

Implementation of the OECD Anti-Bribery Convention Initial BIAC comments on a future “Phase 4 review”

I. Key achievements of the Anti-Bribery Convention

More than 15 years after its entry into force, the OECD Anti-Bribery Convention remains a landmark in the global fight against bribery and corruption. The Convention is the only international legally binding instrument that specifically addresses the bribing of public foreign officials. It has become a recognized international standard against which the performance of governments can be benchmarked.

All OECD countries and seven non-member economies have ratified and implemented the Convention, which has committed the world’s leading exporting countries to make it a crime to bribe foreign public officials when engaging with them in cross-border business transactions. The 41 parties to the Convention represent a significant proportion of global trade and global outward foreign direct investment.

However, several G20 countries, including China and India, are not yet parties to the Convention, which has the potential to undermine the efforts to create a level playing field for international business. The OECD should therefore use its well-established cooperation with key partners to bring them closer to OECD policy standards, with the ultimate objective to work towards their adherence to the Convention to ensure a global level playing field.

Countries’ implementation and enforcement of the Convention are monitored through a rigorous peer-review monitoring system, which has so far taken place in three phases, with phase 1 evaluating the adequacy of a country’s legislation to implement the Convention, phase 2 assessing whether a country is applying this legislation effectively, and phase 3 focusing on enforcement of the Convention, the 2009 Anti-Bribery Recommendation, and outstanding recommendations from phase 2. Peer pressure has proven to be essential to ensure the highest level of compliance with the Convention.

The OECD has further established an informal exchange of views with business and other stakeholders as an integral part of the review process. BIAC considers that this dialogue is important and should be further reinforced as it helps to better determine the impact that the laws and enforcement have on actual behavior.

II. Initial remarks on a possible phase 4 review

Going forward and building on the successful work of the 3-phase review process, BIAC would like to offer the following initial comments as the OECD is currently reflecting on a possible phase 4 review:

- As a starting point, due consideration should be given to the question about the pros and cons of launching a phase 4, if the phase 3 review process has not been fully accomplished. A possible phase 4 should not take away emphasis, energy and resources from fully implementing and enforcing the Convention. Even if major steps in the implementation of the Convention have been taken, there is still work to be done to ensure that all the recommendations are comprehensively implemented and efficiently enforced. This implies that due emphasis needs to be given to the results of phases 1-3, identifying gaps and areas for further action. While reflecting on the focus of a future phase 4, it is therefore important not to lose sight of the goals of the previous phases to ensure that we do not forget about the “basics”.
- Continued monitoring of a correct implementation and enforcement of the Convention, where necessary, should therefore remain high on the OECD agenda going forward. Peer reviews have been essential to boost governments’ anti-corruption agenda and should be consistently pursued. However, peer reviews often focus on the number of cases or convictions. Going forward, reviews should not be undertaken based on a formalistic approach or focusing mainly on the number of cases, but rather be oriented towards a functional equivalence approach.
- With these considerations in mind, one goal of a future phase 4 review could be to reach greater consistency of international anti-corruption standards, by focusing not only on ‘vertical’ analysis, involving close but separate scrutiny of each signatory’s anti-bribery laws and enforcement, but more on ‘horizontal’ assessment, comparing the laws and practices of the signatories to encourage compliance and additional consistency. As a result, best practices and good examples could be identified, which would encourage countries to make their standards more consistent according to identified best practice measures.
- One important way to foster integrity and accountability is to encourage companies to develop and adopt adequate internal controls, ethics and compliance programs or measures for the purpose of preventing and detecting foreign bribery, as suggested in the OECD Recommendation for Further Combating Bribery of Foreign Public Officials in International Business Transactions (2009). The implementation of the recommendation that member states should require eligible contractors to demonstrate that they have functioning compliance programs should be duly monitored.

- For obvious reasons, phases 1-3 focus on the implementation of the Convention in national legislation and its effective use and enforcement. While a party may use various approaches to fulfil its obligations as mentioned in the commentaries on the Convention, from the business perspective, it is also worthwhile that future reviews further reflect on the following "key performance indicators" to be included in a future phase 4 methodology:
 - Are the parties of the Convention encouraging and steering an effective dialogue with business on how to fight corruption?
 - Are the parties of the Convention supportive of modern anti-corruption measures, for example by engaging in Collective Action (cooperation between stakeholders), Integrity Pacts and compliance monitoring of public infrastructure projects?
 - Do the parties of the Convention encourage and incentivize compliance efforts of companies and acknowledge voluntary disclosure by companies as well as their cooperation with law enforcement?

III. Looking beyond phase 4

From the point of view of securing a truly level playing field for international business, due consideration should be given to the question whether launching a phase 4 would be the most appropriate next step to be taken. It should be born in mind that without a renewed effort to expand adherence to the Convention, the achievements of phases 1-3 would be undermined.

Regardless of whether a phase 4 review is launched and despite the major achievements of the Convention, further efforts are required, including on issues currently not included in the Convention. Open-minded reflections to effectively curb corruption and provide a real level playing field for international business in and outside OECD countries are essential. Therefore the OECD should pay attention to the following issues going forward:

- **Address the demand side:** We strongly encourage the OECD to effectively address the demand side of bribery, i.e. bribe solicitation and extortion by public officials. This would represent a significant step towards a more corruption-free business environment that helps the business community to establish the necessary confidence.
- **Additional adherence:** Seeking continuous expansion of adherence to the Convention, including major emerging economies, will be essential for ensuring a global level playing field and effectively addressing bribery and corruption.
- **Incentivize self-reporting:** We recommend dedicated OECD work on how to encourage and duly recognize voluntary efforts of companies, e.g. by rewarding voluntary self-disclosure of companies. Companies should further have the possibility to mitigate



blacklisting/debarment decisions by implementing effective compliance measures after a corrupt activity was detected and remediated.

- **Avoid double jeopardy (principle of *ne bis in idem*):** We recommend that the OECD “translate” the principle contained in article 4.3 of the OECD Convention into a more immediate and effective rule of international *ne bis in idem* to be introduced in the various anti-bribery national acts and legislations. Avoiding duplicating proceedings for the same offense in several jurisdictions could in many cases accelerate remediation of the underlying causes of the offense.
- **Build capacity:** Education, training and capacity building should remain a key priority to foster a culture of integrity and promote knowledge sharing. This would include education and training of current and future managers, engineers, government officials and civil society leaders, SMEs, but also capacity building campaigns in emerging and developing countries with the aim to reduce compliance risk for companies.
- **Promote public-private dialogue:** Governments and business should promote coordinated partnerships to leverage resources for advancing technical assistance efforts and engage in discussions on how companies can join forces with public institutions of the countries where they do business in order to reduce corruption risks.
- **Set-up high level reporting mechanisms:** High-level Reporting Mechanisms would constitute an important tool for companies to rely on when faced with bribe solicitation including the area of public procurement. This process allows companies to report quickly and effectively on bribe solicitation to a dedicated and high-level institution that is tasked with responding swiftly and in a non-bureaucratic manner.
- We also encourage the OECD as a multi-disciplinary organization to reflect the importance of addressing bribery and corruption in different work areas, including among others, investment, responsible business conduct, governance, to name just a few. The OECD Integrity Forum plays an important role in highlighting the importance of consistency between different initiatives. BIAC looks forward to making an active contribution.