

11th International Anti-Corruption Conference: Workshop 7.1

Presentation Abstract

1. Panelist Name: E. Quinones

2. Workshop Title: OECD Convention: Do governments want it to work?

3. Title of case-study or paper: Enforcement: Myth or Reality?

The OECD Anti-Bribery Convention came into force on 15 February 1999. The thirty-five countries Parties to the Convention agreed to adopt national laws making it a crime to bribe foreign public officials in order to obtain or retain international business. These laws are now in place but the legitimate question being asked in fora such as this one, is whether these laws are working – have they succeeded in reducing the flow of corrupt payments in global business affairs.

Signing the Convention and even making it part of national law, will not do much to change ingrained patterns of corrupt behavior unless there is a credible way to monitor whether governments are abiding by their obligations. The Convention contains an enforcement mechanism that makes it one of the most effective tools to combat international bribery and corruption. Thus, a country that joins the Convention and adopts implementing legislation will be subject to a rigorous review of its efforts to enforce the Convention. It is the responsibility of the OECD Working Group on Bribery in International Business Transactions (the “Working Group on Bribery”), to determine, in a first phase, whether the implementing legislation meets the standards set by the Convention (Phase 1) and as part of a later phase (Phase 2), to assess how well the country in question is applying the Convention in practice.

Practically all countries (32 out of 35) have had a Phase 1 evaluation of their laws. The Convention is designed to work within a country’s existing legal system, so differences in the way countries have implemented the Convention are to be expected. Nevertheless, the Working Group’s role is to ensure that there are not major discrepancies that would undermine the equal application of the Convention by all Parties. It is particularly important that in their national laws, countries not inadvertently create loopholes or introduce provisions that might lead to inconsistent application. For this reason, the Working Group on Bribery has made specific recommendations in cases where problems were identified to assist those countries in conforming more fully to the requirements of the Convention.

Phase 2 goes even further to determine how countries are applying the Convention in practice. To do so, it is necessary to look carefully at such issues as impediments to successful investigation and prosecution of foreign bribery cases and the adequacy of statutes of limitations. Phase 2 must also make sensitive determinations whether political considerations have improperly influenced decisions to prosecute. Phase 2 began in late 2001, and so far five countries have been reviewed. The schedule calls for two more by the end of the year and starting next year, seven to eight countries will be reviewed per year. All countries should have a Phase 2 review by end of 2007.

The Convention does not contain a dispute settlement mechanism nor does it foresee sanctions for Parties that do not live up to their obligations. Some query whether the “soft” approach of pressure by peers is sufficient to guarantee good behavior. So far, the process is proving successful if somewhat slow due to Parliamentary procedures that must be respected. Quite a few countries, including Japan and the United Kingdom have announced changes in their national laws largely as a result of the recommendations made by the OECD in reviewing their current legislation. The Working Group on Bribery periodically reviews what measures countries have taken in response to their reviews.

The criticism of peers is made even more forceful by public scrutiny. Making country reports available to the public, including via publication on the Organization’s website, increases public pressure to effectuate changes. Civil society has taken a very active interest in the results of these evaluations and plays a key role in maintaining public vigilance over government commitments in this area.

But how should one measure the success (or failure) of the Convention? The monitoring mechanism is meant to ensure effective implementation and enforcement but if, in reality, companies or their employees are still bribing to obtain international business, as seems to be implied by recent cases in the press, how can we claim that the Convention is making a difference?

Some would argue that prosecutions are the only valid measure of success. Prosecutions may in fact be the ultimate and most effective deterrence weapon, but changes in behavior brought about by increased awareness of the risk of bribing as well as knowledge of the new legal framework prohibiting such practices may signal an important shift which is not easily captured by existing “perception” indexes.

One way of measuring the level of increased awareness may be to survey companies more precisely on such things as:

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- adoption of company codes, how wide-spread are such codes, are SMEs also adopting codes,
 - how has the content of these codes changed, are there more specific references to acts of bribery and other illegal practices – references to new national laws outlawing bribery or to international conventions,
 - how are companies enforcing these codes – increased training of officials, compliance procedures, what about foreign subsidiaries,
 - are companies giving more importance to the protection of whistle-blowers, what procedures are in place to ensure that complaints can be made without fear of reprisals.

Finally, one can ask whether and how to make the most effective use of “bribery tips” provided to embassies/commercial attaches, should there be an international “hotline” to report suspected cases of bribery.

The global legislative framework to fight bribery in international business transactions is mostly in place. It will nevertheless take time to make it work. Behavior patterns are slow and difficult to change and clearly more high visibility prosecutions will spur greater compliance. In the meantime, raising awareness of the increased risks of bribing abroad is the responsibility of national governments and international organizations alike.
