

Overcoming Obstacles to Enforcement of the OECD Convention on Combating Bribery of Foreign Public Officials

Report on Paris Meeting of 2-3 October 2003



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When the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Convention) was signed in 1997, it was widely hailed as a major breakthrough in the fight against international corruption. All 35 signatories (including five non-OECD members) have ratified the Convention and enacted laws making foreign bribery a crime. The challenge now is to make sure that national governments actively enforce the prohibition against foreign bribery. Even though most laws have been in place for several years, most countries have taken little or no enforcement action. This is of critical concern because the success of the Convention depends on consistent multilateral action by all the signatory states, particularly by the major exporting countries. Unless enforcement gathers momentum soon, there is serious danger that the Convention will fail to become an effective weapon against international corruption.

To address this concern Transparency International (TI) convened a meeting of thirty-nine experts from nineteen countries in Paris on 2-3 October 2003. The participants included prosecutors from eleven countries, seven persons from the OECD and its Working Group on Bribery, TI representatives from eleven countries, and representatives from the private sector and trade unions. The list of participants is attached. The meeting considered the current status of enforcement, the causes of insufficient enforcement, and what can be done to strengthen enforcement. This report summarizes the conclusions and recommendations of the meeting, reflecting the general consensus of the group. Participants attended the meeting in their personal capacity and not as representatives of the organizations with which they are affiliated.¹

Current Status of Enforcement

Even though several foreign bribery prosecutions are underway, in many signatory countries no cases have yet been brought and few investigations are under way. This finding reflects detailed written and oral reports at the meeting from twelve TI national chapters and comments from prosecutors and from OECD experts. Copies of the reports from TI national chapters in Australia, Canada, Finland, France, Germany, Italy, Japan, Switzerland, UK and USA, and from the Attorney General of Lesotho have been transmitted to the OECD Working Group on Bribery and will be available on TI's website at www.transparency.org.

Causes of Insufficient Enforcement

Based on the country reports and the comments from prosecutors and OECD experts, the meeting identified the following as the most common causes for insufficient enforcement:

Insufficient resources. Investigating and prosecuting foreign bribery cases requires extensive work by experienced professionals. Law enforcement offices in many Convention countries are not adequately staffed or trained to undertake foreign bribery cases. Because most prosecutors are already swamped by large case loads, they are reluctant to take on new cases that require large resources and will take years to complete.

¹ Nicola Bonucci and Nicola Ehlermann-Cache participated as technical experts and took no position on the conclusions and recommendations.

Decentralization of enforcement. Responsibility for investigating and prosecuting foreign bribery cases is often dispersed among multiple offices. In several countries, criminal enforcement is based at the state or provincial level, and not at the national level. This hampers enforcement because decentralized prosecutors are less likely to have sufficient resources and enough interest to bring foreign bribery cases.

Difficulty of obtaining mutual legal assistance. Because foreign bribery cases require evidence located in other countries, the delays and inefficiencies of mutual legal assistance (MLA) procedures are a serious obstacle to enforcement. While Article 9 of the OECD Convention provides for MLA among signatory states, it does not cover MLA for developing countries, where foreign bribery is widespread.

Lack of complaints. Prosecutors indicated that they receive few complaints about foreign bribery. This can be attributed to such factors as lack of public awareness that foreign bribery has become a crime, the absence of adequate reporting procedures and concern about retribution.

Statutory shortcomings. In some countries prosecution is deterred by statutory shortcomings such as short statutes of limitations and jurisdictional limitations.

Lack of proactive government support for enforcement. Governments have failed to follow up on the passage of laws implementing the Convention by publicizing that foreign bribery has become a crime and by taking steps to provide adequate funding and staffing for enforcement. This is evidence of lack of political will to prohibit foreign bribery.

PROPOSALS FOR ACTION

After reviewing the troubled status of enforcement and the obstacles that must be overcome, the meeting developed the following proposals for action:

1. Proposals for Strengthening Enforcement

Coordinating national enforcement. Each signatory government should establish a national office to coordinate foreign bribery enforcement. That office should serve as a centralized contact point for foreign prosecutors seeking mutual legal assistance and should receive complaints of foreign bribery. That office should also organize a pool of experienced investigators and prosecutors available for work on foreign bribery cases. Particularly important are forensic accountants and anti-money laundering experts, capable of following the financial trail of corrupt funds. Where practical, taking into account established national law enforcement organization, the national office should also be assigned authority to investigate and prosecute foreign bribery prosecutions, with freedom from political interference.

Raising public awareness. The governments of the signatories should take steps to publicize widely the Convention, and even more importantly, the national implementing laws. Awareness raising programs should be directed to government officials, including law enforcement and the diplomatic service, to the business community, particularly companies involved in international trade and investment, and to accounting and law firms and the media. Increased awareness should increase complaints about violations and improve compliance.

OECD should organize similar awareness raising programs in developing countries and should secure cooperation and support for such programs from international organizations, including the World Bank, IMF, WTO and the UN. The national contact points for the OECD MNE Guidelines could play a useful role in this respect.

Establishing national reporting channels. Governments should develop and publicize procedures to facilitate reporting of complaints, including websites and hotlines. Laws and procedures should be developed to encourage and protect whistle blowers.

North-South MLA Cooperation. Submission of complaints from developing countries to law enforcement agencies in Convention countries must be facilitated, and mutual legal assistance with developing countries should be improved. The OECD Working Group on Bribery should organize periodic meetings attended by law enforcement officials from Convention states and from developing countries for the purpose of improving formal as well informal channels for cooperation on foreign bribery cases. Developing countries should be provided with technical assistance, as needed, to more effectively participate in law enforcement co-operation and in MLA.

Overcoming statutory obstacles. Signatory governments should overcome statutory obstacles which hamper foreign bribery enforcement. In particular, nationality jurisdiction should be provided; territoriality jurisdiction should be interpreted broadly so that an extensive physical connection to the bribery act is not required; statutes of limitations should only begin to run when bribes are discovered; corporations should be subject to criminal liability; and dual criminality requirements for MLA should be restricted.

Coverage of foreign subsidiaries. Widespread belief that multinational companies based in Convention states use foreign subsidiaries to pay bribes erodes confidence in the effectiveness of the Convention. The OECD Working Group on Bribery should take prompt action to make clear that the use of foreign subsidiaries to pay bribes is prohibited by the Convention. As one step, parent companies based in signatory states should be expected to require their controlled subsidiaries to adopt anti-bribery compliance programs.

2. Proposals for Strengthening Monitoring of Enforcement

The meeting emphasized that the OECD monitoring process, established under Article 12 of the Convention, is essential to ensure that all signatories enforce the Convention. Phase 1 of the monitoring process, reviewing national laws implementing the Convention, is almost complete, and has been largely successful in requiring the signatories to enact laws meeting the requirements of the Convention. However, Phase 2 of the monitoring process, reviewing national enforcement programs, has had a disappointingly slow start as a result of inadequate funding. During the first two years only five countries were reviewed, instead of the 14-16 originally planned. Additional funding has been provided for 2003 and 2004, but only partial funding is in place for the following years when at least 17 reviews remain to be scheduled. The meeting developed the following proposals:

Need for Long-Term Monitoring Commitment. To assure effective enforcement, OECD monitoring must be a long-term, open-ended effort. One round of Phase 2 reviews will not be enough to ensure effective enforcement. This conclusion is driven by: (a) the lack of adequate enforcement to date, (b) the difficulty of overcoming the obstacles to enforcement identified above, (c) the need to assure that deficiencies found during the initial round of reviews are corrected, and (d) the need to maintain continuing commitment to enforcement through

changes in governments, budgets and personnel. The recognition that a long-term monitoring program is required must drive funding, staffing, and planning.

Short-term funding. As a first step, the OECD Council should ensure that funding is committed to complete the initial round of Phase 2 Review program in 2007. Action should be taken promptly in order to preclude another budget crisis at the end of 2004. After the faltering start in 2001-2002, failure to maintain momentum after 2004 would endanger the credibility of the monitoring process. Reviews of the ten largest exporters should be completed by the end of 2004.

Planning for Phase 3. The Working Group on Bribery should develop plans for an effective monitoring program beyond the initial Phase 2 reviews, – including further on-site reviews with priority to countries with the most significant deficiencies.

Increasing participation by prosecutors. Governments should assign experienced prosecutors as regular participants on the Working Group on Bribery and on country review teams.

Reviewing the Phase 2 Guidelines. The guidelines for Phase 2 reviews should be reviewed to cover the following:

- Civil society and private sector organizations, including BIAC, TUAC, ICC and TI, should, in consultation with the Secretariat and officials of the country being examined, take responsibility for organizing the agenda and selecting the participants for the private sector and civil society consultation component of the on-site visits.
- Government responses to OECD questionnaires should be made available on a timely basis to private sector and civil society participants in the consultation and should be made public.
- To ensure frank and open discussion, the civil society and private sector participants should have the opportunity to discuss potentially sensitive issues “in camera”, without government officials from the country under review being present.
- The dates of the Phase 2 review should be publicized in advance and the OECD should invite submission of written comments from those unable to participate in meetings organized for the on-site visit.
- Country reviews should devote sufficient attention to accounting and auditing practices, corporate anti-bribery compliance programs, controls against tax deductibility of bribes, and anti-money laundering programs.
- Reports on Phase 2 reviews should be finalized and published promptly after each country visit.
- Within one year following each country review, governments should provide the Working Group, and make public, a detailed report on actions taken to correct deficiencies in the Phase 2 report.

3. Proposals for Civil Society Action

The meeting supported the following civil society actions to encourage enforcement of the Convention:

Annual TI Report Card on Enforcement. TI will publish an annual Report Card on enforcement of the Convention. This should draw on annual reports prepared by TI National Chapters, in cooperation with bar associations, accounting and other knowledgeable groups,

assessing the progress of enforcement of the OECD Convention by their governments, and of corporate compliance programs.

TI Website: Enforcement Action Clearinghouse. TI National Chapters and bar associations should collect information on foreign bribery cases, including documents filed in court, and submit that information for inclusion on TI's website.

Raising Awareness in Signatory Countries. TI, bar associations, accounting and other private sector and civil society organizations should conduct efforts to raise awareness of laws prohibiting foreign bribery among public officials, particularly in areas susceptible to bribery, such as procurement, and to broaden private sector adherence to anti-bribery compliance programs.

Raising Awareness in Developing Countries. TI National Chapters, bar associations, accounting and other private sector and civil society groups should conduct programs in developing countries to raise awareness by governments and the private sector about the OECD Convention's prohibition of foreign bribery. Participants should include government officials as well as private sector and civil society organizations.

Facilitate Reporting and Protecting Whistleblowers. TI National Chapters should disseminate information on how foreign bribery allegations can be reported (in the home country and in Convention signatory countries) and develop a list of officials who can be trusted to deal appropriately with such information. TI National Chapters, bar associations and other civil society groups should also encourage the adoption of effective whistleblower-protection laws.

4. Adherence to the Convention by Additional States

The basic objective of the Convention, to curb the supply side of international bribery, would be enhanced by encouraging adherence by additional parties that play a significant role in international trade and investment. Expansion of the existing group of signatories must be accompanied by organizational and funding arrangements necessary to assure the effective management of the Working Group on Bribery and its monitoring and follow-up program.

5. Promoting Corporate Compliance

While the meeting focused on strengthening enforcement of the Convention, the participants stressed the importance of accelerating efforts to promote corporate compliance, including by medium-sized and small enterprises. It was recognized that enforcement would not succeed unless the majority of companies conducted effective anti-corruption compliance programs. However, widespread adoption of corporate compliance programs will depend on corporate perception that foreign bribery laws are being enforced.

The foregoing proposals will be submitted by TI to the OECD Working Group on Bribery at its 22 October 2003 meeting. TI National Chapters will also submit these Recommendations to their national governments.

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