INTERNATIONAL ANTI-CORRUPTION CONFERENCE (IACC)

Programme
Papers
Organisers
Sponsors

Lima Declaration

8th INTERNATIONAL ANTI-CORRUPTION CONFERENCE

The Papers

Contribution of Industrialised Countries in the Prevention of Corruption: The Example of the OECD

Prof. Mark Pieth
(Switzerland)
Chairman OECD Working Group on Bribery

<!--yikes--adjust end of table-->

Chairman,
Distinguished Delegates, Dear Colleagues,

I.

I would like to thank the Organising Committee for reserving this prominent place on the agenda, allowing me to give you an overview of the work of the OECD on corruption. After an expose of the initiatives of the OECD in this area, I would like to touch upon some of the difficuities of our current work as well as the concerns of the business sector and some critical comments made by academics. I will then attempt to explain my optimism, why I believe that this approach in conjunction with work in other fora and the Civil Society in general will succeed in reducing corruption world-wide where other initiatives have failed so far.

From the outset I would like to stress that I am talking not as an official representative of OECD, but as a law-professor with his own ideas, not necessarily shared by everyone.

We are all aware that corruption is a very old technique used to influence decision makers in the partial interest of the corruptant. There have been times in history and regions where Corruption has reached endemic proportions. It is, however, by all means not a new problem. Why, one might ask, are we suddenly all so concerned about this phenomenon? How did, what some colleagues have called an "erruption of corruption"[1] come about? Why are most international organisations and international financial institutions developing anti-corruption programs at the end of the twentieth century, even though corrupt pracitices have been widespread at least for many decades?

Academics, especially in the North, give various reasons: They detect a strong impetus towards democratisation[2] after the ending of the cold war. Certainly the replacement of dictatorial regimes by elected governments helps uncover previous abuses of power. And it may well be that the loss of the interest of superpowers in supporting dubious administrations for geo-political reasons helps to bring about their down-fall. But also the traditional centres of power in industrialised states have experieced a spectacular uncovering of corrupt dealings over the last five years. In a world-wide perspective authors agree that trade-liberalisation, the moves towards a global economy have helped to raise the awareness of the issue: Of course we have **known all along** that corruption distorts individual decision processes, that it leads to an inefficient use of tax payers' money, that systemic corruption may invite Organised crime to collude with business and administrations, that it fundamentally undermines general trust in procedures, authorities, in the state of law and even democracy as such. What may be **new** is the realisation that corruption abroad affects everyone. This is one of the consequences of the opening of markets. In a genuinely globalised economy there will be no isolated immune national economies. I am of course aware that globalisation is a mere tendency and that economists[3] are warning against an overly simplistic use of the concept. However, quite rightly members of the "World Economic Fomm's Davos Group"[4] have recently pointed out that in an integrated international economy there is no such place as "somewhere else".

One might conclude from this explanation that the North and large muiti- lateral institutions have only decided to seriously tackle the issue of world- wide corruption since they themselves are affected by it. Maybe there is some truth in this statement, however, I would not see it as a negative development if industrialised countries and muiti-national enterprises are waking up to realise just how noxious corruption is, including to their own interests: they now seem ready to take their own responsibility.

I will come back to this point when discussing the rationale of international action against corruption. Let me first give you an idea of what OECD is doing against corruption.

II.

Only a few words to start with on the organisation itself: The Organisation for Economic Cooperation and Development is part of the system of Western international institutions developed after World War II. The aims, enshrined in its founding Convention of 1960 are to:

- achieve the highest sustainable economic growth and employment;
- promote economic and social welfare throughout the OECD area by coordinating the policies of its Member countries;
- stimulate and harmonise its members' efforts in favour of developing countries.

The 29 Member countries produce about 70 % of the world's goods and services as well as of international exports and generate around 90 % of international investments. It is evident from these data that a commitment and even more so the implementation of a no-corruption policy would have a tremendous impact on the world of corruption in international business transactions.

The OECD-**instruments** against international commercial corruption have been developed in three stages (without counting a previous statement in the 1976 guidelines for muitina tional enterprises[5]: Between 1989 and 1994, when the first Council Recommendation on Bribery was adopted, a decisive development took place. At the outset a US-initiative asking for an OECD-instrument against international bribery was very much linked to the domestic debate in the US whether the famous "Foreign Corrupt Practices Act" (FCPA [6]) had led to trade-disadvantages for US companies. US-Congress had just amended the FCPA in 1988 and was considering further changes depending upon the reaction of other leading trading nations. Whereas the initial reception of the US-suggestion by other Member States was rather unenthusiastic, the discussion until 1994 helped to bring about a change of attitude in many capitals. If countries realised their own interest in controlling commercial corruption they yet needed more assurances that coordinated action could really be effective. This confidence was gained over the next two periods by discussing the issues in greater detail. The text of the **1994 Recommendation**[7] remained rather open, it contained a firm, but general commitment to take effective measures to deter, prevent and combat the bribery of foreign public officials, and a list of topics that needed further exploration (the so called "shopping list"). At the time maybe underestimated was the dynamic process of the follow-up steps the countries agreed to. It allowed for studies into existing and yet planned legislation in Member States and detailed close -up discussions on speciflc substantive measures to prevent and repress corruption: namely

1. the **criminalisation** of bribery of foreign public officials by member states,
2. abolishing **tax-deductibility** of bribes,
3. adjusting **book-keping and auditing** rules to prevent corruption,
4. establishing a minimal standard on **public procurement**, especially by blocking the access to public contracts at home as a sanction for corrupt behaviour abroad.

These items were picked up over the next three years and gradually processed towards a set of **more substantive recommendations**. In order to give some political direction to the development of standards an intermediate **Council Recommendation in 1996**[8] phrased in cautious diplomatic language asked for the abolishment of tax deductibility of such bribes and pronounced the criminalisation of international bribery as necessary.

This Recommendation, together with the seconding received from other fora, notably the G7 Summit in June 1996 and the Declaration of the General Assembly of the United Nations of December 1996 were necessary stepping stones to the new revised Recommendation of 1997[9] (the text has been supplied to you as a room-document). Summing up the work done in thc OECD framework on commercial corruption so far. You will note that while the mother document is phrased as a **Recommendation**, one issue, the core topic of criminalisation, has been singled out: According to the will of Member-States the compromise reached in the so-called "agreed common elements on criminalisation" (appended to the Recommendation) will be translated into a **Convention**. While this will give the instrument a legally binding nature, members have already in the 1997 documcnt committed themselves to **implement** the standard **speedily**. Governments will go to national parliaments by April 1,1998 in countries where new legislation is necessary and parliaments are expected to enact laws by the end of 1998. To some of you used to traditional treaty-negotiations the OECD process might seem peculiar. OECD procedure demands advancing on the basis of unanimity. This implies a step by step procedure going over the same issues several times, allowing for time to discuss matters at home, to come back and review them in the Group, but also to allow the Group to exert its peer-pressure. Group pressure gets especially tough once a standard has been adopted.

I will not be able to go into the detail of the ongoing **negotiations**. I would mercly like to point out that Member States are not

asked to develop identical rules, they will not have to change their fundamental legal concepts. Moreover, they can reach the common goal in different ways, as long as they are considered **functional equivalents** by the group. The main issues at stake are of course the definition of the offence, including the difficuit issue of how to circumbscribe foreign public officials, but also of how to deal with the responsibility of legal entities, including their foreign subsidiaries. Issues of jurisdiction and prosecutorial discretion are being muted. Ancillary provisions are dealing with corruption-money laundering and falsification of documents. Finally international cooperation (mutual legal assistance and extradiction) form an essential part of the packet.

Of course the OECD work is embedded in the framework of other initiatives, both of an intergovernmental nature and of private bodies like business organisations and other NGO's. The procedures in OECD and in other fora have influenced each other over the last five years. OECD has profited from the experience of regional organisations like OAS and EU. A continuous exchange between OECD and the Council of Europe as well as other international fora, like the Worldbank and IMF is guaranteed by negotiators participating in both efforts as well as a formal observer-status of the other organisations in the OECD Working Group.

Still, it should be kept in mind that the various organisations have their own mandates and only cover part of the ground. OECD-specific is an approach combatting corruption of foreign public officials in international **business transactions**. Many discussions have taken place as to whether to broaden the scope, for instance to extend to private corruption or to tackle transnational corruption as such. For the benefit of speedy action OECD has so far opted for a tough approach with a limited scope, based on the idea that action by other fora would be complementary.

III.

This brings me to discuss two main critiques voiced so far. The first point is raised mainly by academics and Third World activists, daiming that OECD efforts are an expression of mere self-interest of industrialised countries. The second argument, put forward by representatives of the business sector in the North asks whether the project will really work or merely create competitive disadvantages to the law-abiding companies.

As to the first point: Doubts have been raised whether the OECD type of action is really benefidal also to the development of the South. Academics [10] have argued that by supplant ing the **"economic development issue"** in the discussion of world-wide corruption by an **"international trade and Investment" agenda**, countries of the North might be reducing the issue to redistribution. Or puffing it more directly: From the perspective of the North they argue "we in the industrial countries now care about corruption in the developing world be cause we believe "their" corruption hurts **us**".

I think this critique has to be taken seriously, if the mistakes of the UN- efforts in the seventies[11] are not to be repeated; especially since the mere loss of contracts to others is somtimes given as the only motivation to act against corruption.

It is true that OECD efforts are **unilateral** in the sense that application of the standards to companies of the North will not depend upon all potential victim-countries joining the relevant instruments: It will simply be forbidden to actively bribe foreign public officials, as long as the crime is committed on the territory or by nationals of a participant country. You might consider my approach too pragmatic, but I see no disadvantage if the incentives to ethical business-practice are rooted in self-interest of the business community. It will nevertheless make a huge difference to the population of a country if projects are no longer tailored to maximise undue "commissions", even if it is only because the consequences of being caught for active transnational bribery for a company and its managers are such that they simply cannot be risked economically and socially.

The contribution of the North amounts to **reducing the supply side** of world- wide corruption. There will be less funds available to a dishonest administration to be distributed amongst partisans and used to buy judges and other representatives of institutions of independent control. I would therefore dispute that focusing on a "fair trade agenda" will contribute in widening the North-South divide. On the contrary, the gap is there and it is up to the North to take its share of the responsibility by acting firmly against **active** corruptants.

The second type of critique sterns from sceptical business circles in the North. They fear the **loss of essential contracts** to competitors not bound to the same rules. To them corruption is merely a sometimes necessary means to obtain business. Even though this attitude must be regarded as cynical, it must be conceded that they have a valid interest in sound and comparable implementation and enforcement of agreed standards. Their doubts are of course based on professional experience and it has to be admitted that enforcing the standards will not be easy. Their wariness leads directly to the question of why this initiative should work where others have failed.

IV.

The answer to efficiency is captured in two key words: **"follow-up"** and **"outreach"**.

I have already pointed out that the principle of the OECD process is peer pressure. Whereas the OECD is a relative newcomer in the drafting of treaties the Organisation has a long tradition in development of softlaw-instruments and in peer review. Between **self evaluation** on the basis of questionnaires and discussion in technical groups and full scale **mutual evaluations** on the other hand, maybe even induding on-site-inspections, all variations exist and have been tested. Experience has proven that such collective evaluation not only is a strong incentive to act in coordination, it also helps fine-tune common standards in the course of the ongoing process. Frequently interpretive notes to more general standards have come out as a side-product of such a procedure. Generally countries are very sensitive to the "rating" by their peers. One of the most prominent examples of peer

review has dose links to our topic: The follow up of the Financial Action Task Force on Money Laundering. As you know it has proved very effective in spreading a unique standard world-wide in little more than five years. Finally it may be noted that it is an international noveity to combine a convention with a political follow-up-process, but the mix suggested by OECD could be very efficient.

V.

To sum up: I am convinced that the OECD effort will make an essential difference, especially because it is the serious attermpt of industrialised states to contribute their share in dealing with rampant world-wide corruption. It does not, however, want to cover the whole ground and is therefore dependent upon action by other fora, regional or world-wide, specialised or general, as well as countries, the business world and Civil Society in general.

Notes and References

[1] Glynn, Cobrin and Naim, The Globalisation of Corruption, in: Elliott (ed.), Corruption and the Global Economy, Washington 1997 p. 8.
[2] Ibid,p. 11 s.
[3] Hirst, Thompson, Globalisation in Question, Cambridge 1996.
[4] Glynn, Cobrin and Naim (note 1) p. 13.
[5] Declaration of 21st June 1976 by Govemments of OECD Member Countries on International Investment and Multi-National Enterprises, Annex: Guidelines for Muitinational Enterprises VII 7.
[6] Foreign Corrupt Practices Act (FCPA) 1977, 85 amended in 1988.
[7] Recommendation of the Council on Bribery in International Business Transactions adopted on 27 May 1994, C (94) 75/FINAL.
[8] Recommendation on the Tax Deductibility of Bribes of Foreign Public Officials adopted on 11 April 1996, C (96) 27/FINAL.
[9] Revised Recommendation of the Council on Combatting Bribery in International Business Transactions adopted on 23 May 1997, C (97) 123/FINAL.
[10] Rodrik in Elliott (ed.), Corruption and the Global Economy, Washington 1997 p. 109 ss.
[11] Cf. The documents elaborated by the ECOSOC-adhoc Intergovernmental Working Group on the Problem of Corrupt Practices and of the Committee on an International Agreement on Illicit Payments (and its "Draft International Agreement on Illicit Payments" of May 1979).

---

return to table of contents