

Procedure for Self- And Mutual Evaluation of Implementation of the Convention and the Revised Recommendation - Phase 2

PHASE 2 QUESTIONNAIRE

Objective

The purpose of the second phase of the self-evaluation and mutual review of implementation of the Convention and the 1997 Recommendation (Phase 2) is to study the structures put in place to enforce the laws and rules implementing the Convention and to assess their application in practice. Phase 2 should also broaden the focus of monitoring to encompass more fully the non-criminal aspects of the 1997 Revised Recommendation. Phase 2 would also serve an educational function as participants discuss problems and different approaches. Phase 2 will be carried out according to the Terms of Reference adopted by the Working Group in DAFPE/IME/BR(99)33/FINAL.

The Phase 2 examinations will be carried out in order to obtain an overall impression of the functional equivalence of participants' efforts to apply the Convention effectively. One central issue will be how participants have actually dealt with concrete cases that have arisen in their territories with respect to the Convention. The institutional mechanisms put in place in individual countries to deal with cases covered by the Convention (prosecution authorities, means to provide mutual legal assistance, etc.) need to be examined. Participants will also be asked what promotional efforts they have undertaken to make the Convention better known (seminars, workshops, press communication, private sector dialogue, etc.).

During Phase 1, the WG identified deficiencies in the domestic legislation of some countries concerning the implementation of the Convention. In Phase 2, countries will be asked what remedial steps they have taken in the meantime if they have not already taken action to address them. However, as these are issues concerning individual countries only, country-specific questions are not included in this general Phase 2 questionnaire.

Also in Phase 1, the WG concluded that a number of issues are of a broader nature and therefore merit an in-depth horizontal analysis. These horizontal issues therefore will be dealt with separately from the Phase 2 questionnaire. Nevertheless, parts of the questionnaire are also relevant for these horizontal issues.

The questionnaire will assist the Group in assessing how participants address the principal issues under the Convention in the application of their implementing laws, and in gaining a clear overview of how the Convention has been applied as a multilateral instrument.

Scope of Replies

The replies to the questionnaire should be precise and provide sufficient detail to permit an assessment of the actual application of the Convention's implementing legislation. During on-site visits, countries should not be expected or required to disclose information otherwise protected by a country's laws and regulations.

Where appropriate, copies of relevant laws, regulations, administrative guidance, or court decisions should be provided in English or in French. In formulating replies to the questionnaire participants should also take account of the Commentaries.

Confidentiality

Replies to the questionnaire received by the Secretariat will be treated as confidential. Each participant may release information concerning its questionnaire, or make it publicly available, subject to its domestic laws on the protection of privacy and secrecy.

Deadline

The Working Group will decide the date of examination for each country. Participants should address their replies to the Secretariat within the time limits fixed by the Secretariat for each individual country.

Submission of replies

Replies should be submitted in either English or French and preferably in electronic format.

Contact persons

Please insert here the name and contact numbers of a person(s) within your country who can be contacted in relation to the reply to the questionnaire, if different from Phase 1 contacts.

QUESTIONS CONCERNING PHASE 2

A GENERAL ISSUES

1. General approach

1.1 Please describe your country's policy with regard to the means put in place (besides implementing the Convention into domestic legislation) to fight bribery of foreign public officials. In addressing this question, please include specific information on measures your government may have taken (or plans to take) with respect to items listed in section II of the 1997 Recommendation (see Part C of questionnaire).

1.2 If you have dependent or overseas territories, is the Convention and your implementing legislation applicable to them? If not, have you taken any steps (or do you plan to take steps) to make the Convention applicable to those territories ?

1.3 If more than one level of government has legislative-making powers, and another level of government has enacted legislation that applies to the situation of foreign bribery, please explain the relationship of these laws and whether one would supersede in certain circumstances.

2. Institutional Mechanisms

2.1 If there are specific bodies that include in their competence the fight against bribery of foreign public officials in your country, please specify their legal basis, composition, functions, and powers.

2.2 What measures are in place to ensure that persons or bodies in charge of combating bribery of foreign public officials have the necessary independence and autonomy to perform their functions?

2.3 What resources (human and financial) are available for the implementation of the Convention? (Please include information about training programmes, if any). If private resources have also been available for implementation activities, please specify the nature and level of such resources.

2.4 Have there been any cases in your country of domestic officials reporting cases to superiors, prosecutors, or other public authority, that they have been promised, offered or given a bribe by foreign nationals or companies? Is there any mechanism for such reporting? Are there safeguards such as whistleblowing or witness protection programmes for such officials?

2.5 Have there been instances where competitors have filed complaints or provided information, or where company employees have brought a violation to the attention of the authorities? Do procedures exist for the public to provide information (e.g., hot lines)? Are there safeguards to protect "whistle-blowers"? Are there mechanisms to make such information available to other countries concerned?

2.6 Have your authorities provided any assistance to companies in case of direct or indirect solicitation of bribery of foreign public officials? In particular, have any initiatives been taken or mechanisms developed concerning greater public recognition of solicitation, the setting-up of bodies

providing assistance to enterprises, and organised concerted actions in exceptional cases, including joint actions by governments?

2.7 Does your government provide a procedure whereby persons and companies may submit a request for an opinion, based on the facts of a prospective transaction, on whether the transaction would constitute the offence of bribing a foreign public official? If so, please describe the process and explain to what extent, if any, the opinion would be binding on the courts.

3. Public Awareness

3.1 What activities have been undertaken or what activities are planned to make the Convention better known in your country (e.g. workshops, seminars, public campaigns, encouraging compliance in the private sector, training programs for lawyers, etc.)?

3.2 Are you aware of guidelines or of any public or private initiative to develop codes of conduct, including corporate compliance schemes concerning adequate internal company controls? What efforts do you undertake to promote the OECD Guidelines for Multinational Enterprises and the OECD Principles on Corporate Governance as they relate to issues of bribery?

3.3 Does your government maintain contact and organise consultations with business, labour, and NGOs in anti-corruption activities with a view to promoting public awareness of the Convention?

B. APPLICATION OF THE CONVENTION

Preliminary remark: The following questions have been designed to provide participants with some guidance in addressing the relevant issues concerning the application of their implementing legislation. Ideally, participants would answer these questions by referring to concrete cases that have arisen under their implementing legislation or any other legislation (such as trafficking in influence or misuse of company assets, etc.) with regard to the bribery of foreign public officials (whether or not these cases have been successfully prosecuted). However, if a country cannot provide examples that relate directly to the bribery of foreign public officials, it is invited to provide other relevant examples. Cases of bribery of domestic public officials would be the best alternative.

- (i) Have there been any concrete cases in your country that fall under the scope of the Convention? If yes, please describe the facts and explain how your authorities have dealt with such cases.
- ii) Please describe what has been done in your country in order to provide for an effective application of your country's implementing legislation? Have guidelines been developed concerning the interpretation of the Convention?
- (iii) Has a coherent interpretation of the Convention and/or its implementing legislation been developed by legal science? What is the legal weight given to secondary sources of law, such as the Commentaries to the Convention and articles in legal journals?
- (iv) If relevant, have there been practical examples to show how your country has/has not been able to use the concept of "direct applicability" of the Convention in order to compensate for discrepancies or gaps in the national implementing legislation?

4. Article 1. The Offence

4.1 Please describe how your authorities have applied the offence in cases involving bribery of foreign public officials (by natural or legal persons). If no cases have arisen concerning the bribery of foreign public officials, please refer to cases involving bribery of domestic public officials where appropriate¹. In answering this question, please pay particular attention to the following elements:

- a) Since Phase 1, have there been any significant interpretations (by courts or other authorities) of Article 1? How have the following elements of the offence of bribery of foreign public officials or equivalent domestic bribery laws been interpreted: *intent*, the *offer, promise or giving* of a bribe, *undue pecuniary or other advantage* (provide examples of advantages that have been covered), *intermediaries* (provide examples, where available), *third party beneficiaries* (especially cases where the benefit went directly to the third party), *in relation to performance of official duties* (what acts/omissions have been covered), *obtaining or retaining business or other improper advantage* (where relevant, how have the courts applied facilitation payments or bona fide expenses), and *international business* (compared to domestic business).
- b) Many countries did not adopt in their national laws, per se, the autonomous definition of *foreign public official* provided in the Convention. Can you please describe how the definition adopted in your legislation has been applied to foreign bribery cases and whether you have encountered any difficulties? Please provide examples of cases involving interpretation of the terms "public function", "public enterprises", and "public agencies".
- c) Please provide examples of cases involving incitement, aiding, abetting, or authorisation, attempt (if relevant), conspiracy (if relevant).
- d) Have cases been dismissed due to successful pleading of defences (either general or defences specific to the bribery offence)?

5. Responsibility of Legal Persons

5.1 Can you provide examples of the application of the law ascribing the liability of legal persons (including state enterprises) to the bribery of foreign public officials? If not, please refer to cases involving bribery of domestic public officials. In describing the cases, please pay careful attention to describing the types of entities that have been prosecuted and how the standard of liability (e.g. breach of supervisory duty, leading person theory, etc.) has been applied to bribery offences.

5.2 Concerning the relationship of liability between the legal person and the natural person:

- a. What has been the outcome when the individual(s) responsible for the bribery transaction (e.g. directors, managers, shareholders) has (have) not been convicted or identified before assigning liability to the legal person?

1. A reference to cases of bribery of domestic public officials would be appropriate with regard to all questions listed below except a. (elements of "obtaining or retaining business"; "international business") and b. ("foreign public official").

- b. Is responsibility of the legal person determined in the same proceedings as the individual(s) responsible for the bribe or as a consequence of the proceedings in relation to the individual(s)?
- c. If the standard of liability for legal persons involves the identification of someone in the legal person who is responsible for the bribe, would information about the identity of the directors, shareholders and beneficial owners be available on a timely basis to the investigating authorities? Please explain what information would be available and how it would have to be obtained.

5.3 Does the state have the same powers for investigating an offence in relation to a legal person as in relation to a natural person (e.g. search and seizure, including the search and seizure of bank records, subpoenaing witnesses, etc.)? Who are the competent authorities for investigating such cases?

6. Sanctions

-- Natural and Legal Persons

6.1 On the basis of available information, please describe all criminal, administrative, and civil sanctions that have been applied in practice to natural persons for the offence of bribing a foreign public official and compare them with those that have been applied for domestic bribery as well as other similar offences (e.g. fraud, theft and embezzlement).

6.2 On the basis of available information, please describe all criminal, administrative, and civil sanctions that have been applied in practice to legal persons found liable for bribing foreign public officials and compare them with the sanctions that have been applied for domestic bribery as well as other similar offences (e.g. fraud, theft and embezzlement).

6.3 Where possible, in cases where persons have been found liable for foreign bribery cases, what were the grounds for determining the severity of the sentence (including the amount of the fine and/or term of the imprisonment, or for the non-imposition of a sanction)?

6.4 If your country provides a procedure for out-of court settlements (e.g. plea-bargaining or other procedure), please describe how this process has been applied to cases of bribery of foreign public officials, and include information about the resulting sanctions. If information is available, please compare these sanctions with those obtained under other judicial procedures.

7. Seizure and Confiscation

-- Pre-trial Search, Seizure and Confiscation

7.1 Please provide cases where your authorities have granted or denied pre-trial search, seizure and confiscation in relation to the bribe and the proceeds of bribing a foreign public official.

7.2 Please provide cases where your authorities requested access to bank records or other financial records held by a financial institution for the purpose of obtaining information, searching and seizing, or freezing property in relation to the bribery of foreign public officials and note any difficulties encountered in carrying out these powers.

-- ***Confiscation or Comparable Monetary Sanctions***

7.3 Please describe how confiscation of the bribe and the proceeds has been exercised in relation to the foreign bribery offence. In responding, please answer the following questions:

a) In practice, have the authorities confiscated the bribe and the proceeds of bribing a foreign public official or just one or the other? In practice, how far have the authorities been able to trace the assets generated by the foreign bribery offence (i.e. where they have been converted from their original form)? Have the authorities encountered difficulties in tracing the proceeds?

b) If confiscation is not possible because the assets cannot be traced or are no longer available (because, for instance, they are in the possession of a bona fide third party, or they have been gambled away), or confiscation is not available under your laws, what monetary sanctions of a comparable effect have been applied?

c) If confiscation of the bribe when it is still in the possession of the briber is available, can you provide examples of having applied this power in practice?

d) Can you report cases concerning legal persons subject to confiscation? If so, is it available on the same terms as it is for natural persons?

8. Jurisdiction

-- ***Territorial Jurisdiction***

8.1 In practice, have there been any difficulties in establishing territorial jurisdiction over cases of bribery of a foreign public official? For natural persons? For legal persons? In particular, if your country has identified certain requirements such as government authorisation, the requirement that a particular person report the offence (e.g. an employer or a victim), or that some test is met (e.g. that prosecution is in the public interest), how has this requirement(s) been applied in practice to the foreign bribery offence?

-- ***Nationality Jurisdiction***

8.2 In practice, have there been any difficulties in establishing nationality jurisdiction over cases of bribery of a foreign public official? For natural persons? For legal persons? In particular, if a requirement(s) must be satisfied for the establishment of nationality jurisdiction, such as reciprocity, dual criminality, government authorisation, the requirement that a particular person report the offence (e.g. an employer), or that some test is met (e.g. that the prosecution is in the public interest), how has this requirement(s) been applied in practice to the foreign bribery offence?

8.3 Can you report whether your country has established jurisdiction over cases where a foreigner (non-national) working for a domestic company bribes a foreign public official abroad?

8.4 Please explain what criteria you apply in determining the "nationality" of a legal person in your country (e.g. place of registry or main seat). Has a legal person established in your country been held responsible for bribery of foreign public officials by one of its subsidiaries abroad?

9. Enforcement (Investigation and Prosecution)

9.1 How do you apply existing rules concerning the opening and closing of investigation and prosecution (principle of legality, principle of discretion)? Are there any special investigative techniques that can be used in your country in cases of bribery, especially in regard to bribery of foreign public officials?

9.2 What difficulties have you experienced concerning investigation and prosecution of offences of bribery of foreign public officials?

9.3 If available, please provide statistical information concerning the number of investigations, prosecutions, court cases, and convictions. If information is available, how long has it taken your authorities to conclude the prosecution of any foreign bribery cases that have occurred to date? Are there any time limits for any of the stages of the criminal process from investigation to appeal?

9.4 In practice, does the prosecution of a case of foreign bribery depend on the consent of a person or body other than the normal prosecutorial authorities (e.g. Minister of Justice)? On what grounds did this authority grant or deny consent?

9.5 If there are examples of where the determination of whether to prosecute a case of bribing a foreign public official involved consideration of the public interest, on what grounds was it decided that the public interest was or was not satisfied and by whom?

9.6 If you give victims the opportunity to intervene at any stage of the proceedings, please provide examples of how you identify the victim in the case of bribery of foreign public officials. In particular, can victims compel prosecution or have an impact on the sentence?

10. Statute of Limitations

If information is available, can you indicate approximately how many cases of bribery of foreign public officials could not be prosecuted because the statute of limitations had expired, even taking into account periods of suspension, interruption, reinstatement, or extension?

11. Money Laundering

11.1 Please explain how your money laundering legislation has been applied where the predicate offence was the bribery of a foreign public official, and include answers to the following questions:

- a) What sanctions (including confiscation or monetary sanctions of comparable effect and sanctions under the laws that regulate the financial system) have been applied to cases involving bribery by natural and legal persons?
- b) If applicable, can you provide examples of the application of the money laundering offence where the defendant should have known or was negligent as to whether the proceeds were derived from the commission of the offence of bribing a foreign public official?
- c) Where the predicate offence takes place abroad have the courts required that certain additional conditions be met (e.g. dual criminality or a conviction of the predicate offence)?
- d) Please explain any differences in the application of the money laundering offence where the predicate offence has been the bribery of a domestic public official.

11.2 Has your country applied sanctions for money laundering to employees and officers of financial institutions who have assisted or co-operated in laundering the illegal gains from the bribery of foreign public officials?

11.3 Have financial institutions provided information to the competent authorities about suspicious transactions involving the proceeds of bribing foreign public officials?

12. Accounting and Auditing Standards

12.1 Please provide examples of the civil, administrative and criminal penalties that have been applied for omissions and falsifications of books, records, accounts and financial statements of companies for the purpose of bribing foreign public officials or of hiding such bribery.

12.2 Please provide examples of prosecutions of the bribery of foreign public officials in your country that were initiated by a report by an auditor of a suspicious transaction to the company management, a corporate monitoring body or the competent authorities.

12.3 Does your country have books and records requirements, accounting standards, auditing standards and financial statement disclosure requirements in place that are effectively used as a tool to deter and detect the bribery offences discussed in Article 8.1 of the Convention? If so, please describe such books and records requirements, accounting standards, auditing standards and financial statement disclosure requirements, as well as how they are used.

12.4 How are such books and records requirements, accounting/auditing standards and financial statement disclosure requirements enforced in practice to deter and detect the bribery offences through the accounting and auditing standards discussed in Article 8.1 of the Convention?

12.5. What mechanisms, resources and structures does your country devote to deterring and detecting the bribery offences discussed in Article 8.1 of the Convention?

13. Mutual Legal Assistance

13.1 Please describe the requests for MLA your authorities have received (including requests for financial information such as bank records) regarding the bribery of a foreign public official, and include answers to the following questions:

- a) How many requests have your authorities received since the Convention entered into force in your country? How many requests have been granted/rejected and on what grounds?
- b) How many requests have you made to other countries? How long has it taken for your country to receive a reply to a request for MLA? How many of them were granted/rejected and on what grounds?
- c) How long has it taken your country to reply to requests for MLA? Have you been able to reply to requests promptly (see Article 9)? Are there time limits for responding to requests for the various forms of MLA?
- d) How have any existing requirements (such as dual criminality or reciprocity) been applied?
- f) Have you granted or denied requests for MLA concerning a legal person; if so, under what circumstances?

13.2 If your authorities have received requests for MLA regarding the offence of money laundering where the predicate offence is the bribery of a foreign public official, please explain how you responded, and comment on whether you provided the same range of MLA as has been provided for other offences?

13.3 Have your authorities been able to promptly grant MLA in cases where a request is for (a) information from a financial institution, such as a customer's name or about a customer's transaction, or (b) information about a company, including the identity of the owner, proof of incorporation, legal form, address, the name of directors, etc.?

13.4 Can MLA be provided by dependent or overseas territories?

13.5 Have you entered into new arrangements or agreements for the purpose of facilitating mutual legal assistance since the Convention became effective for your country?

14. Extradition

14.1 Please describe the requests for extradition that you have received in relation to the offence of bribing a foreign public official, and include answers to the following:

- a) How many requests have your authorities received since the Convention entered into force for your country? How many requests have been granted/rejected and on what grounds?
- b) How many requests have you made to other countries? How many of them were granted/rejected and on what grounds?
- c) How have any existing requirements (such as dual criminality or reciprocity) that must be met in order to grant extradition been applied? How have other grounds (such as offences of a political nature, "ordre public" or other essential interests) been interpreted and applied?
- d) If you have denied any requests for extradition on the basis that the requests concerned your nationals, were these cases submitted to your own prosecutorial authorities?
- e) How long has it taken for your authorities to respond to these requests? Are there time limits for granting/denying extradition.

14.2 Have you entered into new arrangements or agreements for the purpose of facilitating extradition since the Convention became effective for your country?

C. APPLICATION OF THE REVISED RECOMMENDATION

15. Public subsidies, licences, or other public advantages

Have you taken steps to ensure that public subsidies, licences, or other public advantages be denied as a sanction for bribery of foreign public officials, pursuant to Section II (v) of the Revised Recommendation? How do you ensure that public subsidies, licences, or other public advantages are not inadvertently granted in cases of bribery of foreign public officials ?

16. Accounting and Auditing Standards

16.1 Have civil, administrative, or criminal penalties pursuant to Section V.A of the Revised Recommendation been imposed since the Convention went into effect? If so, please provide a list of cases or examples.

16.2 How do you effectively ensure the independence of external auditors (Section B. (ii)). If your country requires independent external audits as described in the Revised Recommendation Section V.B, what mechanisms are in place to ensure that they are being carried out? Please provide examples or a list of cases.

16.3 If your country requires independent auditors to report irregularities indicating possible illegal acts, pursuant to Revised Recommendation Section V.B, what mechanisms exist in your country to ensure that auditors are carrying out this obligation? Please provide examples or a list of cases.

16.4 What steps has your country taken to encourage the development and adoption of adequate internal company controls, as described in Revised Recommendation Section V.C?

17. Tax Deductibility of Bribes

17.1 How do you ensure that bribes paid to foreign public officials are not inadvertently permitted a deduction? In providing your response, please address the following questions:

- (i) Please describe the categories of expenses and methods of payment that your tax examiners would examine to identify suspicious payments that could be bribe payments to a foreign public official.
- (ii) Please describe the measures that have been taken to sensitise your tax examiners to the need to focus on suspicious payments that might constitute bribes and to provide guidance to your tax authorities on how to identify suspicious payments (e.g. guidelines, tax manuals, training programmes).
- (iii) Who has the burden of proving that a particular deduction is permissible or impermissible and what is the standard of proof?

17.2 Under what conditions and in what circumstances can your tax authorities share information about suspicious bribery transactions with the following authorities:

- (a) the criminal law enforcement authorities in your own country;
- (b) the tax authorities in another country; and

(c) the criminal law enforcement authorities in another country?

17.3 Are financial institutions in your country obliged to provide financial information (e.g. identification of bank customers and beneficial owners of accounts as well as suspicious bribery transactions) where requested by the tax authorities for tax purposes? If so:

- (a) under what circumstances; and
- (b) what procedures must be followed?

17.4 Have your tax authorities permitted tax deductions for payments to foreign public officials that fall within an exception to the offence (e.g. small facilitation payments or a payment permitted by the written law of the foreign public official's country—Commentaries 8 and 9 of the Convention), or a defence to the offence? If so when?

18. Public Procurement

18.1 Can you report cases concerning bribery of foreign public officials with regard to public procurement? In particular, are there cases where your authorities suspended from competition for public contracts enterprises that have bribed foreign public officials in contravention of your national laws? Did your authorities apply any other (additional) procurement sanctions in such cases?

18.2 Have you taken steps to require anti-bribery provisions in bilateral aid-funded procurement, to promote the proper implementation of anti-bribery provisions in international development institutions, and to work closely with development partners to combat bribery in all development co-operation efforts?

19. International Co-operation

Please provide an overview of cases of international co-operation involving your country in relation to combating bribery in international business relations (other than Mutual Legal Assistance and Extradition). In particular, please respond to the following:

- (a) What have been the specific means of co-operation?
- (b) Did you enter into new arrangements or agreements for this purpose since the Recommendation became effective for your country?
- (c) Did you find it necessary to take steps to ensure that your domestic laws afford adequate basis for international co-operation? If yes, please describe the measures taken.