

## The Role of Civil Society Actors in the Monitoring of the OECD Convention

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*(Background note)*

Business is strongly opposed to any kind of corruption. Corruption causes competitive disadvantages for honest business, unpredictability for investments (especially in new markets), and added costs. Already in 1976, the OECD addressed this concern by developing guidelines for multinational enterprises, clearly rejecting the paying and asking of bribes in all transactions. These Guidelines, in 1976 and since, were endorsed by business associations and numerous multinational companies all over the world. BIAC, business' voice at the OECD, participated in this work from the beginning actively.

Because corruption distorts competition (and thus distorts efficiency in markets) and undermines trust (a necessary element for any long term investment and business operations), we in business assume that governments should actively combat the problem. BIAC welcomed the elaboration and conclusion of a convention on combating bribery of foreign public officials by the OECD. BIAC views the convention as a tool to put all business competitors on a equal footing in bidding situations, for example. If it functions properly, it should discourage some corruption by adding intolerable risks (criminal liability) to the list of disadvantages. This tool can be a major contribution to the fight against corruption in the forms of extortion and bribery.

It was essential that the convention enters into force simultaneously for the most important trading partners, to ensure that business competitors, foreign and domestic, will have a "level playing field" (otherwise, distortion of competition will remain, and the businesses who wish to eliminate corruption are disadvantaged). Arguably, it is critically important that at least the ten OECD member countries with the largest GDP should ratify the convention before its entry into force. The monitoring process has to disclose whether the envisaged "level playing field" has been achieved, or whether some countries are lagging behind or advancing too fast (in either way distorting competition and causing inefficient economic outcomes).

The monitoring process shall not only focus on the paper facts such as the laws or court cases but has to take into account the business climate in which companies operate. This can only be done by integrating business as well as other interested circles into the monitoring process. This was the reason for BIAC, ICC, TUAC and TI to issue a joint statement (*annexed*) the request full implementation into the monitoring

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process. Unfortunately, governments are reluctant to fully integrate these expertise into their peer review and share replies to questionnaires with the organisations concerned in a comprehensive manner.

The fight against corruption has to be conducted simultaneously on all fields. As important strengthening of the penal law is, complementary measures by companies (changing business attitudes, reviewing internal procedures) and by governments, are nevertheless essential. Streamlining legislation or authorisation procedures, improving control mechanisms, reviewing remuneration schemes for officials are just some examples of areas where improvement is needed in a number of countries.

Today, most of current governmental actions are incompletely focused on the offering of bribes. However, business associations report that companies are frequently confronted with explicit direct or indirect solicitation of bribes, despite the measures against bribes. Respecting the OECD Recommendation and action program, governments have to assist companies in such situations, as efficiently as they attempt to fight against the payers of bribes. This is not yet sufficiently recognised.

Corruption can not be attacked by only addressing the "paying side" (bribery). The "demand side" (extortion) has to be dealt with as well. This is so because extortion has the same effect on business trust (reducing the predictability of investment) and tends to distort competition and raise costs in similar ways. Regrettably, the convention has not been limited to "inter parties" (it only covers transactions into signatory states). All signatory states are bound to take equally efficient steps against extortion and passive bribery. This is not the case for non-signatory countries in which companies may be confronted with difficult situations and competitive disadvantages remain.

Requests for bribes are often made in an indirect manner in an early stage of business transactions. In such a situation companies want and require safeguards for their business interests. Therefore, any governmental intervention must duly take account of the need of ensuring business secrets. Further, there are often insufficient proofs to enter formal judicial proceedings. Governmental actions must still be possible, and co-operation with honest businesses can help in developing evidence.

Often, competing companies from different countries are confronted with similar bribe requests. A co-ordination at international level could be immensely useful, to encourage more businesses to identify corruption, and to resolve the situations without discrimination of any single competitor. However, again, businesses will be concerned about maintaining their business-related secrets, as well as their business-related relationships—so there should be safeguards to help them without confidential information being spread to competing companies or to different countries.

Because corruption occurs in various forms, and practices differ widely over the world, it may not always be obvious that a specific payment or behaviour of a company violates anti-corruption laws. Such uncertainty affects international commerce seriously and may distort competition. Companies would like to have speedy access to reliable information on the "legitimacy" of certain business transactions, so that they can react appropriately (it must be speedy so that they can react to legitimate business

opportunities as quickly as their competitors). Such clearance should be provided by official sources that are not engaged with penal prosecution; this is necessary to protect substantive rights of the company or individuals involved, in the event of a later prosecution regarding the transaction.

Reporting on the situation of corruption should not be limited to the enforcement of penal sanctions and other measures against paying bribes. Both sides of the coin have to be addressed by a follow-up mechanism. This may lead to the naming of specific countries or situations at an early stage (in a setting with protections for confidentiality), although formal and judicial proofs may be obtained later through investigation.

### **BIAC Programme for Combating Solicitation of Bribes**

#### ***Public recognition of the problem***

Up to now, governments have been reluctant to recognise the problem of solicitation. It was feared that companies accused of bribing could defend themselves in penal prosecution if fault by others was acknowledged. However, this hesitation creates the false impression that companies are the source of corruption. Testimony and available evidence indicate that explicit or implicit requests for bribes are more often the "initiating act" for bribes.

Governments have to publicly recognise the problem of solicitation of bribes and engage themselves to act against it, to assist companies in specific situations, and to co-operate internationally. Declarations by the OECD Ministerial Conference as well as declarations of National Governments (e.g. in the context of parliamentary debates on implementing legislation) could be adequate instruments in this respect.

#### ***Integration in follow-up programs***

As the current international instruments do not properly address the problem of the demand side of bribes, such programs do not include the situation in "receiving" countries - in all parts of the world. This gives a unbalanced picture. Necessary data to support active measures against the distorting effects of requests for bribes has not been collected.

The convention's follow-up mechanisms - especially within the OECD - has to include the investigation of explicit or implicit requests for bribes and the sufficiency and functioning of mechanisms in place to combat them. Such enquiries can only be done in a close co-operation with business.

Collecting such data may be difficult as formal proof will seldom be available and business secrets must be safeguarded. Therefore, it will be necessary to establish reporting bodies as "filters" that can provide the necessary information in a anonymous

and aggregated form. Such reporting bodies must be separated from any body having judicial or penal prosecution competence to avoid compromising the independence of the judicial process, as well as the allowed defendant protections.

#### ***Clearance for transactions***

As it may not always be obvious whether a specific transaction violates anti-bribery laws, companies must be able to obtain quick clearance on the legitimacy of specific transactions. The United States provides such a facility in their FCPA. To safeguard basic rights of a defendant in a penal prosecution, such – reliable and binding – advice, when feasible, should be offered by offices not related to penal proceedings. Information provided in the context of such a preliminary inquiry should have restrictions on its use (so as not to prejudice later judicial proceedings). Some exceptions could be established to avoid abuse (although they are not currently offered under US FCPA rules).

Governments ratifying the OECD convention should establish neutral information points to provide companies with clarity on the legitimacy of specific transactions.

#### ***Assistance in cases of solicitation***

Quite often companies are confronted with requests for bribes, for example in the context of large public procurement contracts. Specific action is needed in such cases. For this purpose, an international co-operation mechanism is recommended. For example, national “contact point” could alert counterparts in other countries to enquire whether other companies have been confronted with similar requests, as part of a thorough investigation.

***Governments should exchange information about reported attempts of solicitation of bribes. They should co-operate in joint investigations on substantiated cases of solicitation of bribes. They should respect and safeguard the business secrets involved. The commercial position of reporting persons in the market concerned should not be jeopardised by their co-operation in government investigations.***

#### ***Co-ordinated measures***

Requesting bribes not only distorts trade but violates obligations under the rules of Good Governance. Whereas large trading countries may act individually in such situations by limiting development assistance programs or imposing binding obligations to recipient countries, this is not the case for most OECD member countries. International co-operation is needed.

***Governments should engage themselves to co-ordinate their means in enforcing good governance and the fight against solicitation of bribes. Development aid and other assistance has to be taken into account.***

***A close dialogue has to be maintained with the business sector in all areas to ensure realistic implementation, and to test the practicability of the measures taken. BIAC is well experienced and equipped to play this role for the OECD. However, such a dialogue can only be conducted fruitfully among informed partners. To this end, some OECD working papers and analysis should be more widely shared, even before final adoption. In this context, the BIAC network has proved its reliability in relation to the OECD, even in cases where secrecy is a priority. Its membership includes the major representative business organisations in each of the OECD member states; therefore BIAC ensures a full picture of the business world's views. While welcoming valuable contributions from interested NGOs, BIAC expects that its role as the OECD business voice shall be duly recognised in the continuing dialogue at OECD. We see a co-operative approach as the key to developing creative and effective tools to combat corruption.***