

Review of the 2009 OECD Anti-Bribery Recommendation

Contribution to the public consultation

Business at OECD (BIAC) reiterates its strong support for the review of the 2009 Recommendation for Further Combating Bribery of Foreign Public Officials in International Business Transactions to ensure that it reflects changes in regulatory approaches as well as new trends that have occurred over the last ten years. The fight against corruption has developed significantly. Many businesses have constructively contributed by designing and implementing innovative compliance systems and promoting collective action, which should be reflected.

We believe that the update of the Recommendation is also a unique opportunity to include additional elements in the Recommendation to enhance the effectiveness of the fight against corruption and demonstrate that it is based on a truly comprehensive approach and effective cooperation among governments, business and key stakeholders. This will not only further increase the relevance of the Working Group on Bribery, but also establish the OECD as the leading organization in fostering integrity and fighting corruption in a comprehensive manner.

The following issues, some of which are further elaborated under the specific questions below, should be included in the revised Recommendation:

- **Address the demand side:** The fight against corruption can only be effectively addressed if both the supply side and the demand side are included. The 2018 OECD report on Foreign Bribery Enforcement, which explored whether there is a "flip side" to enforcement actions that ended in sanctions for the supply-side of a foreign bribery transaction, highlighted that much more must be done to effectively sanction public officials accepting bribes as in only one fifth of the 55 concluded foreign bribery cases formal sanctions were imposed on public officials. These findings highlight that the OECD must take decisive steps to address the demand side of bribery, requiring efforts to prevent corruption, and underline the need for clear processes that must be in place, including the possibility of firms to communicate solicitation. The review of the Recommendation provides an excellent opportunity for addressing the demand side in a key OECD instrument and make it part of a review process (see below).
- **Support well-functioning anti-corruption and compliance systems:** Compliance efforts help to foster corporate accountability, strengthen consumer and investor confidence, and are indispensable for the prevention against corruption. To support compliance, internal investigations should be officially recognized and protected. At the same time, it should be recognized that no compliance system can fully guarantee that it can prevent all infringements

in the same way that states cannot guarantee there will be no criminal behavior of their employees. The Recommendation should support companies' proactive engagement by providing positive recognition of effective anti-corruption and compliance systems. It should call for the recognition of compliance systems and self-cleaning measures in public procurement regimes to ensure that companies have the possibility to mitigate debarment decisions by implementing effective compliance measures after a corrupt activity was detected and remediated (see below).

There should be no automatic debarment from public tenders. The risk of a single person committing an infringement rises with a larger number of employees and a higher frequency of change in personnel, therefore larger companies would disproportionately be disadvantaged. Debarment from public tenders needs to be a case-by-case decision taking into account all individual circumstances of the case, not only one factor. The company culture as a whole should be taken into account, not only a single incident. Compliance efforts could also be rewarded by using non-trial-resolutions as a leniency-measure.

- **Encourage voluntary self-disclosure:** The revision of the Recommendation should encourage voluntary self-disclosure by calling for the harmonization of administrative and legal approaches to give companies the certainty they need. This should include leniency programs for corporations, taking into account their compliance efforts, cooperation and self-disclosure (see below). The use of the *Defense of effective regret* should be recommended, as it is another incentive promoting self-disclosure, which also promotes the detection of deficiencies in domestic administration. In this regard leniency programs similar to antitrust law should be recommended. It is also necessary to preserve the legal privileges of “consultants”, such as tax accountants.
- **Digital opportunities:** Reflecting groundbreaking developments over the last decade and benefiting from the OECD Going Digital work, the Recommendation should support the increased use of information and communication technologies as a means to reduce corruption and promote trust and confidence in governments, including in public procurement systems, customs clearance and trade facilitation schemes more broadly.
- **Include expectations for public institutions, including state-owned enterprises (SOEs):** The 2018 OECD publication on SOEs and corruption has shed light on the worrying extent of corrupt behavior in SOEs. The Recommendation should therefore put due emphasis on actions that state members should undertake to prevent corruption from the public sector perspective. It currently largely limits this to “awareness raising activities”. The revised Recommendation should include clear expectations towards SOEs and public institutions more generally to implement internal controls, ethics and compliance requirements, including in the areas of risk assessment, internal anti-bribery policies, awareness, communication and training. Expectations should be at the same level as those for private companies, tailored to the public sector.
- **Promote collective action:** The Recommendation should promote collective action efforts with companies, including SMEs, to effectively and continually eliminate facilitation payments using various means, fostering business codes of conduct, standard interpretations of regulations

impacting companies, promote regulation that ease doing business, increased use of electronic communication and official fee payment systems, training, independent audits and effective grievance mechanisms. Collective action and other integrity initiatives of the private sector should be supported.

- **Include expectations for all stakeholders:** The Recommendation should be comprehensive and consider the responsibilities of business, governments but also other stakeholders, such as non-governmental organizations in the fight against corruption. All stakeholders should be called upon to commit themselves to transparency as well as effective and risk-adequate compliance standards.
- **Avoid double jeopardy:** We recommend that the OECD further clarify the principle contained in article 4.3 of the OECD Convention according to which Parties shall consult with a view to determining the most appropriate jurisdiction for prosecution when more than one Party has jurisdiction over an alleged offence. The review of the Recommendation presents an opportunity to translate this into an effective rule of international *ne bis in idem*. Administrative assistance should be harmonized and competencies in cross-border cases should be defined. Information exchange between prosecution authorities and compliance professionals in companies should be fostered. Avoiding duplicating proceedings for the same offense in several jurisdictions would increase overall efficiency and could in many cases accelerate remediation of the underlying causes of the offense. In the event of several sanctions across several jurisdictions for the same offense, it should be ensured that aggregate sanctions are appropriate in relation to the nature of the offense. In this regard non-trial-resolutions, e. g. settlements, also need to be considered.
- **Update the good practice guidance:** Annex II has been an important source of expected good practice in terms of designing an anti-corruption compliance program. However, it falls short on details on *how* to design an effective anti-corruption compliance program. The compliance elements should be modernized and reinforced, offering countries a generally agreed reference document in this area, taking into consideration the need for a risk-based approach, which could also be fulfilled by SMEs (see below).

Additional information in response to selected questions:

What are your general impressions concerning the effectiveness of the implementation of the 2009 Anti-Bribery Recommendation? Is there a need to increase impact of the OECD anti-bribery monitoring work?

The monitoring work of the OECD Working Group on Bribery regarding the implementation of the OECD Convention and the 2009 Recommendation is often referred to as the gold standard of OECD peer reviews. We value the rigorous peer review process that has been put in place and the publication of the peer review reports. We often cite the process as an example of how other OECD instruments should be reviewed. The outcome of the national peer review reports must be raised at the highest level in governments.

As the OECD is now involved in phase 4 of the review cycle, we underline that this should not take attention away from the fact that not all the recommendations from previous cycles have been comprehensively implemented and efficiently enforced. Existing gaps and areas for further action need to be highlighted. 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 often focus on the number of cases or convictions. To further enhance the effectiveness of the peer review process, an additional goal the OECD review process should be to assess how to reach greater consistency of international anti-corruption standards, and consider how governments are encouraging and steering an effective dialogue with business, how they support modern anti-corruption measures, how they modernize and improve regulations that ease doing business, and how they support compliance efforts of companies. These issues should therefore be prominently included in the updated Recommendation. The current status of anti-corruption practices at a global level should be reviewed with the goal of identifying if there are common minimum standards to be reflected in the Good Practice Guidance.

To facilitate the effective participation of business in the peer review visits, we call upon the OECD to provide us with timely information on the planned visits. To encourage business organizations and companies to engage proactively in the peer review process, we also call upon the OECD to prepare a short guidance on what is expected from participants and the nature of the discussions, including on the level of confidentiality of the information provided by participants.

How could foreign bribery awareness raising, and training actions be further addressed?

The Recommendation should specifically underline the importance of reasonable funding by governments, adequate conditions for public officials, and educational measures at the national and local levels. Governments need to have adequate budgets in place to improve compliance in the public sector, customs authorities and training of public officials in general. We also need to invest in increased cooperation among government agencies to facilitate information exchange, timely access to information and a multi-disciplinary approach. International cooperation in foreign bribery is essential.

Education and training should be supported to build capacity, foster a culture of integrity and promote knowledge sharing between institutions and stakeholders. This would include education and training of future and current managers, engineers, government officials and civil society leaders through short-term and long-term courses. For this purpose, templates for workshops/trainings could be developed, based on lessons learned. International assemblies and platforms for discussion between the stakeholders should also be promoted.

What recommendations could be envisaged to address issues related to foreign bribery, concerning for instance the demand side of bribery or the bribery of officials from sports organizations, bearing in mind the specific focus of the Anti-Bribery Convention and the work carried out in other fora on these issues?

The fact that the OECD Convention has a specific focus does not mean that the Organization should not expand its work bearing in mind that to effectively combat corruption both the supply and the

demand side of the equation must be addressed. In fact, we believe that the OECD is ideally suited to do so, which has also been highlighted by the Secretary General's high-level advisory group on anti-corruption and integrity, which underlined the need to address the demand side.

Further guidance is needed on what public authorities can do internally to prevent bribery. Concrete action is also needed to address difficulties for firms to communicate solicitation to reduce and ultimately eliminate facilitation payments. Building on the initial deployment and experience of a High-Level Reporting Mechanism in some countries, the Recommendation should help encourage setting up similar schemes in other countries.

Among others the following elements should be reflected:

- **Prevention:** Increasing awareness and competencies of government officials, and mechanisms that minimize interactions with government officials for routine transactions, i.e. e-government, reduction of timelines for completion of transactions, streamlining of the number of public authorities involved in one transaction, introduction of single window systems, effective trade facilitation systems, etc. This should also include developing templates for workshops/trainings of civil servants and government officials, including lessons learned sessions and show cases of past infringements as well as methods to prevent them.
- **Reporting:** While a lot of discussion has focused on whistleblowing lines in companies, there are only few whistleblowing possibilities for companies that detect problematic situations. The Recommendation should not only call for the implementation of reporting systems in companies' compliance systems, but also for high-level reporting mechanisms as a tool for companies to rely on when faced with bribe solicitation including in 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. Reporting Mechanisms should be secure, data privacy compliant and fast. Keeping the identity of the reporting person confidential and protected is crucial. The reporting person, if acting in good faith, should be in no danger of unlawful retaliation.
- **Collective action:** We need a coordinated approach to enforce better governance. An effective means of addressing the demand side of bribery transactions would be collective action between governments and the private sector in several areas: a) codes of conduct for public and private employees to prevent the solicitation and payment of bribes; b) clear guidance on regulations governing business operations, in order to eliminate ambiguity in interpreting regulations, and c) projects focusing on improving the regulatory environment to do business, elimination of facilitation payments and d) closer linking of internal company processes and applications with control instruments of the organization.

We also underline the importance of seeking coherence with the OECD guidelines and standards for public sector integrity. Contrary to the anti-bribery instruments, these standards do not create legally binding obligations and do not require formal peer-review monitoring to ensure their implementation and enforcement. The Recommendation should underline the importance of public sector integrity policies and make a link to work in other parts of the OECD. Guidance on public sector integrity should be given additional weight and be subject to regular monitoring.

How could the Good Practice Guidance on Internal Control, Ethics, Compliance annexed to the 2009 Recommendation be revised to reflect evolving global standards?

We have underlined the importance of recognizing corporate compliance efforts when awarding public contracts and when imposing sanctions for breaches. For this it is essential that there is a common understanding of what a good ethics and compliance program entails.

The 2009 Recommendation “Good Practice Guidance on Internal Controls, Ethics and Compliance” provides a useful overall framework for a risk-based ethics and compliance program. The Guidance should be updated to ensure a holistic and comprehensive approach and should take into consideration relevant standards and accepted best practices which have been developed since 2009, including the work of the G20-B20 process.

While recognizing that the guidance is meant to be broad to fit the considerations of different sizes of companies and sectors, it would benefit from further guidance on *how* to put in place an effective program (e.g. how to put the “tone from the top” into action and ensure the relevant procedures are understood by all employees and relevant business partners, how to ensure accessibility of information on the program, how to apply ethics and compliance programs to business partners, communication and training to ensure the necessary skills are available, the link between compliance-driven behavior and human resources policies, etc.). This should also help to avoid the unnecessary proliferation of many local regulations or guidance and provide further clarity.

Implementation of internal reporting channels (whistleblowing-systems) should be recommended. Internal reporting channels should be secure, data privacy compliant and fast. Keeping the identity of the reporting person confidential and protected is crucial, and the reporting person, if acting in good faith, should be in no danger of unlawful retaliation. To prevent abuse of reporting mechanisms, there should be no financial reward using the reporting mechanism, except leniency effects. Recommendations with specific proposals should be published on how to clearly communicate reporting channels, how to ensure the protection of reporting persons, how to ensure confidentiality of identity, which measures would be considered as retaliation and how to prevent such measures. Such Recommendations should consider the financial and other resources of SMEs and adapt requirements accordingly to lessen the burden on SMEs.

Regarding Annex II A) a risk-based due diligence should be recommended pertaining mergers and acquisitions. In A) 6) it should be clarified, that “appropriate and regular oversight of business partners” means continued monitoring for the time of the business relationship. Number A) 7) should be clarified by stating “books, records and accounts have to be maintained in a way reflecting transactions and dispositions accurately and fairly in reasonable detail.”

What recommendations could be envisaged to address the issue of incentivizing anti-bribery compliance?

Companies’ investment in compliance systems, substantial support to collective action projects, companies’ efforts of cooperation to prevent bribery by employees, companies’ pursuit and punishment of wrongdoers, self-disclosure and full cooperation with governments in investigations should be considered as mitigating factors in case companies face penalties.

What recommendation could be envisaged to address awareness-raising?

Education, training and awareness-raising 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. The recommendation should also call for public-private partnerships and increased dialogue to address corruption risks.

What recommendation could be envisaged to address the issue of voluntary self-disclosure?

As highlighted by the 2017 OECD study on the Detection of Foreign Bribery, self-reporting or voluntary disclosure is a major source of detection as 23% of the foreign bribery schemes that have resulted in definitive sanctions since the entry into force of the OECD Anti-Bribery Convention were detected via self-reporting. This underlines the importance of further supporting voluntary self-disclosure by fostering international coherence and certainty.

The recommendation should call upon adhering countries to harmonize their administrative and legal approaches to self-disclosure of compliance breaches, recognize effective reporting (in their own and other jurisdictions), and support adequate self-cleaning. This involves among others aligning laws and regulatory requirements that strengthen voluntary self-disclosure mechanisms through reduced penalties and recognize self-cleaning efforts after misconduct has been detected and remediated, for example, by allowing them to be reconsidered for inclusion in public tenders.

What steps could the Working Group take to further appeal to key non-members to adhere to and implement the Anti-Bribery Convention and related instruments?

The fact that several major economies are not yet parties to the Convention undermines 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, involve them in discussions and capacity building programs, with the ultimate objective to work towards their adherence to the Convention to ensure a global level playing field. The G20 process, in which the OECD is actively involved, should be used to encourage the adherence of G20 countries that are not yet part of the OECD Convention. Non-members should be offered assistance regarding the implementation of individual aspects of the Anti-Bribery Convention. This should include among others publishing sample texts in the different national languages of key non-members on a website, providing material for aspects of a basic implementation, etc.

What steps could the Working Group take to enhance cooperation with international organizations, non-governmental organizations and the business community?

Business at OECD (BIAC) is the official advisory body of business to the OECD, representing over 7 million companies across sectors, both large and small from OECD countries and beyond. We appreciate the opportunity to participate in the consultations with the Working Party on Bribery and thank the Secretariat for the constructive engagement process. To further improve our cooperation, the Working Party could consider sharing strategic papers and studies of the Working Group early in the process to allow us to help shape them as they are being developed.