

Green Inclusive Growth Knowledge Centre Commission on Corporate Responsibility and Anti-corruption

ICC Contribution to the public consultation on the Review of the OECD Anti-Bribery Recommendation

ICC appreciates the opportunity given by the OECD Working Group on Bribery (WGB) to provide input on the Public Consultation Document.

ICC has long placed high importance on the work performed by the OECD on matters of integrity and in particular on the outstanding work produced by the OECD Working Group on Bribery.

The ICC Commission on Corporate Responsibility and Anti-corruption, successor to the ICC Anti-Corruption Commission, has reviewed the questionnaire provided with the Public Consultation Document and submits to the OECD replies and information deemed of particular importance for business and for the furtherance of greater integrity in the business world.

General Questions for Consultation

General Question 1

The OECD Convention is a milestone for anti-corruption and has undoubtedly marked a point of no-return for business integrity. The OECD 2009 Anti-Bribery Recommendation has reinforced this result.

Although corruption has not disappeared, one may state with certainty that anti-corruption efforts are widespread now, and that must be considered as one of the most remarkable results of the OECD anti-corruption legal instruments.

Progress on implementation of the OECD Convention and Recommendation remains slow, however, with a number of member countries enforcing too little. Also, more progress needs to be made with regard to other aspects, such as communication, training and effective protection of whistleblowers.

Indeed, we note a gap in the implementation of the OECD Recommendation from one country to another. While many companies in the North are making strong efforts in order to rigorously comply with the OECD rules, it is not always the case for companies headquartered in many other regions. There is a risk that this discrepancy would in the end severely penalize some of the more ethical companies. Therefore, we consider it a priority for the OECD to further promote the implementation of the current Recommendation in every State Party.

Indeed, challenges to implementation of the OECD Convention and Recommendation include difficulties in identifying cases, different liability regimes, legal obstacles to information exchange among countries, and lack of incentives for companies to self-report.

It is further noted that twenty-one Parties to the OECD Convention have not yet sanctioned

foreign bribery, which indicates the need for stronger efforts by the WGB in this matter. It is crucial that the effort to combat foreign bribery takes place in all the WGB Parties, so as to create a better scenario for international business around the globe.

Another issue is the problem of the flow of information between the demand-side and the supply-side. It would be appropriate for the WGB to improve and monitor the mechanisms for exchange of information on this among countries.

General Question 2

Monitoring is essential and gives the Convention and the Recommendation a unique role among international instruments. One may enhance the progress and make the country reviews more efficient by considering making mandatory annual public reporting by the countries.

The OECD Working Group on Bribery might also consider providing experts, businesses and NGOs an earlier notice for their on-site monitoring visits, so as to give these stakeholders more preparation time for the often very precise questions the monitoring countries and the OECD Secretariat will ask. It should be noted that these stakeholders continue to be very interested in participating in the monitoring sessions during the country visits but that they are often taken unawares due to the short time given to them before these sessions.

Specific questions

Q1 – Guidance on foreign bribery offense

Consideration can be given to further clarification of the language of Article 1 of the Convention and to bringing the definitions of OECD and UNCAC more in line. One can consider distinguishing in a new draft of the Recommendation the difference between what is outright solicitation (including extortion) and the mere suggestion or inuendo of a possible hidden deal. The former is a clear form of crime and has to be dealt with accordingly by the enforcement authorities, while the latter may be brought to the attention of a person, institution or ombudsman designated in the framework of a High-Level Reporting Mechanism (HLRM).

Q2 – Awareness-raising and training

There should be more specific recommendations for WGB Countries on training which should subsequently be assessed. Awareness-raising can best be obtained by insisting on creating, and improving constantly in all businesses solid, sustainable, continuous and realistic ethics and compliance programs.

One may refer at this stage to the French Sapin II law which requires companies of a certain size to have an ethics and compliance program meeting certain requirements. If the French Anti-corruption Agency (AFA) sees that a company fails to put in place a satisfactory program, an administrative fine may be imposed.

In addition, the WGB should ensure that training is offered by all the Parties to their public officials, making possible the adequate enforcement of the foreign bribery legal provisions. Many public officials are not used to dealing with issues of integrity and have recently been assigned to this role, which makes training even more relevant. These officials need to be ready to correctly recognize and assess all the details of a case and the context where the offense was committed so as to take into consideration any difficulty faced by the company in a concrete case.

Q4 – Demand side

ICC constantly has insisted on the need to address the difficult question of the demand side. One is aware that criminalization of the demand side is harder to implement than criminalization of the supply side. One is struck by the repeated and strenuous complaints from many ICC members about the harassing demands they receive in many countries and industry segments. Leaving this problem totally unattended is hardly acceptable.

In the field of international public corruption, it would be advisable, in a case of supply side corruption (so-called active corruption) has been adjudicated in an OECD country or more largely in one of the 44 Parties to the Convention, that an investigation or prosecution procedure be started in the jurisdiction of the person or body, which was at the origin of the bribery demand (so-called 'passive corruption'). The WGB, which keeps a record of investigations or prosecutions in the OECD zone, could serve as a 'clearing house', which could give warnings to the demand side country in question, each time a demand side investigation should be started.

Q5 – Liability of legal persons

It is noted that there has been little progress in some WGB countries concerning sanctioning of legal persons involved in foreign bribery. Thus, it is necessary to regularly monitor these countries in the enforcement of foreign corruption provisions, to ensure an adequate and equal enforcement of the law around the globe.

It must be taken into consideration that certain legal frameworks do not provide for criminal liability for legal persons. However, this fact, per se, should not be an obstacle to sanctioning legal persons involved in foreign bribery. It should be noted that the administrative system can often be more efficient and faster than civil and criminal procedures.

Continuous monitoring of the WGB Parties, where sanctions have not yet been imposed, is recommended, to make it possible to understand the obstacles that these countries are facing.

Q6 – Enhancing compliance

The new Recommendation could impose two requirements on legal persons which contract with or intend to contract with intermediaries in difficult or risky circumstances: (i) an obligation to establish at the time of the contract negotiations and to provide in case of an investigation an economically reasoned explanation for the use of an intermediary (such as for instance the absence of any representation in the country concerned, the launching of a new project, while the market concerned is new for the principal...) and (ii) an obligation to establish (again at the time of the contract negotiations and to provide in case of an investigation) a reasoned justification for the quantum of the fee paid or payable to the intermediary (for instance based on hours effectively worked or on a percentage of the turnover obtained).

Paragraph 1.2.3. refers to a possible 'harmonization' of compliance models. We wish to warn against any excessive harmonization in compliance programs. SME's cannot in many circumstances build oversized programs. Harmonization of ethics and compliance programs could bring challenges to these companies.

Q7 – How can the Good Practice Guidance be revised

The Good Practice Guidance might be made more explicit along the lines of the Sapin II law and the Recommendations produced by French AFA. Furthermore, a revised GPD should make clear that this guidance also applies to state-owned enterprises.

Q8 – Incentivizing compliance

The Recommendation needs to leave the following options to WGB countries to incentivize compliance: either make compliance systems a partial or complete defense to foreign bribery, or take compliance into account when deciding to dispose of foreign bribery charges with a non-trial resolution, or as a mitigating factor for sanctioning.

Q 9 – Foreign bribery enforcement

Consideration needs to be given to requiring public annual reporting by the WGB Countries and to carrying more regular OECD reviews. It is to be noted that for a certain number of countries that used to consider anti-corruption as a high priority in their enforcement policy, anti-corruption is now seen as a lower degree priority. These Countries should be encouraged to prioritize anti-corruption again by allocating enough resources and personnel, and by putting their anti-corruption agency in a high priority place in their public governance organogram.

Q13 – Independent judiciary

States need to comply not just with recommendations of the OECD but also with other organizations such as GRECO.

Q 14 – Non-trial resolutions

With regard to non-trial resolutions, the Recommendations needs to provide for clear criteria, clear conditions, transparency and judicial approval. Non-trial resolutions need to be published, together with all the facts. Non-trial resolutions are very successful. The countries that use them are in the top list of the best enforcers. For companies, non-trial resolutions can save management time, can help improving the company's integrity practices and culture and give the possibility to move forward without being dragged down by lengthy procedures. The new Recommendation could encourage Parties to the Convention to adopt non-trial resolutions for companies and to use them rather than to bring such instances to the courts.

Qs 15 to 18 - Sanction/double jeopardy

There should be recognition of the "ne bis in idem" or no double jeopardy principle, or, at a minimum, a mandatory consultation between the WGB countries involved for consideration of penalties. Double sanctioning is seen as unfair by business. Furthermore, sanctions should be dissuasive but should not put companies in danger of bankruptcy.

Q 19 – Addressing mitigating circumstances

Companies expect a real mitigating effect from their genuine ethics and compliance programs. They want to see that the enforcement authorities understand that there can be instances which escape control, even when the companies' compliance programs are well organized. The OECD should consider developing a clear set of rules such as the US Sentencing Guidelines. The criteria should also be part of a published non-trial solution.

Q 20 – Tax ramifications

No sanction of whatever nature should be tax deductible.

Q 21 – Judicial training

Specialized training of prosecutors and judges is a necessity. One should not forget that the matter of international corruption is still relatively recent and very complex.

Q 22 – Small facilitation payments.

ICC has arrived at the position that small facilitation payments are unacceptable and that it is impossible in an international company to have differentiated commercial policies, with some branches accepting those payments, and others condemning them. The only exception in this

matter accepted in the ICC Rules on Combating Corruption is a threat of physical harm. In the latter exceptional case, the expense should be properly registered in the accounts.

Q 23 – Awareness raising

We need to take stock of the fact that the public sector now is lagging on matters of training. We recommend active information providing and training by WGB countries and close cooperation between the public and private sector. During OECD reviews the achievements of the countries should be carefully reviewed.

Q 24 – Sensitive sectors

Collective action can be particularly valuable in fighting international public corruption. OECD has been instrumental in several experiences in this respect and could help setting up additional successful experiences. There again business stands ready to play its part.

Q 27 – Whistleblower protection

Adequate protection of whistleblowers is of the essence. This should not only be legal theoretical protection, but also good effective protection, which is lagging in many countries. A thorough review is desirable.

Q31 – Self-reporting

The WGB countries should be recommended to develop and publish clear rules and standards so that the benefits and risks of self-reporting are transparent and clear.

Q41 - Supporting implementation of the 1996 Development Assistance Committee Recommendation on Anti-corruption (“ODA Recommendation”)

The ODA recommendation should reinforce assessment of the corruption risks posed by a project or an entity receiving the aid and should encourage development agencies to promote the implementation of compliance programs within the entities receiving the aid.

Q 44 - Mutual legal assistance

The exchange of information among countries is essential in raising awareness of cases of foreign bribery committed abroad. However, the delay in information exchange and the legal obstacles to make it work (such as the different liability regimes to sanction foreign bribery) are challenging.

Thus, the Parties must ensure that all the necessary legislative measures have been adopted to facilitate the flow of information and the sharing of evidence among different authorities. The WGB should make all necessary efforts to facilitate the aforementioned and monitor information request, whenever possible. It would be a good measure to keep a standing committee to work just on this mission.

Q. 48 – Multi-jurisdictional cases

As stated in the Convention (art. 4-3), “when more than one Party has jurisdiction (...), the Parties involved shall (...) consult with a view to determining the most appropriate jurisdiction for prosecution”. What matters is that bribery acts are effectively prosecuted; there is no need for prosecutions by several countries of the same acts. It can put companies in a very difficult situation where cooperation or settlement with an authority of one country may jeopardize the defense of this company before the court of another country. The recommendation should therefore include mechanisms promoting the effective implementation of article 4-3.

The International Chamber of Commerce (ICC)

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