

## ***Business at OECD* comments on the Draft Revised Recommendation on Further Combating Bribery of Foreign Public Officials in International Business Transactions**

Written contribution to the consultation with external stakeholders

*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 trends and developments that have occurred over the last decade and appreciates the opportunity to contribute to this process, representing the voice of business at the OECD. This contribution builds on and extends our [comments](#) submitted to the public consultation in 2019.

### **An opportunity to ensure comprehensiveness of the 2009 Recommendation**

The fight against corruption has developed significantly since 2009. Many businesses have constructively contributed by designing and implementing corporate compliance systems, recognizing that these are not only necessary in order to act in line with existing rules and regulations, but that they also constitute a strategic investment in the company's long-term viability and success. Innovative compliance systems in particular are becoming increasingly important to tackle new forms of corruption and corrupt practices that may arise. Meanwhile, numerous companies have also significantly stepped up efforts to promote collective action. These developments are promising, and may benefit from further encouragement.

The review of the Recommendation is also a unique opportunity to include additional elements that enable a truly comprehensive approach to the fight against corruption, leveraging SMEs' buy-in and addressing both the demand and supply sides of corruption through joint efforts among governments, business and key stakeholders.

At the same time, digitalization is opening up ever-new opportunities, which may also benefit the fight against corruption and which merit further consideration in the context of the revised Recommendation.

On the part of the OECD, the organization has continued to generate new insights and has led the development of the Guidelines on Anti-Corruption and Integrity in State-Owned Enterprises, constituting a unique standard, supporting governments, as owners of enterprises, with practical guidance on how to fight corruption in SOEs. These additional resources should also be referenced in the revised text.

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Finally, the recent Covid-19 crisis has revealed critical weaknesses of our economies and exposed additional corruption risks that may prevail in times of crisis. The update of the 2009 Recommendation in 2021 may thus also provide a good opportunity to include additional provisions that draw the necessary lessons from recent experiences to foster resilience building going forward.

## Specific comments

Business at OECD (BIAC) is pleased to see that the draft of the revised 2009 Recommendation incorporates many important aspects and concepts, which business views as highly relevant to strengthen the broader framework for the fight against corruption and which we have also highlighted in our previous comments. To that end, we specifically welcome the changes and additions outlined in the following, while proposing a number of additional considerations that in our opinion should be taken into account in the final revised version.

- **The specific role of SMEs:** SMEs play a crucial role in our economies as they are in almost any supply chain and represent the majority of businesses in many countries around the world. At the same time, they are also critical to the fight against corruption, for which the buy-in of all businesses, large small is needed. Yet, SMEs often face tight resource constraints, and hence fear that they may be overburdened with the costs of compliance regulations that are not adapted to their capacity.

We welcome the flexibility provided by the 2009 Recommendation's Annex II comprising the Good Practice Guidance on Internal Controls, Ethics and Compliance, which notes that the guidance is *intended to be adapted by companies, in particular small and medium sized enterprises (hereinafter "SMEs"), according to their individual circumstances* and welcome reference to the need in the General provisions for *awareness-raising in the private sector, in particular among enterprises operating abroad, including small and medium size enterprises, for the purpose of preventing and detecting foreign bribery (IV.ii)*. However, we would encourage the inclusion of more targeted guidance, for instance, on expectations with respect to the application of compliance standards and other frameworks, supporting SMEs in identifying critical elements of compliance programs.

The revised text could further explore the potential of incentives that encourage SMEs to implement anti-corruption standards and promote innovative compliance models. It could also highlight more explicitly in Annex 2, paragraph B) that business organizations can play an important role not only *in assisting companies, in particular SMEs, in the development of effective internal control, ethics, and compliance programmes*, but also in informing policy makers about the challenges and opportunities that SMEs may face on the ground.

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- **Addressing the demand side of bribery:** We have consistently underlined that, in order to ensure a holistic approach to the fight against corruption, it must be ensured that bribery is addressed at every level and that both private-sector representatives on the supply side and public officials on the demand side soliciting or accepting bribes face a credible risk of being sanctioned.

To that end, we highly appreciate the inclusion of a dedicated section on the demand side of bribery, calling for more awareness raising and training of public officials (XII.i., XII.ii., XXIII), coordinated actions with a view to engage host countries on addressing the solicitation and acceptance of bribes (XII.iii.) and introducing the recommendation to *foster, facilitate or, engage or participate in anti-bribery collective action initiatives with private and public sector representatives, as well as civil society organisations, aiming to address foreign bribery and bribe solicitation* (XII.iv).

In addition to these critical considerations, the reviewed text could further include provisions calling for efforts to proactively prevent corruption, including tailored integrity/corruption risk training for public officials, clear definitions of processes and responsibilities with appropriate oversight and efforts to foster a broader culture of integrity. It is also important to establish and implement policies and processes where public officials are required to disclose actual, potential (and perceived) conflicts which may impact their decision making. Such measures should be accompanied by targeted communication that helps to raise awareness and develop a sound understanding of the consequences of corruption, including its human rights impacts. The review of the 2009 Recommendation may also be an opportunity to include additional provisions that create expectations for disclosures by public officials as well as public officials giving up decision-making roles and business influence in the private sector during, and if appropriate for a certain timeperiod following, their tenure.

Moreover, in light of the experiences of the recent Covid-19 crisis, which necessitated accelerated decision-making and emergency public procurement, we would further recommend introducing additional references to the importance of ensuring sound internal controls and robust emergency protocols.

- **Establishing sound reporting channels:** While we strongly support the inclusion of provisions calling to facilitate reporting, by establishing and publicising *clear policies and procedures by which any individual, including public officials, can report suspicions of bribery of foreign public officials and related offences to competent authorities, including by allowing for confidential and, where appropriate, anonymous reporting* (XXI.i.), we would recommend the OECD to make explicit reference to reporting channels for bribe solicitation and the concept of high level reporting mechanisms (HLRMs), which was also explored in the 2020 OECD study on [Tackling Bribe Solicitation Using the High-Level Reporting Mechanism for Preventing Bribery](#). The text should also underline that such reporting channels must also be easily accessible by companies facing bribe solicitation.

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It is recommended to align with other key policy makers such as European Union on internal and external misconduct reporting obligations in order to reduce the burden for the private sector resulting from misaligned regulation. In particular, there are certain misalignments between the current EU and other DP regulations and the Anti-Corruption frameworks including relevant expectations on companies to implement effective corporate compliance (e.g., AB DD, compliance monitoring, internal investigations and reporting). The OECD could play an instrumental role in aligning or at least inviting the EU and other countries to help resolving these challenges in the Good Practice Guidance. As part of this engagement, it should be clarified and aligned with the EU (EC) specifically that larger organizations / companies can use a uniform and central whistleblower scheme within the group in order to ensure an effective and efficient misconduct reporting program that provides strong whistleblower protection.

- **Whistle-blower protection:** We strongly support the additional provisions under XXII (on the protection of whistle-blowers, which we consider an essential element in the fight against corruption. However, we would propose to abstain from recommending countries to *consider introducing financial and other rewards as an incentive for making reports that qualify for protection* (XII. xi).
- **Supporting corporate compliance:** As outlined at the outset, companies have gained considerable experience in implementing corporate compliance programs. Yet, there may still be room for additional buy-in from companies of all sectors and sizes. To support such investments, government need to set up a conducive and enabling policy environment.
  - To that end, we welcome the inclusion of additional provisions that can help to encourage and support corporate compliance efforts. We specifically recognise the recommendation in XV.ii. & XXIII.D.c. to consider voluntary disclosures; full cooperation, the acceptance of responsibility; and remediation as well as the development of effective internal controls, ethics and compliance programmes as mitigating factors and the call in XXIII.D.a. to encourage government agencies to consider compliance programmes and other efforts to detect and prevent foreign bribery in their decisions to grant public advantages. As far as the latter is concerned, we underline the need to abstain from overly high requirements on compliance programs as a basis for granting such advantages, and stress the importance of maintaining sufficient flexibility in order not to overburden SMEs, which may face distinct resource constraints that may limit their possibilities of establishing comprehensive compliance programs. Meanwhile, the establishment of dedicated incentives for companies to foster the adoption of advanced technology in the context of their compliance programs (i.e. Artificial Intelligence, data analytics, etc.) may help or further advance the fight against corruption. That said, we strongly advocate for not implementing the currently proposed approach

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that requires a penalization in any case of a misconduct. Several countries allow for not sanctioning a company if it is able to prove that an effective compliance system was designed and implemented. There cannot be a 100% guarantee of no misconduct.

The call to *provide training and guidance to their relevant government agencies, on how internal controls, ethics and compliance programmes or measures are taken into consideration in government agencies' decision-making processes, and ensure such guidance is publicised and easily accessible for companies (XXIII.D.b.)* is further essential to ensure transparency and fairness of the process. Beyond this, we propose to include additional language that calls on governments to provide greater clarity around their expectations on what constitutes an effective compliance program and encourage governments to explore avenues to ensure the effectiveness of corporate compliance programs, for instance by incentivizing businesses to devote resources to assuring impact of their programs and promoting public-private partnerships as well as technological solutions.

- **Managing debarment decisions:** Debarment from public procurement processes can serve as powerful tool to deter bribery. Yet, the possibility of mitigating debarment decisions when a company has engaged in self-cleaning measures and developed sound compliance programs, rectifying their undoing also represents a strong incentive for companies to develop anti-corruption programs.

In light of this, we appreciate the recommendation that *where appropriate and to the extent possible, in making such decisions on suspension and debarment, member countries take into account remedial measures developed by companies to address foreign bribery risks, including internal controls, ethics and compliance programmes or measures (XXIV.iii.)*. On top of this, the text should call on governments to consider debarment on a case-by-case basis. It is further important to ensure that debarment follows observations about deficiencies in the broader business environment, rather than individual incidents.

- **The use of non-trial resolutions:** In light of the findings of the 2019 OECD study on [Resolving Foreign Bribery Cases with Non-Trial Resolutions](#), which found that foreign bribery cases have increasingly been resolved through non-trial resolutions, we welcome the inclusion of the recommendation to make use of this tool, with the clear understanding that this needs to be guided by a number of principles ensuring transparency and appropriate oversight, among others.
- **Establishing expectations for state owned enterprises (SOEs):** The role of SOEs, making up already more than a fifth of the world's largest companies and becoming increasingly active in international markets, is constantly growing. Meanwhile, corruption risks in SOEs tend to be elevated, as confirms the 2018 OECD study on [State-Owned Enterprises And Corruption: What are the risks and what can be done?](#) according to which two in five SOE insiders reported

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to have witnessed corruption or irregularities in the last three years. In light of this, we strongly endorsed the adoption of the 2019 OECD Council Recommendation on the Guidelines on Anti-Corruption and Integrity in State-Owned Enterprises (ACI Guidelines), which constitute the first international instrument to offer the state, in its role as an enterprise owner, support in fighting corruption and promoting integrity.

Relatedly, we appreciate that the revised text makes reference to the ACI Guidelines in the preamble and that it clarifies that the Good Practice Guidance contained in Annex II is addressed to all companies, including those that are public owned. XXIII.C.a. specifically calls on governments to *encourage companies, including state-owned enterprises to develop and adopt adequate internal controls, ethics and compliance programmes or measures for the purpose of preventing and detecting foreign bribery, taking into account the Good Practice Guidance on Internal Controls, Ethics, and Compliance, set forth in Annex II.* We consider this provision one of the core advancements in the revised text, addressing the important role of the state to lead and walk the talk, while levelling the playing field for business more broadly.

- **Promoting collective action:** We have consistently underlined the important role collective action efforts play to advance the fight against corruption and have encouraged OECD to include additional references to the promotion of collective action in the revised 2009 Recommendation. The updated text recognizes upfront the role of collective action and partnerships between the private and public sector in awareness raising activities (IV.ii) and further encourages governments to foster, facilitate, engage or participate in collective action to address bribe solicitation (XII.iv). Annex II moreover stresses the role that business organisations and professional associations can play to provide *general advice and support on resisting extortion and solicitation, including, where appropriate, by promoting collective action.* These references are highly welcome. In addition, a much broader exchange of experiences and insights between private companies and the countries' public sector/SOEs should be mentioned (As an example, the secondment of private sector compliance experts to SOEs can lead to the building of expertise in critical topics, including anti-bribery and ethical culture, and contribute to enhanced compliance capacity.)

However, we note that the suggested application of collective actions remains limited. To that end, we encourage the OECD to consider adding references to promote collective action that also aims at eliminating small facilitation payments, developing and scaling up the use of technology to drive transparency across potentially corrupt economic activity and business networks, fostering codes of conduct, providing standard interpretations of regulations affecting companies and disseminating best practices etc.

- **Handling multijurisdictional cases:** Avoiding duplicative proceedings for the same offense in several jurisdictions can help to increase overall efficiency and could, in many cases, accelerate remediation of the underlying causes of the offense.

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In light of this, we welcome the additional recommendations with a view to harmonize administrative processes, calling on governments *when more than one member country has jurisdiction over an alleged offence described in the Convention, to consider, where appropriate, consultations during the investigation, prosecution and conclusion of the case, in conformity with their legal systems (XIX.C.b.)* We further appreciate that XIX.C.b. notes that *Member countries should also pay due attention to the risk of prosecuting the same natural or legal person in different jurisdictions for the same criminal conduct.* However, we recommend the OECD to further encourage governments to respect the non bis in idem principle contained in article 4.3 of the OECD Anti-Bribery Convention, which states that *when more than one Party has jurisdiction over an alleged offence described in this Convention, the Parties involved shall, at the request of one of them, consult with a view to determining the most appropriate jurisdiction for prosecution so as to avoid double jeopardy.* The text should further contain additional provisions to ensure that in the event of several sanctions across several jurisdictions for the same offense, aggregate sanctions are appropriate in relation to the nature of the offense.

- **Annex II:** The Good Practice Guidance contained in Annex II has been an important source of expected good practice for companies. To that end, we appreciate the inclusion of additional provisions, including on a strong and effective protected report framework (A.12a), on a risk-based due diligence for mergers and acquisitions (A.14) and the reference to a *culture of compliance* (A.9) as well as the clarification in A.6.i. , *that appropriate and regular oversight of business partners means continued monitoring for the time of the business relationship.* The text of the revised Guidance helps to further specify what elements are needed for the design of a robust and effective anti-corruption compliance program. However, Annex II would benefit from additional clarifications on how companies can implement these elements and more specifically, how SMEs can ensure that they meet expectations with respect to compliance that are aligned with their resources and capacities. To that end, we recommend to draw for the revision of Annex II from the findings of the 2020 OECD study on [Corporate Anti-Corruption Compliance Drivers, Mechanisms, and Ideas for Change](#), which provides further insights into why companies adopt compliance mechanisms, how they assess their corruption risk, what measures companies adopt, how they manage their resources and what they identify as challenges for implementation for anti-corruption programmes. Best practices identified in the context of the B20 & G20 anti-corruption and integrity work could further help to inform the update of Annex II.

On the other hand, we strongly suggest to change the proposal in the Good Practice Guidance that the Chief Compliance Officer (CCO) should have an adequate level of autonomy, because any CCO reporting into the CEO will not be independent or autonomous. However, a CCO is much more effective if he is able to influence the highest level of management in a company and has direct access to the supervisory board. We suggest to consider a wording in the spirit of the following proposal: “...a senior compliance officer, with adequate level of **authority**,

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resources, experience and qualification who has access to the supervisory body of the company.”

In addition, *Business at OECD* (BIAC) recommends further elaboration on the following issues:

- **SOEs, NGO and other organizations:** Where the text of the OECD draft refers to “companies,” SOEs, NGOs and other organization types should also be included or mentioned to ensure a level playing field by establishing the same expectations for private and public companies as well as NGOs and other organizations or institutions. Except for the section XXIII.C. and the GPG, this is currently not consistently done (e.g., missing in section XXIII.B. – Independent External Audit).
- **Integrity of Public Institutions and in Public Processes (Public Sector Integrity):** While the current draft expressly covers SOE and recommends to raise awareness of bribe solicitation and training of Public Officials, it is silent on any measures countries should take to ensure, maintain or increase public integrity. We suggest that the OECD consider including a dedicated section around this topic which should leverage the current work of the OECD in this area. In particular, the following aspects of the OECD Recommendation on Public Integrity (similar to the GPG for private entities) could be mentioned to strengthen countries’ Public Sector Integrity and to deter domestic and foreign bribery:
  - Establish an Integrity System
  - Create a Culture of Public Integrity
  - Ensure Effective Accountability (which includes also Risk Management and a transparent and open government - certain other aspects such as enforcement is already covered in the draft)
- **National Anti-Corruption Strategies / Plans:** If the topic of “Public Sector Integrity” will not be included as a separate section or covered more broadly, we recommend that countries develop and implement National Anti-Corruption Strategies / Plans taking into account the guidance provided by the G20 (2020 G20 High-Level Principles for the Development and Implementation of National Anti-Corruption Strategies). These plans should include amongst other issues:
  - the identification of areas (sectors, institutions or threats and vulnerabilities at the national and international levels) that pose a higher risk in order to define effective response actions;
  - the commitment to fostering private sector Collective Action efforts, both locally and on a global level, to help mitigate related risks.

It is also important to establish mechanisms to measure corruption based on reliable and generally accepted corruption indicators for the purpose of understanding the effectiveness of national anti-corruption frameworks (incl. Policies, Processes, Strategies and risk mitigation measures)



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- **Digital opportunities:** Digital information and communication technologies have greatly evolved over the course of the last decade and have not only become omnipresent in our daily lives, but they can also play an important role in combatting corruption. The use of digital national registers of beneficial ownership data, for instance, can help to reduce illicit financial flows while the digitization of government services and administrative procedures, including licensing, granting of permits, customs clearance, trade facilitation schemes, public procurement and supplier due diligence can foster transparency and accountability in public sector processes. Relatedly, standardised document templates, for instance in the context of certificates of origin for trade, can help to reduce opportunities for bribing public officials, who are examining these documents. Another approach worth exploring is the adoption of the cashless payment systems, which allow for tracking of payments, while also facilitating tax revenue collection. The OECD should also use the opportunity to promote “open and transparent governments standards and processes”; a reference to the 2020 G20 High Level Principles for Promoting Public Sector Integrity Through the Use of Information and Communications Technologies (ICT) could be included, too.

On the private sector front, the development and adoption of blockchain and distributed ledger technologies can allow companies to improve their internal control system through real-time analysis, and promote collaboration across networks to identify patterns indicative of corruption in payment, contractual, or compliance database information. The Recommendation should therefore encourage increased use of information technologies both in the public and private sectors with additional references to opportunities that capture advances in digitization, data analytics, blockchain and Artificial Intelligence.

- **Include expectations for all stakeholders:** In order for the Recommendation to be truly comprehensive, the text should consider not only the responsibilities of business, governments but also those of other stakeholders, such as non-governmental organizations in the fight against corruption. All stakeholders should be called upon to commit to transparency as well as effective and risk-adequate compliance standards.
- **Different levels of government:** While the Recommendation currently comprises recommendations for adhering governments more broadly, the revised text could also benefit from a clear recognition that countries should consider given recommendations across all levels of government. Local government bodies, depending on the degree of decentralisation, may in some instances bear considerable decision-making powers. Yet, at the local level, interactions often tend to be more direct and accountability tends to be more disperse, thus elevating corruption risks.
- **Gender and Corruption:** The draft recognizes the need to improve the understanding of linkages between gender and corruption, including bribery of foreign public officials, how corruption can affect genders differently, and the importance of promoting gender equality and women’s empowerment. This statement reflects the recent and important international

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developments that gender and corruption should be focus of global agendas. However, there are no further recommendations included for countries and governments to consider (which reflects the reality that initiatives in this area have been limited over the last years.)

- **Addressing corruption at city and municipal level:** Half the global population lives in cities and municipals. Large cities have increased their importance for international business such as infrastructure projects. Moreover, international anti-corruption standards and local anti-corruption laws are applied locally. Hence, deterring corruption at a local / city / municipal level should be a key focus of countries to fight domestic but also foreign bribery. As the OECD Convention intends to cover not only national governments and their officials but public officials at “all levels and subdivisions of government, from national to local” (as referred to in Article 1(4)b) of the convention,) it is important to stress that local anti-corruption efforts are critical factors for the success of the broader national anti-corruption frameworks. Consequently, the draft could be used to emphasize the criticality of those local efforts including transparency and strong local governance . They should be a focus of national anti-corruption strategies too.