

OECD: IMPACT OF BRIBERY DURING INTERNATIONAL TRANSACTIONS

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AN INTRODUCTION TO THE OECD

- n The Organisation For Economic Co-operation and Development (OECD) brings together the governments of countries committed to democracy and the market economy from around the world to:
 - Support sustainable economic growth;
 - Boost employment;
 - Raise living standards;
 - Maintain financial stability;
 - Assist other countries' economic development;
 - Contribute to growth in world trade;

- n Provides a setting where governments compare policy experiences, seek answers to common problems, identify good practice and coordinate domestic and international policies.

- n For more than 40 years, OECD has been one of the world's largest and most reliable sources of comparable statistics and economic and social data. As well as collecting data, OECD monitors trends, analyses and forecasts of economic developments and researches social changes or evolving patterns in trade, environment, agriculture, technology, taxation and more.

OECD Working Group on Bribery in International Business Transactions

- n The OECD Working Group on Bribery in International Business Transactions (Working Group) is responsible for monitoring the implementation and enforcement of the OECD Anti-Bribery Convention, the 2009 Recommendation on Further Combating Bribery of Foreign Bribery in International Business Transactions (2009 Anti-Bribery Recommendation) and related instruments.
- n This peer-review monitoring system is conducted in three phases and is considered by Transparency International to be the 'gold standard' of monitoring.
- n The three phases mentioned above will be discussed in more detail.
- n Made up of representatives from the 38 States Parties to the Convention, the Working Group meets four times per year in Paris and publishes all of its country monitoring reports online.
- n South African is the only African Country that is a Party to the Convention.

OECD Anti-Bribery Convention

- n The Convention's preamble *inter alia* mentions the following as base considerations supporting the creation of the document:
 - That bribery is a widespread phenomenon in international business transactions, including trade and investment, which raises serious moral and political concerns, undermines good governance and economic development, and distorts international competitive conditions; and
 - That all countries share a responsibility to combat bribery in international business transactions;

- n The convention provides that parties thereto undertake as follows:

- n Each Party shall take such measures as may be necessary to establish that it is a criminal offence under its law for any person intentionally to offer, promise or give any undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign public official, for that official or for a third party, in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business.

- n Each Party shall take any measures necessary to establish that complicity in, or such attempt, including incitement, aiding and abetting, or authorisation of an act of bribery of a foreign public official shall be a criminal offence.

- n Each Party shall take such measures as may be necessary, in accordance with its legal principles, to establish the liability of legal persons for the bribery of a foreign public official.

OECD Anti-Bribery Convention ...continued

Recommended Sanctions To Be Provided For and Other Topics

With reference to sanctions regarding the bribery or attempted bribery of foreign officials, the Convention provides as follows:

- The **bribery of a foreign public official** shall be **punishable by effective, proportionate and dissuasive criminal penalties**.
 - In the event that, under the legal system of a Party, criminal responsibility is not applicable to legal persons, that Party shall ensure that legal persons shall be subject to **effective, proportionate and dissuasive non-criminal sanctions**, including monetary sanctions, for bribery of foreign public officials.
 - Each Party shall take such measures as may be necessary to provide that **the bribe and the proceeds of the bribery** of a foreign public official, or property the value of which corresponds to that of such proceeds, are subject to seizure and confiscation or that monetary sanctions of comparable effect are applicable.
 - Each Party shall consider the imposition of additional **civil or administrative sanctions** upon a person **subject to sanctions for the bribery of a foreign public official**.
- n Other topics also dealt with in terms of the provisions of the convention include:
- Jurisdiction and Enforcement;
 - Statute of Limitations;
 - Money Laundering and Accounting;
 - Mutual Legal Assistance and Extradition;

Country monitoring of the OECD Anti-Bribery Convention

- n Countries' implementation and enforcement of the OECD Anti-Bribery Convention is monitored by the OECD Working Group on Bribery through a rigorous peer-review monitoring system, which Transparency International calls the “gold standard” of monitoring.
- n Monitoring is subject to specific agreed upon Principles and takes place in three phases:
 - Phase 1 - evaluates the **adequacy of a country's** legislation to implement the Convention
 - Phase 2 - assesses whether a country is **applying this legislation effectively**
 - Phase 3 - focuses on **enforcement of the Convention**, the 2009 Anti-Bribery Recommendation, and outstanding recommendations from Phase 2

Monitoring Procedures and General Principles

- n A programme of systematic follow-up to monitor and promote full implementation of the OECD Anti-Bribery Convention is required by Article 12 of the Convention. The Working Group on Bribery has undertaken its monitoring work through a system of peer review.
- n The following outlines general issues of country monitoring agreed upon by the Working Group on Bribery in 1998 and revised in 2009.
- n Delegates agree that the monitoring procedure should conform to a number of general principles

General Principles

- **Purpose.** To ensure compliance with the Convention and implementation of the 2009 Recommendations. Monitoring also provides an opportunity to consult on difficulties in implementation and to learn from the experiences of other countries.
- **Effectiveness.** Monitoring must be systematic and provide a coherent assessment of whether a participant has implemented the Convention and 2009 Recommendations.
- **Equal treatment.** Monitoring must be fair and this means equal treatment for all participants. To ensure equal treatment in the overall monitoring work of the Group, Phase 3 evaluations should be conducted in a way that takes into account the lessons learnt during the Phase 2 evaluation process .
- **Efficiency and effectiveness.** The Phase 3 procedure should be efficient, realistic, concise and not overly burdensome. Monitoring must also be effective to guarantee a level playing field.
- **Co-ordination within the OECD.** The monitoring of practical applications of some issues might require specific expertise that may be found in other parts of the Organisation. In conducting its evaluation work, the Working Group will endeavour to draw on information and expertise developed by other OECD bodies - particularly the Committee on Fiscal Affairs, the Development Assistance Committee, and the Working Party on Export Credits and Credit Guarantees - on implementation of elements of the Recommendations in their respective fields.

PHASE 1

- n Phase 1 included elements of both self and mutual evaluation. The approach was “vertical” or based on examinations country-by-country. In consultation with the country examined, two countries were chosen to lead the examination. The countries acting as lead examiners chose the experts who took part in the preparation of the preliminary report. The entire group of countries Party to the Convention evaluated each country’s performance and adopted conclusions.

- n Elements of the Phase 1 mutual evaluation procedure
 - Preparation of the evaluation in the Working Group on Bribery.
 - Appointment of two countries to act as lead examiners.
 - Country’s reply to an evaluation questionnaire.
 - Preparation of a provisional report on the country’s performance.
 - Evaluation by the Working Group on Bribery.
 - Adoption of a report, including conclusions, on the examined country’s performance.

PHASE 2

- n The **purpose of Phase 2** was to study the structures put in place to enforce the laws and rules implementing the OECD Anti-Bribery Convention and to assess their application in practice. Phase 2 broadened the focus of monitoring to encompass more fully the non-criminal law aspects of the 1997 Revised Recommendation. Phase 2 also served an educational function as participants discussed problems and different approaches.
- n Phase 2 included elements of both self and mutual evaluation. The approach is “vertical” or based on examinations country-by-country. In consultation with the country examined, two countries were chosen to lead the examination. The countries acting as lead examiners chose the experts who took part in the on-site visits and preparation of the preliminary report. The entire group of countries Party to the Convention evaluated each country’s performance and adopted conclusions.
- n Elements of the Phase 2 evaluation:
 - Preparation of the evaluation in the Working Group on Bribery
 - Appointment of two countries to act as lead examiners
 - Replies to an evaluation questionnaire
 - On-site visit to the country examined
 - Preparation of a preliminary report on country performance
 - Evaluation by the Working Group on Bribery
 - Adoption by the Working Group of a report, including recommendations, on country performance

PHASE 3

- n The Working Group on Bribery adopted a post-Phase 2 assessment mechanism in December 2009, to act as a permanent cycle of peer review, involving systematic on-site visits as a shorter and more focused assessment mechanism than for Phase 2. The aim of the mechanism is to improve the capacity of Parties to fight bribery in international business transactions by examining their undertakings in this field through a dynamic process of mutual evaluation and peer pressure. The first cycle of review under this mechanism is known as Phase 3.
- n The **purpose of Phase 3** is to maintain an up-to-date assessment of the structures put in place by Parties to the OECD Anti-Bribery Convention to enforce the laws and rules implementing the Convention and the 2009 Recommendations. Phase 3 involves a shorter and more focused evaluation than Phase 2, and concentrates on the following three pillars:
 - n Progress made by Parties to the Convention on weaknesses identified in Phase 2
 - n Issues raised by changes in the domestic legislation or institutional framework of the Parties
 - n Enforcement efforts and results, and other key group-wide cross-cutting issues
- n As for Phase 1 and 2, the approach for Phase 3 evaluations is “vertical” (based on evaluations for each country). The Working Group on Bribery has established a schedule of Phase 3 evaluations from 2009 to 2014, which includes the designation of two countries to act as lead examiners in each evaluation. The countries acting as lead examiners choose the local/national experts who take part in the on-site visits and they prepare the preliminary country report. The entire Working Group on Bribery, made up of representatives from all States Parties to the Anti-Bribery Convention, evaluates each country’s performance and adopts conclusions.

PHASE 3 ...continued

n Elements of the Phase 3 Evaluation include:

- Appointment of two countries to act as lead examiners
- Replies to an evaluation questionnaire by the country being evaluated
- On-site visit to the country being evaluated
- Preparation of a preliminary report on country performance
- Evaluation in the Working Group on Bribery
- Adoption by the Working Group of a report, including recommendations, on country performance.

SOUTH AFRICA: PHASE 1 REPORT

- n This report was approved and adopted by the Working Group on the 20th June 2008.
- n The **offence of bribery** of Foreign Public Officials – section 5 of the Prevention and Combating of Corrupt Activities Act, 2004 (PCCA);
- n **Complicity** – section 21(c) of PCCA;
- n **Attempt and Conspiracy** - section 21 of PCCA;
- n **Responsibility of Legal Persons** – As a general rule, South African law is applicable to natural and legal persons alike; and “Private Sector” is defined in section 1 of PCCA;
- n **Sanctions** – the principle and supplementary penalties applicable under PCCA are the same for bribery of a domestic and a public official (see section 26)
- n **Penalties and Mutual Legal Assistance** – As provided for in terms of the South African Extradition Act 1962, extradition to countries with which South Africa has extradition agreements, will be subject to the conditions specified in such agreements.
 - For countries with which SA does not have a specific extradition agreement, the Extradition Act defines an extraditable offence as any offence punishable with a sentence of imprisonment or other form of deprivation of liberty for a period of 6 months or more.

SOUTH AFRICA: PHASE 1 REPORT...continued

- n **Seizure and Confiscation** – Chapter 2 of the Criminal Procedure Act 1977
 - Section 20 – seizure of any article which is concerned or believed to be concerned in the commission or suspected commission of an offence
 - Sections 30 -34 provide for the disposal of articles seized, where said articles are not forfeited to the State;
 - Section 35 – provides for forfeiture of articles to the State

- n **Proceeds** of an offence may also be subject to **pre-trial seizure**; for e.g. Part 3 of Chapter 5 of the Prevention of Organised Crime Act 1998 (POCA)

- n **Confiscation** – section 14, 18 and 19 of POCA;

- n **Rules and Principles regarding investigation and prosecution:**
 - **This subject was a point of focus in the report**
 - Mentions for example that the SA rules and principles of investigation and prosecution of a foreign bribery offence are essentially contained in the PCCA, CPA and NPA Act. The Special Investigating Units and Special Tribunals Act 1996, may also be relevant in certain circumstances.
 - General public – National Anti-Corruption Hotline;
 - Was pointed out that corruption, including foreign bribery, has been included as one of the 4 strategic priorities of the SAPS in its Strategic Plan for 2005 – 2010.
 - The Directorate of Special Operation (DSO or the “Scorpions”)
 - In this regard the report mentioned that the DSO would not remain in operation.

SOUTH AFRICA: PHASE 1 REPORT...continued

n General Comments:

- The Working Group commended the South African Authorities for their high level of co-operation and openness during the examination process;

“Section 5 of the Prevention and Combating of Corrupt Activities Act 2004 (the PCCA) criminalises bribery of foreign public officials. The Working Group considers that overall South Africa’s legislation conforms to the standards of the Convention, subject to the issues noted below. In addition some aspects of the South African legislation would benefit from follow-up during the Phase 2 evaluation process.”

n The “issues” referred to include:

- The requirement of intent;
- Identification of the natural person to prosecute the legal person;
- Sanctions;
- Jurisdiction;
- Enforcement – special law enforcement body with specific responsibility for serious crime, including foreign bribery and the consideration of the economic impact of the offence;
- Extradition

SOUTH AFRICA: PHASE 2 REPORT

- n The Phase 2 on-site visit to SA was undertaken by an evaluation team of the Working Group from the 15th to the 19th of February 2010 in Pretoria and Johannesburg.

- n The Phase 2 report highlights *inter alia* the following aspects:
 - While the **current measures to fight corruption** are well publicised and reported, further efforts are necessary to **raise awareness** of the foreign bribery offence within both the private and public sectors;
 - At the time of this report there were **no prosecutions** for foreign bribery in SA.
 - In this regard the Working Group recommended that SA develop specialised investigators and prosecutors and ensure adequate resources and training; also that SA enhance coordination between police and prosecutors in respect of these cases.
 - Liability of legal persons – the Working Group recommended the **attention of prosecutors and investigators** be drawn to the importance of **effectively enforcing liability of legal persons** in this regard;
 - The Working Group also highlighted the **positive aspects of SA's** work to fight foreign bribery, stating that the **legislative framework** is generally of a **high standard**.

PHASE 3

n Where to from here?