

12th IACC
WORKSHOP LONG REPORT

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Workshop 1.4. *OECD Anti-bribery Convention: How can the pressure be maintained*

Date and time : 17 November, 11:30 a.m -2 p.m

Moderator : Mr. Patrick Moulette, Head Anti-Corruption Division, OECD

Rapporteur : Mrs. Nicola Ehlermann-Cache, Administrator, OECD Anti-Corruption Division

Panellists (Name, institution, title)

- *Alan Bacarese*, United Kingdom Crown Prosecutor
- *Kirstine Drew*, UNICORN, Trade Union Anti-corruption Network
- *Fritz Heimann*, Transparency International
- *Jean-Pierre Vidon*, French Roving Ambassador in charge of the fight against organised crime (a position which is also includes responsibility for combating corruption)

A. Main Issues Covered

I. The OECD Anti-Bribery Convention

The core of OECD's action against corruption is dedicated to curbing bribery in international transactions¹. To this end, the 30 OECD Member countries as well as six non-members ratified the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (hereafter the Convention), which was signed in December 1997 and came into effect in February 1999. State Parties to the Convention are committed to implement a set of legal, regulatory and policy measures to prevent, detect, investigate, prosecute and sanction the bribing of foreign public officials.

The OECD uses two tools - monitoring and peer pressure – to ensure effective implementation and enforcement of the Convention and the associated anti-bribery instruments. The OECD Working Group on Bribery in International Business Transactions (hereafter the Working Group), composed of experts of countries Party to the Convention, examines and evaluates through a rigorous monitoring mechanism Party's efforts to live up to their anti-bribery obligations. After the initial assessment of countries' legislation in conformity with the Convention (Phase 1), the second phase of the monitoring process examines the structures in place to enforce the laws². All Parties to the Convention will have undergone a second monitoring examination in early 2008. The systematic examination and assessment of a country's performance by peers result in recommendations for concrete anti-bribery actions by the examined country. In addition, the so called "tour de table" exercise offers a unique mechanism to report about latest developments both legislative but also on enforcement actions. (For further information on the Convention, the monitoring system and other relevant issues see "The OECD fights foreign bribery".)

¹ The Organisation for Economic Cooperation and Development (OECD) is an intergovernmental organisation comprised of 30 countries, including many major players of the world economy. Its goals and principles are to promote economic growth, prosperity, and employment through co-operation and policy dialogue between members.

² All Phase 1 and Phase 2 reports are available on the OECD Anti-Corruption Division Web site at www.oecd.org/bribery.

In view of ensuring highest standards in the area of foreign bribery, the OECD Working Group will engage as of January 2007 in discussions to determine its future role and priorities. This will encompass the review of the anti-bribery instruments and their future monitoring as well as the relations of with major emerging economies.

II. Impact of the OECD monitoring on the Convention's implementation and enforcement

Almost a decade after the adoption of the Convention a key question for debate is whether monitoring of State Parties' anti-bribery laws, provisions and policies by the Working Group has ensured effective implementation and enforcement of the treaty. It is also a timely moment to determine main achievements as well as remaining shortcomings.

II.1. Anti-corruption monitoring: the 'gold standard'

Panellists' consensus on the importance and the benefits of the OECD monitoring mechanism and the associated peer pressure was strong. Fritz Heimann (TI) qualified the OECD monitoring mechanism as "gold standard". He and other panellists underlined that the rigorous and comprehensive country reviews prove to be demanding for Parties and that it is a powerful mechanism to galvanise countries' actions. Most Parties to the Convention strengthened their legislation following their assessment by the OECD Working Group on Bribery under Phase 1. The Phase 2 reviews resulted in further improvement on legislation and systems to combat bribery.

The publication of the comprehensive and critical country reviews on the OECD Web site was viewed as an essential component of the peer review mechanism. The obligation of governments to provide follow-up reports to the Phase 2 recommendations was also identified as a strong incentive to act.

Panellists furthermore stressed the importance of the on-site visits which lead governments to bring together all stakeholders, including representatives from business, civil society and academia. Involvement of all stakeholders is essential in the fight against corruption; consultations are crucial because they help raise awareness and stimulate appropriate actions by all, including the development of corporate compliance programmes.

II.2. Need to enhance enforcement efforts

Panellists expressed different views on the impact of the OECD monitoring mechanism on Parties' detection, investigation and prosecution of bribery in international business transactions.

Civil society representatives suggested that further substantial efforts are required to halt overseas supplies of bribes. They acknowledged that some countries undertook investigations and prosecutions of foreign bribery allegations. Nonetheless they underlined an overall need for enhanced enforcement efforts in view of levelling the playing field among Parties.

Government representatives noted that complex foreign bribery offences pose difficulties of identification and traceability, which notably impact on the length of investigations. They also argued that the *tour de table*, the unique and systematic information exchange during each Working Group plenary, increasingly focuses on enforcement. In their view, the *tour de table*

developed from usual reporting on legislative changes to an increasingly open and frank exchange between Parties to the OECD Convention.

II.3. Awareness is crucial

Participants noted that the Convention and the OECD anti-corruption work more generally are insufficiently known. Panellists and experts insisted that the lack of awareness in turn impacts on enforcement of the Convention.

Various reasons were put forward to explain the confidential status of Parties' anti-corruption work and efforts:

1. *Limited OECD communication.* Availability of the country reviews in English and French on the OECD Web site is a necessary and essential component of the peer pressure system. However, it is not sufficient to raise visibility and ensure awareness of all stakeholders.
2. *Insufficient country communication.* Parties have not established national systems to disseminate the country reports and, unfortunately, the Working Group recommendations do not address this matter.
3. *Lack of media attention.* Regretfully, the media does not pay much attention to the publicly available country reports.
4. *Language limitations.* Only a few reports are published in the language of the reviewed country.

III. The relation of the OECD Convention to the UN Convention against Corruption (UNCAC)

Panellists recalled that the OECD initiative builds on industrialised nations' pledge to combat large scale bribes to foreign officials in view of levelling the playing field for international business transactions. This commitment is not invalidated or undermined by countries' ratification of the UNCAC. On the contrary, both initiatives should be viewed as complementary, and the UNCAC should be seen as strengthening and reinforcing the fight against corruption globally. Also, the high OECD standard on the supply side of bribery may be instrumental to ensuring strong implementation of the UNCAC.

B. Outcomes

It was acknowledged that Parties took noteworthy steps in the fight against corruption as a result of monitoring. Nonetheless, further progress is necessary to ensure the Convention's enforcement and a wide application of its standards in the anti-foreign bribery area. Panellists and participants expressed their views on (i) the post- Phase 2 monitoring of the Convention and (ii) the reach of the OECD anti-bribery instruments both in terms of substance as well as in terms of geographical coverage. They also made proposals on how to raise awareness and enhance the fight against corruption.

I. Enhance Enforcement

I.1. Monitoring

Participants noted that the OECD country reports as well as the 2006 TI Progress Report highlight a number of remaining shortcomings. The Convention's initial objective of establishing

common rules and level the playing field for international business has not yet been achieved. Maintenance of a robust OECD monitoring beyond completion of the Phase 2 process in early 2008 was considered essential. Without continued serious monitoring, distortions in international trade would prevail and the Convention would fail.

Participants advocated that the post-Phase 2 monitoring should take account of the Working Group's earlier work, in particular the recommendations to Parties. While doing so, the Working Group should focus first and foremost on large countries who have not yet initiated any investigations nor prosecutions.

Participants' highlighted room for improvement in future monitoring activities. Based on current practices they suggested enhanced civil society involvement and participation in on-site panels, NGO representation in the reviews, and civil society advocated less governments discretion over restricting public access to answers to the monitoring questionnaires.

1.2. Other Actions to raise enforcement

It was suggested that the OECD publish enforcement actions by Parties to the Convention. The Head of the OECD Anti-Corruption Division mentioned that this possibility is currently under consideration by the Working Group. He noted, however, that the collection and subsequent publication of this kind of information requires careful analysis. Prior to engaging in such publication, conceptual and methodological differences between countries have to be addressed and overcome.

Some participants noted that resolutions had been made on the Convention's enforcement during past G7 meetings. They wondered whether it would be useful and feasible to submit a progress report to the spring 2007 G7 meeting.

II. Reach of the OECD anti-bribery provisions

The OECD Working Group should seek to ensure that the OECD anti-bribery instruments remain most useful, relevant and widely-respected. This calls for both a review of the OECD anti-bribery instruments as well as their extension to non-member countries.

II.1. Review of the OECD anti-corruption instruments

Participants advocated extending the OECD anti-bribery instruments, in particular the Convention, to areas that are currently not addressed or insufficiently addressed. Suggestions for extension of the OECD anti-bribery provisions pertained to (i) bribery of political parties and party officials, (ii) foreign subsidiaries of parent companies based in countries Party to the Convention. It was also suggested that the Convention's exemption for facilitation payments be re-examined because these payments may be a major problem in developing countries. Whistleblower protection should be provided to ensure that a whistleblower does not become a victim of harassment or subject to criminal proceedings.

II.2. Extending geographic coverage

To fight transnational bribery effectively, OECD anti-bribery standards need to apply to all major traders, including non-member emerging economies. The soon to be expected ratification of the Convention by South Africa was welcomed and participants recommended that China, Russia and India also become involved into the Working Group activities. Furthermore, anti-

corruption activities will have to be carried out with other non-members, in particular regional players.

III. Raise public attention

Efforts to raise awareness about the OECD Convention and Parties anti-bribery efforts have to be undertaken among the various stakeholders. Knowledge needs to be improved in government circles. Companies and their subsidiaries also need to be made aware that foreign bribery is a crime. Participants also advocated promotion of the Convention in non-member countries, suggesting that special attention be paid to promoting awareness among those who may be affected by the supply of bribes.

Non-governmental participants reminded workshop participants that awareness-raising is an important duty of the OECD and its governments. However the private sector, trade unions and civil society may share responsibility in enhancing visibility of OECD's anti-corruption work.

OECD and Party governments could be more proactive in disseminating information about the Convention and Parties' anti-bribery provisions. In particular, pressure should be put on governments to disseminate their country reviews in their national language to bolster domestic awareness. Additional solutions need to be envisaged to ensure access and readability by the public at large.

It was acknowledged that the OECD Convention has difficulties in attracting media attention. Interestingly, the media reports more easily and more frequently on TI's work. Participants stressed the need to identify ways to increase interest by the press. They also wondered whether civil society could possibly play a stronger role, including publicising the country reports and increasing actions targeting governments and the media. Finally, there was a discussion on whether public announcements in the press or on television, including in third countries, would adequately raise awareness.

Awareness of business was identified as key. While major multinationals may have been at the forefront of introducing stricter policies to counter corruption, too many businesses are lagging behind. In particular, small and medium-sized enterprises (SMEs) have yet to develop adequate tools to prevent corruption. Furthermore, parent companies based in countries Party to the Convention should apply corporate anti-bribery policies to controlled subsidiaries. Assistance by business organisations may be necessary to enhance awareness of the problem of bribery among corporations.

IV. International co-operation

The OECD should play an active role in the development of co-operative arrangements among the different organisations involved in monitoring countries' commitment to fight corruption. The OECD Anti-Bribery Convention's monitoring system is unique and cannot be duplicated. Among other reasons, it would be too cumbersome and expensive to replicate this mechanism for all the countries having ratified the UNCAC. However, the OECD Working Group on Bribery should co-operate to the overall monitoring efforts; this could also help overcome resource constraints.