



TI Recommendations to OECD Working Group on Bribery

We understand that the Working Group on Bribery will be considering plans for its future work at its October meeting. On behalf of Transparency International we would like to make the following recommendations.

1. What is at Stake: OECD Convention at the Crossroads

Notwithstanding almost a decade's effort by the Working Group, the success of the OECD Convention is not yet assured. Thus the program to be adopted by the Working Group will determine whether the Convention will succeed or fail. If the Convention is successfully enforced, it will significantly reduce the supply-side of international corruption.

Because the OECD Convention has been widely regarded as the most promising international anticorruption initiative, its failure would represent a major setback for the whole effort to deal with corruption through international conventions. It would also be a serious embarrassment for OECD.

2. Need for Continuing Strong Monitoring Program

Because there is still only limited enforcement of the Convention's prohibition against foreign bribery, it is essential that the Working Group continue with a strong monitoring program. The 2006 TI Progress Report on Enforcement of the OECD Convention, which we reviewed with the Working Group at its June meeting, indicates that enforcement is underway in 12 countries, with little or no enforcement in the other 24 countries.

The success of the Convention depends on the collective commitment by all parties to stop foreign bribery. Without continued monitoring to ensure that lagging governments meet their commitment, support for the Convention will unravel. Governments that now prosecute foreign bribery will be reluctant to continue enforcement if their competitors persist in winning orders through bribery.

The principal objective of the next phase of the monitoring program should be to ensure that active enforcement programs get underway in the countries where there has been little or no enforcement. In particular, follow-up reviews are needed to make sure that governments correct the deficiencies identified in prior reviews.

Country visits should continue to be a major monitoring tool. While country visits are costly and require substantial resources, they are the only reliable method for assessing the adequacy of enforcement. During the next phase, country visits should be used

selectively, focusing on countries where there is little or no foreign bribery enforcement. Priority should be given to the largest exporters, including Japan, UK, Italy, Canada and the Netherlands.

3. Additional Actions to Increase Enforcement

In TI's view, the reviews conducted by the Working Group in Phases 1 and 2 of its monitoring program have been of high professional quality. They have made an invaluable contribution to implementation and enforcement of the Convention in those countries where there is the requisite political will to combat corruption. That enforcement is still inadequate in many signatory states, indicates that other actions, in addition to monitoring, are needed to increase enforcement. TI recommends the following:

A. Identifying and Overcoming Obstacles to Enforcement

The Working Group should undertake a systematic study to identify obstacles to foreign-bribery enforcement. The Phase 2 country reports and the detailed summary contained in the May 2006 "Mid-Term Study of Phase 2 Reports" provide an invaluable database. A meeting with prosecutors from signatory states should be held in 2007 to obtain their views of obstacles to enforcement and of steps needed to overcome them.

TI's 2006 Progress Report on Enforcement provides information on a number of obstacles to enforcement. In TI's view, a critical obstacle is that foreign bribery cases require extensive specialized resources, such as forensic accountants, anti-money laundering experts, and lawyers familiar with mutual-legal assistance procedures. In most countries, such resources can only be provided by organizing a centralized office for foreign bribery cases, and not leaving the responsibility to inadequately-staffed local prosecutors. Other obstacles include lack of accessible complaint-reporting procedures, inadequate whistleblower protection, and failure to provide for criminal liability of corporations.

Based on the proposed study, the Working Group should develop recommendations for actions to overcome obstacles to enforcement. Future monitoring reviews should check on the implementation of these recommendations.

B. Securing Increased Public Attention

The Working Group's reports are entitled to high credibility because they present detailed assessments of national enforcement programs. Putting the reports on the OECD website is important, but is not enough to secure public attention and promote increased enforcement. TI recommends that the Working Group take steps to secure a much higher level of public attention in the countries where reviews are conducted. Suggestions

should be obtained from media representatives, civil society, the private sector and trade unions. Some actions have already been taken, including preparation of summaries of the conclusions of country reviews, but more is needed. In-country press conferences should be organized, if possible by OECD, if not by civil society, bar associations or other interested groups.

The Working Group should also publish an annual report listing all foreign-bribery prosecutions and the number of investigations underway in all signatory states. The report should be updated to reflect the information reported at the tour-de-table conducted at each Working Group meeting. Keeping such information confidential is counter-productive. We recognize that some aspects of monitoring reviews may require confidentiality. However, we see no justification for not publicly disclosing the *names* of all foreign bribery prosecutions and the *number* of all foreign bribery investigations.

The Working Group should review the process for conducting consultations with civil society and private sector organizations. TI commends the willingness of the Working Group to hold periodic consultations. We hope ways can be found to make to such consultations more productive for the Working Group and for the participants.

C. Exercising Peer Pressure

The success of OECD in other fields is widely credited to the effective use of peer pressure. Because the failure of the Convention would damage OECD's reputation, peer pressure to ensure increased enforcement is appropriate and in OECD's interest. Peer pressure is particularly important where non-enforcement is caused by lack of political will or by political desires to gain export orders even by illicit means. The Working Group should consider what recommendations it could make to the Secretary-General and to the OECD Council. We note that resolutions adopted at the last four G-7 meetings called for enforcement of the OECD Convention. It would be useful for OECD to submit a report to next year's meeting on enforcement by G-7 countries.

4. Other Issues

Until a substantial majority of the parties are actively enforcing the Convention's prohibition against foreign bribery, ensuring such enforcement must remain the Working Group's top priority. However, it is timely for the Working Group to consider several other issues. Action on such issues may require additional funding because it should not come out of funds required for monitoring enforcement.

A. Outreach to Other Major Exporting States

Accession to the Convention by other major exporting states would promote the Convention's objective to curb the supply-side of international corruption. The accession

by South Africa is a welcome development, as would be accession by China, India and Russia. Accession by such countries should be conditioned on their agreement to submit to the same monitoring reviews as the existing parties to the Convention.

B. Bribery of Political Parties and Party Officials

In 2000 TI submitted recommendations to the Working Group to strengthen the coverage of bribery of political parties and party officials. For the reasons explained in our submission, the prohibition against bribery of foreign public officials may not apply when a payment is made to a political party or party official, who influences a public official in awarding business. This is a serious loophole than can be closed by a Commentary to the Convention, without amending the Convention.

C. Coverage of Foreign Subsidiaries

There is widespread concern that the Convention's prohibition against foreign bribery is often evaded when bribes are paid by foreign subsidiaries of parent companies based in OECD countries. That concern was amplified by the large number of such subsidiaries that are included in the Volcker Report's list of companies that paid kickbacks to under the UN's Oil-for-Food program.

TI recommends that the Working Group consider what actions can be taken to address this issue. One approach would be to urge governments to require their companies to adopt meaningful anti-bribery compliance programs. As part of such programs, parent companies based in OECD countries should apply their corporate anti-bribery policies to controlled subsidiaries. Such an approach is consistent with current thinking on corporate governance. It would not raise problems regarding extraterritorial application and could be done by a Commentary, without amending the Convention.

The need for governments to promote compliance programs is important, beyond the foreign subsidiary issue. TI's recently published 2006 Bribe Payers Index, as well as a new survey conducted Control Risks, indicate that many companies are still unaware that foreign bribery is a crime and that in many countries corporate compliance remains inadequate.

D. Facilitation Payments

The exemption of facilitation payments from the Convention's prohibition of foreign bribery should be re-examined. The other anticorruption conventions, adopted after the OECD Convention, do not exempt facilitation payments. Moreover, a substantial number OECD states prohibit facilitation payments.

There are three reasons why attitudes about facilitation payments have changed since the Convention was adopted in 1996. First, it is now widely recognized that facilitation payments are a major problem in many developing countries and place a heavy burden on their poorest citizens. Second, facilitation payments are often part of widespread extortion schemes organized from the top down, and not isolated acts by low-level officials. Third, corporate compliance experts have learned that it is often difficult to draw a line between facilitation payments and other bribes. This thinking is reflected in guides to compliance, including TI's Business Principles for Countering Bribery, the International Chamber of Commerce's Rules of Conduct to Combat Extortion and Bribery, and the World Economic Forum's Principles for Countering Bribery.

For these reasons, it would be desirable for OECD to reconsider the present broad exemption for facilitation payments. The objective should be to encourage companies to work towards eliminating facilitations payments. Because the OECD exemption is provided in a Commentary to the Convention, it can be changed by revising the Commentary without amending the Convention.

E. Cooperation with Other Monitoring Organizations

In recent years concern has developed over duplicative monitoring reviews under different anticorruption conventions. Such concerns are heightened by the entry into force of the UN Convention Against Corruption. OECD should play an active part in the development of cooperative arrangements among the different monitoring organizations. Such cooperation is desirable not only to avoid duplication, but because all monitoring programs have serious resource constraints. Cooperation and coordinating would make all of them more effective. (TI's Report on Follow-up Process for UN Convention Against Corruption, published 12 September 2006, includes proposal for such cooperation.)

F. Private-to-Private Bribery

The International Chamber of Commerce has proposed that the Working Group undertake a study of private-to-private bribery. There are important reasons for undertaking such a study. Privatization of many governmental functions has blurred the line between the public sector and the private sector. In a global economy, private-to-private bribery transcends national borders and is considered to be widespread. Moreover, in many countries the private sector is larger than the public sector.

Coverage of private sector bribery would represent a major extension of the scope of the OECD Convention and the workload of the Working Group. For that reason, OECD action going beyond the proposed study should be deferred until after OECD's prohibition against public sector bribery has been successfully implemented. The study

should take into account that private sector bribery is covered by other anticorruption conventions, and consider what the appropriate role for OECD should be.

In conclusion, the Working Group's deliberations regarding its future plans are of such importance to the success of the Convention that an opportunity for consultation with civil society, the private sector and trade unions should be provided before these plans are finalized. TI would welcome the opportunity to submit additional comments.

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