IV. URGES the prompt implementation by Member countries of the 1996 Recommendation which reads as follows: “that those Member countries which do not disallow the deductibility of bribes to foreign public officials re-examine such treatment with the intention of denying this deductibility. Such action may be facilitated by the trend to treat bribes to foreign officials as illegal.”
Accounting Requirements, External Audit and Internal Company Controls

V. **RECOMMENDS** that Member countries take the steps necessary so that laws, rules and practices with respect to accounting requirements, external audit and internal company controls are in line with the following principles and are fully used in order to prevent and detect bribery of foreign public officials in international business.

A. Adequate accounting requirements

i) Member countries should require companies to maintain adequate records of the sums of money received and expended by the company, identifying the matters in respect of which the receipt and expenditure takes place. Companies should be prohibited from making off-the-books transactions or keeping off-the-books accounts.

ii) Member countries should require companies to disclose in their financial statements the full range of material contingent liabilities.

iii) Member countries should adequately sanction accounting omissions, falsifications and fraud.

B. Independent External Audit

i) Member countries should consider whether requirements to submit to external audit are adequate.

ii) Member countries and professional associations should maintain adequate standards to ensure the independence of external auditors which permits them to provide an objective assessment of company accounts, financial statements and internal controls.

iii) Member countries should require the auditor who discovers indications of a possible illegal act of bribery to report this discovery to management and, as appropriate, to corporate monitoring bodies.

iv) Member countries should consider requiring the auditor to report indications of a possible illegal act of bribery to competent authorities.

C. Internal company controls

i) Member countries should encourage the development and adoption of adequate internal company controls, including standards of conduct.

ii) Member countries should encourage company management to make statements in their annual reports about their internal control mechanisms, including those which contribute to preventing bribery.

iii) Member countries should encourage the creation of monitoring bodies, independent of management, such as audit committees of boards of directors or of supervisory boards.
iv) Member countries should encourage companies to provide channels for communication by, and protection for, persons not willing to violate professional standards or ethics under instructions or pressure from hierarchical superiors.

Public procurement

VI. RECOMMENDS:

i) Member countries should support the efforts in the World Trade Organisation to pursue an agreement on transparency in government procurement;

ii) Member countries’ laws and regulations should permit authorities to suspend from competition for public contracts enterprises determined to have bribed foreign public officials in contravention of that Member’s national laws and, to the extent a Member applies procurement sanctions to enterprises that are determined to have bribed domestic public officials, such sanctions should be applied equally in case of bribery of foreign public officials. 3

iii) In accordance with the Recommendation of the Development Assistance Committee, Member countries should require anti-corruption provisions in bilateral aid-funded procurement, promote the proper implementation of anti-corruption provisions in international development institutions, and work closely with development partners to combat corruption in all development co-operation efforts. 4

International Co-operation

VII. RECOMMENDS that Member countries, in order to combat bribery in international business transactions, in conformity with their jurisdictional and other basic legal principles, take the following actions:

i) consult and otherwise co-operate with appropriate authorities in other countries in investigations and other legal proceedings concerning specific cases of such bribery through such means as sharing of information (spontaneously or upon request), provision of evidence and extradition;

ii) make full use of existing agreements and arrangements for mutual international legal assistance and where necessary, enter into new agreements or arrangements for this purpose;

3 Member countries’ systems for applying sanctions for bribery of domestic officials differ as to whether the determination of bribery is based on a criminal conviction, indictment or administrative procedure, but in all cases it is based on substantial evidence.

4 This paragraph summarises the DAC recommendation, which is addressed to DAC members only, and addresses it to all OECD Members and eventually non-member countries which adhere to the Recommendation.
iii) ensure that their national laws afford an adequate basis for this co-operation and, in particular, in accordance with paragraph 8 of the Annex.

**Follow-up and institutional arrangements**

VIII. **INSTRUCTS** the Committee on International Investment and Multinational Enterprises, through its Working Group on Bribery in International Business Transactions, to carry out a programme of systematic follow-up to monitor and promote the full implementation of this Recommendation, in co-operation with the Committee for Fiscal Affairs, the Development Assistance Committee and other OECD bodies, as appropriate. This follow-up will include, in particular:

- i) receipt of notifications and other information submitted to it by the Member countries;
- ii) regular reviews of steps taken by Member countries to implement the Recommendation and to make proposals, as appropriate, to assist Member countries in its implementation; these reviews will be based on the following complementary systems:
  - a system of self evaluation, where Member countries’ responses on the basis of a questionnaire will provide a basis for assessing the implementation of the Recommendation;
  - a system of mutual evaluation, where each Member country will be examined in turn by the Working Group on Bribery, on the basis of a report which will provide an objective assessment of the progress of the Member country in implementing the Recommendation.
- iii) examination of specific issues relating to bribery in international business transactions;
- iv) examination of the feasibility of broadening the scope of the work of the OECD to combat international bribery to include private sector bribery and bribery of foreign officials for reasons other than to obtain or retain business;
- v) provision of regular information to the public on its work and activities and on implementation of the Recommendation.

IX. **NOTES** the obligation of Member countries to co-operate closely in this follow-up programme, pursuant to Article 3 of the OECD Convention.

X. **INSTRUCTS** the Committee on International Investment and Multinational Enterprises to review the implementation of Sections III and, in co-operation with the Committee on Fiscal Affairs, Section IV of this Recommendation and report to Ministers in Spring 1998, to report to the Council after the first regular review and as appropriate there after, and to review this Revised Recommendation within three years after its adoption.
Co-operation with non-members

XI. APPEALS to non-member countries to adhere to the Recommendation and participate in any institutional follow-up or implementation mechanism.

XII. INSTRUCTS the Committee on International Investment and Multinational Enterprises through its Working Group on Bribery, to provide a forum for consultations with countries which have not yet adhered, in order to promote wider participation in the Recommendation and its follow-up.

Relations with international governmental and non-governmental organisations

XIII. INVITES the Committee on International Investment and Multinational Enterprises through its Working Group on Bribery, to consult and co-operate with the international organisations and international financial institutions active in the combat against bribery in international business transactions and consult regularly with the non-governmental organisations and representatives of the business community active in this field.
ANNEX

Agreed Common Elements of Criminal Legislation and Related Action

1) **Elements of the offence of active bribery**

   i) **Bribery** is understood as the promise or giving of any undue payment or other advantages, whether directly or through intermediaries to a public official, for himself or for a third party, to influence the official to act or refrain from acting in the performance of his or her official duties in order to obtain or retain business.

   ii) **Foreign public official** means any person holding a legislative, administrative or judicial office of a foreign country or in an international organisation, whether appointed or elected or, any person exercising a public function or task in a foreign country.

   iii) **The offeror** is any person, on his own behalf or on the behalf of any other natural person or legal entity.

2) **Ancillary elements or offences**

   The general criminal law concepts of attempt, complicity and/or conspiracy of the law of the prosecuting state are recognised as applicable to the offence of bribery of a foreign public official.

3) **Excuses and defences**

   Bribery of foreign public officials in order to obtain or retain business is an offence irrespective of the value or the outcome of the bribe, of perceptions of local custom or of the tolerance of bribery by local authorities.

4) **Jurisdiction**

   Jurisdiction over the offence of bribery of foreign public officials should in any case be established when the offence is committed in whole or in part in the prosecuting State’s territory. The territorial basis for jurisdiction should be interpreted broadly so that an extensive physical connection to the bribery act is not required.

   States which prosecute their nationals for offences committed abroad should do so in respect of the bribery of foreign public officials according to the same principles.

   States which do not prosecute on the basis of the nationality principle should be prepared to extradite their nationals in respect of the bribery of foreign public officials.

   All countries should review whether their current basis for jurisdiction is effective in the fight against bribery of foreign public officials and, if not, should take appropriate remedial steps.
5) **Sanctions**

The offence of bribery of foreign public officials should be sanctioned/punishable by effective, proportionate and dissuasive criminal penalties, sufficient to secure effective mutual legal assistance and extradition, comparable to those applicable to the bribers in cases of corruption of domestic public officials.

Monetary or other civil, administrative or criminal penalties on any legal person involved, should be provided, taking into account the amounts of the bribe and of the profits derived from the transaction obtained through the bribe.

Forfeiture or confiscation of instrumentalities and of the bribe benefits and the profits derived from the transactions obtained through the bribe should be provided, or comparable fines or damages imposed.

6) **Enforcement**

In view of the seriousness of the offence of bribery of foreign public officials, public prosecutors should exercise their discretion independently, based on professional motives. They should not be influenced by considerations of national economic interest, fostering good political relations or the identity of the victim.

Complaints of victims should be seriously investigated by the competent authorities.

The statute of limitations should allow adequate time to address this complex offence.

National governments should provide adequate resources to prosecuting authorities so as to permit effective prosecution of bribery of foreign public officials.

7) **Connected provisions (criminal and non-criminal)**

--- **Accounting, recordkeeping and disclosure requirements**

In order to combat bribery of foreign public officials effectively, states should also adequately sanction accounting omissions, falsifications and fraud.

--- **Money laundering**

The bribery of foreign public officials should be made a predicate offence for purposes of money laundering legislation where bribery of a domestic public official is a money laundering predicate offence, without regard to the place where the bribery occurs.

8) **International co-operation**

Effective mutual legal assistance is critical to be able to investigate and obtain evidence in order to prosecute cases of bribery of foreign public officials.

Adoption of laws criminalising the bribery of foreign public officials would remove obstacles to mutual legal assistance created by dual criminality requirements.
Countries should tailor their laws on mutual legal assistance to permit co-operation with countries investigating cases of bribery of foreign public officials even including third countries (country of the offeror; country where the act occurred) and countries applying different types of criminalisation legislation to reach such cases.

Means should be explored and undertaken to improve the efficiency of mutual legal assistance.