

### **Selected Key Recommendations**

- It is essential to continue a vigorous monitoring programme, including country visits, until there is active enforcement by all signatories.
- A much higher level of enforcement will be needed before the critical criterion for success – widespread recognition by international business that foreign bribery is no longer acceptable – will be achieved.
- OECD must begin to utilize stronger measures to ensure compliance by governments that have not shown the political will to prosecute foreign bribery.
- Prompt action by the UK government, and if necessary by OECD, is required to overcome the dangerous precedent effects of the AI Yamamah termination.

### **Detailed Recommendations**

#### **A. Need for continuing strong OECD monitoring programme**

Because there is still only limited enforcement of the OECD Convention on Combating Bribery of Foreign Public Officials, it is essential that the Working Group continues with a strong monitoring programme after the conclusion of Phase 2. Support for the convention will unravel without continued monitoring. It needs to ensure that lagging governments meet their commitment to end foreign bribery. Governments that now prosecute foreign bribery will be reluctant to continue enforcement when their competitors persist in winning orders through bribery.

Country visits must continue to be the major monitoring tool because they are the only reliable method for assessing the adequacy of enforcement. The level of review can vary depending on the status of enforcement. The principal focus should be on countries where there are no significant prosecutions. Priority should be given to the largest exporters, including Japan, United Kingdom, Canada and Netherlands. Follow-up reviews are also needed to make sure that governments correct the deficiencies identified in prior reviews.

#### **B. Overcoming the consequences of the UK's termination of the AI Yamamah investigation**

The UK's termination of the AI Yamamah investigation is a serious threat to the future of the convention for three reasons. Each must be addressed to enable the convention to move forward.

- The claim of a national security exception threatens to emasculate Article 5 of the OECD Convention and creates an open-ended loophole that other countries could readily use.
- The credibility of UK support for the convention has been badly eroded. Serious doubts already existed because the UK has never brought a foreign bribery prosecution and had failed to correct its antiquated corruption laws, notwithstanding repeated OECD warnings going back to 1999. Lack of action

by the UK endangers the convention because the UK ranks fourth among OECD exporters.

- The Al Yamamah termination raises troublesome doubts regarding the political will to enforce the convention in other cases involving national champions and large numbers of jobs.

These concerns can be overcome by reinstating the Al Yamamah investigation, by prosecuting other cases which are under investigation, and by passing a new UK corruption law without further delays.

In TI's view, Article 5 of the convention has a very broad scope (without an explicit national security exception) and there is no basis for an implicit national security exception. However, if the Al Yamamah investigation is not reinstated, OECD must take steps to control the precedent effects on Article 5. It will be necessary to define what exceptions to Article 5 should be permitted. Any exceptions should be very narrowly and restrictively defined. Reaching agreement may be difficult. However, the alternative of letting each country decide unilaterally whether a national security exception applies will result in the erosion of the convention.

### **C. Identifying obstacles to enforcement**

The Working Group should undertake a systematic review of its country reports to identify obstacles to convention enforcement, much of this information is already contained in the May 2006 "Mid-Term Study of Phase 2 Reports". A meeting with prosecutors from signatory states should be held to obtain their views of obstacles to enforcement and of steps needed to overcome them.

In TI's view, a critical obstacle is that foreign bribery cases require specialised professional resources, including forensic accountants, anti-money laundering experts, and lawyers familiar with mutual-legal assistance procedures. In most countries, such resources can only be provided by organising a centralised office for foreign bribery cases. Responsibility for foreign bribery should not be left to inadequately-staffed and overworked 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.

### **D. Securing public attention and civil society participation**

The Working Group's reports are entitled to high credibility because they present detailed assessments of national enforcement programmes. Putting the reports on the OECD website is important, but is not enough to secure public attention and promote increased enforcement. The Working Group should 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 summaries of the conclusions of country reviews, but more is needed. In-country press conferences should be organised in cooperation with civil society, bar associations or other interested groups. The country reports should also be made

easily accessible in the home country on government websites and in the national language and should be submitted to the national legislature.

The Working Group should also publish an annual report listing all foreign-bribery prosecutions, convictions 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. Some aspects of monitoring reviews may require confidentiality, but the names of all foreign bribery prosecutions and the number of all foreign bribery investigations should be publicly disclosed.

Further, while major steps have been taken to make the review process transparent, more could be done. Government responses to questionnaires should be published and made available to civil society organisations as soon as completed. Review visits should be publicised, as should opportunities for civil society organisations to make written and oral submissions.

## **E. 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.

### **1. 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.

### **2. 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 the 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 the actions of a public official in awarding business. This is a serious loophole that can be closed by a commentary, without amending the convention.

### **3. 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 in Iraq under the United Nations Oil-for-Food programme.

TI recommends that the Working Group considers 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 programmes. As part of such programmes, 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 can be done by a commentary, without amending the convention.

#### **4. Facilitation payments**

The exemption of facilitation payments from the OECD Convention's prohibition of foreign bribery should be re-examined. The other anti-corruption conventions, adopted after the OECD Convention, do not exclude facilitation payments. A substantial number of 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 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 Principle for Countering Bribery.

For these reasons, it would be desirable for OECD to reconsider the present broad exclusion of facilitation payments. The objective should be to encourage companies to work towards eliminating facilitation 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.

#### **5. Cooperation with other monitoring organisations**

In recent years concern has developed over duplicative monitoring reviews under different anti-corruption conventions. Such concerns are heightened by the entry into force of the United Nations Convention against Corruption (UNCAC). The OECD should play an active part in the development of cooperative arrangements among the different monitoring organisations. Such cooperation is desirable not only to avoid duplication, but because all monitoring programmes have serious resource constraints. Cooperation and coordinating would make all of them more effective.

#### **6. Private-to-private bribery**

The International Chamber of Commerce has proposed that the OECD Working Group undertake a study of private-to-private bribery. There are important reasons for undertaking such a study. Privatisation of many governmental functions has blurred the line between the public and the private sector. Moreover, in many

countries the private sector is larger than the public sector. In a global economy, private-to-private bribery transcends national borders and is considered to be widespread.