



**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
INVESTMENT COMMITTEE**

Working Group on Bribery in International Business Transactions

**RECOMMENDATION OF THE COUNCIL FOR FURTHER COMBATING BRIBERY OF FOREIGN
PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS**

This document is submitted to the Working Group on Bribery for approval under written procedure. In the absence of comments on this text to the Secretariat by Wednesday 28 October, this Recommendation will be forwarded to the Investment Committee for approval by this Committee under written procedure.

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**RECOMMENDATION OF THE COUNCIL FOR FURTHER COMBATING BRIBERY OF
FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS**

[26 November 2009]

THE COUNCIL,

Having regard to Articles 3, 5a) and 5 b) of the Convention on the Organisation for Economic Co-operation and Development of 14 December 1960;

Having regard to the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions of 21 November 1997 (hereinafter “the OECD Anti Bribery Convention”);

Having regard to the Revised Recommendation of the Council on Bribery in International Business Transactions of 23 May 1997 [C(97)123/FINAL] (hereinafter “the 1997 Revised Recommendation”) to which the present Recommendation succeeds;

Having regard to the Recommendation of the Council on Tax Measures for Further Combating Bribery of Foreign Public Officials in International Business Transactions of 25 May 2009 [C(2009)64], the Recommendation of the Council on Bribery and Officially Supported Export Credits of 14 December 2006 [C(2006)163], the Recommendation of the Development Assistance Committee on Anti-corruption Proposals for Bilateral Aid Procurement of 7 May 1996 [DCD/DAC(96)11/FINAL], and the OECD Guidelines for Multinational Enterprises of 27 June 2000 [C(2000)96/REV1];

Considering the progress which has been made in the implementation of the OECD Anti Bribery Convention and the 1997 Revised Recommendation and reaffirming the continuing relevance of the OECD Anti Bribery Convention and the Commentaries to this Convention;

Considering that bribery of foreign public officials is a widespread phenomenon in international business transactions, including trade and investment, raising serious moral and political concerns, undermining good governance and sustainable economic development, and distorting international competitive conditions;

Considering that all countries share a responsibility to combat bribery of foreign public officials in international business transactions;

Reiterating the importance of the vigorous and comprehensive implementation of the OECD Anti Bribery Convention, particularly in relation to enforcement, as reaffirmed in the Statement on a Shared Commitment to Fight Against Foreign Bribery, adopted by Ministers of the Parties to the OECD Anti Bribery Convention on 21 November 2007, the Statement on Bribery in International Business Transactions, adopted by the Working Group on Bribery on 19 June 2009, and the Conclusions adopted by the OECD Council Meeting at Ministerial Level on 25 June 2009 [C/MIN(2009)5/FINAL];

Recognising that the OECD Anti Bribery Convention and United Nations Convention against Corruption (UNCAC) are mutually supporting and complementary, and that ratification and implementation of the UNCAC supports a comprehensive approach to combating the bribery of foreign public officials in international business transactions;

Welcoming other developments which further advance international understanding and co-operation regarding bribery in international business transactions, including actions of the Council of Europe, the European Union and the Organisation of American States;

Welcoming the efforts of companies, business organisations and trade unions as well as other non-governmental organisations to combat bribery;

Recognising that achieving progress in this field requires not only efforts on a national level but also multilateral co-operation, as well as rigorous and systematic monitoring and follow-up;

General

I. **NOTES** that the present Recommendation on Combating Bribery of Foreign Public Officials in International Business Transactions shall apply to OECD Member countries and other countries party to the OECD Anti Bribery Convention (hereinafter “Member countries”).

II. **RECOMMENDS** that Member countries continue to take effective measures to deter, prevent and combat the bribery of foreign public officials in connection with international business transactions.

III. **RECOMMENDS** that each Member country take concrete and meaningful steps in conformity with its jurisdictional and other basic legal principles to further examine the following areas:

- i) awareness raising initiatives in the public and private sector for the purpose of preventing and detecting foreign bribery;
- ii) criminal laws and their application, in accordance with the OECD Anti Bribery Convention, as well as sections IV, V, VI and VII, and the Good Practice Guidance as set out in Annex 1 to this Recommendation;
- iii) tax legislation, regulations and practice, to eliminate any indirect support of foreign bribery, in accordance with the 2009 Council Recommendation on Tax Measures for Further Combating Bribery of Foreign Public Officials in International Business Transactions, and section VIII of this Recommendation;
- iv) provisions and measures to ensure the reporting of foreign bribery, in accordance with section IX of this Recommendation;
- v) company and business accounting, external audit, as well as internal control, ethics, and compliance requirements and practices, in accordance with section X of this Recommendation;
- vi) laws and regulations on banks and other financial institutions to ensure that adequate records would be kept and made available for inspection and investigation;

- vii) public subsidies, licences, public procurement contracts, contracts funded by official development assistance, officially supported export credits, or other public advantages, so that advantages could be denied as a sanction for bribery in appropriate cases, and in accordance with sections XI and XII of this Recommendation;
- viii) civil, commercial, and administrative laws and regulations, to combat foreign bribery;
- ix) international co-operation in investigations and other legal proceedings, in accordance with section XIII of this Recommendation.

Criminalisation of Bribery of Foreign Public Officials

- IV. **RECOMMENDS**, in order to ensure the vigorous and comprehensive implementation of the OECD Anti Bribery Convention, that Member countries should take fully into account the Good Practice Guidance set forth in Annex 1 hereto, which is an integral part of this Recommendation.
- V. **RECOMMENDS** that Member countries undertake to periodically review their laws implementing the OECD Anti Bribery Convention and their approach to enforcement in order to effectively combat international bribery of foreign public officials.
- VI. **RECOMMENDS**, in view of the corrosive effect of small facilitation payments, particularly on sustainable economic development and the rule of law that Member countries should:
 - i) undertake to periodically review their policies and approach on small facilitation payments in order to effectively combat the phenomenon; and
 - ii) encourage companies to prohibit or discourage the use of small facilitation payments in internal company controls, ethics and compliance programmes or measures, recognising that such payments are generally illegal in the countries where they are made, and must in all cases be accurately accounted for in such companies' books and financial records.
- VII. **URGES** all countries to raise awareness of their government personnel on their domestic bribery and solicitation laws with a view to stopping the offering, promising, giving, solicitation and acceptance of small facilitation payments.

Tax Deductibility

- VIII. **URGES** Member countries to:
 - i) fully and promptly implement the 2009 Council Recommendation on Tax Measures for Further Combating Bribery of Foreign Public Officials in International Business Transactions, which recommends in particular “that Member countries and other Parties to the OECD Anti Bribery Convention explicitly disallow the tax deductibility of bribes to foreign public officials, for all tax purposes in an effective manner”, and that “in accordance with their legal systems” they “establish an effective legal and administrative framework and provide guidance to facilitate reporting by tax authorities of suspicions of foreign bribery arising out of the performance of their duties, to the appropriate domestic law enforcement authorities”; and

- ii) support the monitoring carried out by the Committee on Fiscal Affairs as provided under the 2009 Council Recommendation on Tax Measures for Further Combating Bribery of Foreign Public Officials in International Business Transactions.

Reporting Foreign Bribery

IX. **RECOMMENDS** that Member countries should ensure that:

- i) easily accessible channels are in place for the reporting of suspected acts of bribery of foreign public officials in international business transactions, in accordance with their legal principles;
- ii) appropriate measures are in place to facilitate reporting by public officials, in particular those posted abroad, directly or indirectly through an internal mechanism, to law enforcement authorities of suspected acts of bribery of foreign public officials in international business transactions detected in the course of their work, in accordance with their legal principles;
- iii) appropriate measures are in place to protect from discriminatory or disciplinary action employees who make reports in good faith and on reasonable grounds to the competent authorities on suspected acts of bribery of foreign public officials in international business transactions.

Accounting Requirements, External Audit, and Internal Controls, Ethics and Compliance

X. **RECOMMENDS** that Member countries take the steps necessary, taking into account where appropriate the individual circumstances of a company, including its size, type, legal structure and geographical and industrial sector of operation, so that laws, rules or practices with respect to accounting requirements, external audits, and internal controls, ethics and compliance programmes or measures are in line with the following principles and are fully used in order to prevent and detect bribery of foreign public officials in international business, in accordance with their legal principles.

A. Adequate accounting requirements

- i) Member countries should, pursuant to Article 8 of the OECD Anti Bribery Convention, take such measures as may be necessary, within the framework of their laws and regulations regarding the maintenance of books and records, financial statement disclosures, and accounting and auditing standards, to prohibit the establishment of off-the-books accounts, the making of off-the-books or inadequately identified transactions, the recording of non-existent expenditures, the entry of liabilities with incorrect identification of their object, as well as the use of false documents, by companies subject to those laws and regulations, for the purpose of bribing foreign public officials or of hiding such bribery;
- ii) Member countries should require companies to disclose in their financial statements the full range of material contingent liabilities;
- iii) Member countries should, pursuant to Article 8 of the OECD Anti Bribery Convention, provide effective, proportionate and dissuasive civil, administrative or criminal penalties for such omissions and falsifications in respect of the books, records, accounts and financial statements of such companies.

B. Independent External Audit

- i) Member countries should consider whether requirements on companies to submit to external audit are adequate;
- ii) Member countries and professional associations should maintain adequate standards to ensure the independence of external auditors which permits them to provide an objective assessment of company accounts, financial statements and internal controls;
- iii) Member countries should require the external auditor who discovers indications of a suspected act of bribery of a foreign public official to report this discovery to management and, as appropriate, to corporate monitoring bodies;
- iv) Member countries should encourage companies that receive reports of suspected acts of bribery of foreign public officials from an external auditor to actively and effectively respond to such reports;
- v) Member countries should consider requiring the external auditor to report suspected acts of bribery of foreign public officials to competent authorities independent of the company, such as law enforcement or regulatory authorities, and for those countries that permit such reporting, ensure that auditors making such reports reasonably and in good faith are protected from legal action.

C. Internal controls, ethics, and compliance

Member countries should encourage:

- i) companies to develop and adopt adequate internal controls, ethics and compliance programmes or measures for the purpose of preventing and detecting foreign bribery;
- ii) business associations and professional organisations, where appropriate, in their efforts to encourage and assist companies, in particular small and medium size enterprises, in developing internal controls, ethics, and compliance programmes or measures for the purpose of preventing and detecting foreign bribery;
- iii) company management to make statements in their annual reports or otherwise publicly disclose their internal controls, ethics and compliance programmes or measures, including those which contribute to preventing and detecting bribery;
- iv) the creation of monitoring bodies, independent of management, such as audit committees of boards of directors or of supervisory boards;
- v) companies to provide channels for communication by, and protection for, persons not willing to violate professional standards or ethics under instructions or pressure from hierarchical superiors, as well as for persons willing to report breaches of the law or professional standards or ethics occurring within the company in good faith and on reasonable grounds, and should encourage companies to take appropriate action based on such reporting;
- vi) their government agencies to consider, as concerns international business transactions, and as appropriate, internal controls, ethics, and compliance programmes or measures in their decisions to grant public advantages, including public subsidies, licences, public procurement

contracts, contracts funded by official development assistance, and officially supported export credits.

Public Advantages, including Public Procurement

XI. RECOMMENDS:

- i) Member countries' laws and regulations should permit authorities to suspend, to an appropriate degree, from competition for public contracts or other public advantages, including public procurement contracts and contracts funded by official development assistance, enterprises determined to have bribed foreign public officials in contravention of that Member's national laws and, to the extent a Member applies procurement sanctions to enterprises that are determined to have bribed domestic public officials, such sanctions should be applied equally in case of bribery of foreign public officials;¹
- ii) In accordance with the 1996 Development Assistance Committee Recommendation on Anti-corruption Proposals for Bilateral Aid Procurement, Member countries should require anti-corruption provisions in bilateral aid-funded procurement, promote the proper implementation of anti-corruption provisions in international development institutions, and work closely with development partners to combat corruption in all development co-operation efforts;²
- iii) Member countries should support the efforts of the OECD Public Governance Committee to implement the principles contained in the 2008 Council Recommendation on Enhancing Integrity in Public Procurement [C(2008)105], as well as work on transparency in public procurement in other international governmental organisations such as the United Nations, the World Trade Organisation (WTO), and the European Union, and are encouraged to adhere to relevant international standards such as the WTO Agreement on Government Procurement.

Officially Supported Export Credits

XII. RECOMMENDS:

- i) Countries Party to the OECD Anti Bribery Convention that are not OECD Members should adhere to the 2006 OECD Council Recommendation on Bribery and Officially Supported Export Credits;
- ii) Member countries should support the efforts of the OECD Working Party on Export Credits and Credit Guarantees to implement and monitor implementation of the principles contained in the 2006 OECD Council Recommendation on Bribery and Officially Supported Export Credits.

¹ Member countries' systems for applying sanctions for bribery of domestic officials differ as to whether the determination of bribery is based on a criminal conviction, indictment or administrative procedure, but in all cases it is based on substantial evidence.

² This paragraph summarises the DAC recommendation, which is addressed to DAC members only, and addresses it to all OECD Members and eventually non-member countries which adhere to the Recommendation.

International Co-operation

XIII. **RECOMMENDS** that Member countries, in order to combat bribery of foreign public officials in international business transactions, in conformity with their jurisdictional and other basic legal principles, take the following actions:

- i) consult and otherwise co-operate with competent authorities in other countries, and, as appropriate, international and regional law enforcement networks involving Member and non-Member countries, in investigations and other legal proceedings concerning specific cases of such bribery, through such means as the sharing of information spontaneously or upon request, provision of evidence, extradition, and the identification, freezing, seizure, confiscation and recovery of the proceeds of bribery of foreign public officials;
- ii) seriously investigate credible allegations of bribery of foreign public officials referred by international governmental organisations, such as the international and regional development banks;
- iii) make full use of existing agreements and arrangements for mutual international legal assistance and where necessary, enter into new agreements or arrangements for this purpose;
- iv) ensure that their national laws afford an adequate basis for this co-operation, in particular in accordance with Articles 9 and 10 of the OECD Anti Bribery Convention;
- v) consider ways for facilitating mutual legal assistance between Member countries and with non-Member countries in cases of such bribery, including regarding treaty requirements and evidentiary thresholds for some Member countries.

Follow-up and institutional arrangements

XIV. **INSTRUCTS** the Working Group on Bribery in International Business Transactions, to carry out an ongoing programme of systematic follow-up to monitor and promote the full implementation of the OECD Anti Bribery Convention and this Recommendation, in co-operation with the Committee for Fiscal Affairs, the Development Assistance Committee, the Investment Committee, the Public Governance Committee, the Working Party on Export Credits and Credit Guarantees, and other OECD bodies, as appropriate. This follow-up will include, in particular:

- i) continuation of the programme of rigorous and systematic monitoring of Member countries' implementation of the OECD Anti Bribery Convention and this Recommendation to promote the full implementation of these instruments, including through an ongoing system of mutual evaluation, where each Member country will be examined in turn by the Working Group on Bribery, on the basis of a report which will provide an objective assessment of the progress of the Member country in implementing the OECD Anti Bribery Convention and this Recommendation, and which will be made publicly available;
- ii) receipt of notifications and other information submitted to it by the Member countries concerning the authorities which shall serve as channels of communication for the purpose of facilitating international cooperation on implementation of the OECD Anti Bribery Convention and this Recommendation;

- iii) regular reporting on steps taken by Member countries to implement the OECD Anti Bribery Convention and this Recommendation, including non-confidential information on investigations and prosecutions;
- iv) voluntary meetings of law enforcement officials directly involved in the enforcement of the foreign bribery offence to discuss best practices and horizontal issues relating to the investigation and prosecution of the bribery of foreign public officials;
- v) examination of prevailing trends, issues and counter-measures in foreign bribery, including through work on typologies and cross-country studies;
- vi) development of tools and mechanisms to increase the impact of monitoring and follow-up, and awareness raising, including through the voluntary submission and public reporting of non-confidential enforcement data, research, and bribery threat assessments;
- vii) provision of regular information to the public on its work and activities and on implementation of the OECD Anti Bribery Convention and this Recommendation.

XV. **NOTES** the obligation of Member countries to co-operate closely in this follow-up programme, pursuant to Article 3 of the Convention on the Organisation for Economic Co-operation and Development of 14 December 1960, and Article 12 of the OECD Anti Bribery Convention.

XVI. **FURTHER INSTRUCTS** the Working Group on Bribery in International Business Transactions to examine on a priority basis the issue of good practices by companies in preventing and detecting foreign bribery, and to report its conclusions to Council by the end of March 2010, with a view to the adoption of Good Practice Guidance as an additional Annex to this Recommendation by June 2010.

Co-operation with non members

XVII. **APPEALS** to non-Member countries that are major exporters and foreign investors to adhere to the OECD Anti Bribery Convention and this Recommendation and participate in any institutional follow-up or implementation mechanism.

XVIII. **INSTRUCTS** the Working Group on Bribery in International Business Transactions to provide a forum for consultations with countries which have not yet adhered, in order to promote wider participation in the OECD Anti Bribery Convention and this Recommendation and its follow-up.

Relations with international governmental and non-governmental organisations

XIX. **INVITES** the Working Group on Bribery in International Business Transactions, to consult and co-operate with the international organisations and international financial institutions active in the fight against bribery of foreign public officials in international business transactions and consult regularly with the non-governmental organisations and representatives of the business community active in this field.

ANNEX 1

Good Practice Guidance on Implementing Specific Articles of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions

Having regard to the findings and recommendations of the Working Group on Bribery in International Business Transactions in its programme of systematic follow-up to monitor and promote the full implementation of the OECD Convention on Combating Bribery in International Business Transactions (the OECD Anti Bribery Convention), as required by Article 12 of the Convention, good practice on fully implementing specific articles of the Convention has evolved as follows:

A) Article 1 of the OECD Anti Bribery Convention: The Offence of Bribery of Foreign Public Officials

- 1) Article 1 of the OECD Anti Bribery Convention does not provide a defence or exception where the foreign public official solicits a bribe.
- 2) Member countries should conduct public awareness-raising and provide specific written guidance to the public on their laws implementing the OECD Anti-Bribery Convention and the Commentaries to the Convention.
- 3) Member countries should provide information and training as appropriate to their governmental personnel posted abroad on their laws implementing the OECD Anti-Bribery Convention, so that such personnel can provide basic information to their companies in foreign countries and appropriate assistance when such companies are confronted with bribe solicitations.

B) Article 2 of the OECD Anti Bribery Convention: Responsibility of Legal Persons

- 1) Member countries' systems for the liability of legal persons for the bribery of foreign public officials in international business transactions should not restrict the liability to cases where the natural person or persons who perpetrated the offence are prosecuted or convicted.
- 2) Member countries' systems for the liability of legal persons for the bribery of foreign public officials in international business transactions should take one of the following approaches:
 - a) the level of authority of the person whose conduct triggers the liability of the legal person is flexible and reflects the wide variety of decision-making systems in legal persons; or

b) the approach is functionally equivalent to the foregoing even though it is only triggered by acts of persons with the highest level managerial authority, because the following cases are covered:

- A person with the highest level managerial authority offers, promises or gives a bribe to a foreign public official;
- A person with the highest level managerial authority directs or authorises a lower level person to offer, promise or give a bribe to a foreign public official; and
- A person with the highest level managerial authority fails to prevent a lower level person from bribing a foreign public official, including through a failure to supervise him or her or through a failure to implement adequate internal controls, ethics and compliance programmes or measures.

C) *Responsibility for Bribery through Intermediaries*

Member countries should ensure that, in accordance with Article 1 of the OECD Anti Bribery Convention, and the principle of functional equivalence in Commentary 2 to the OECD Anti-Bribery Convention, a legal person cannot avoid responsibility by using intermediaries, including related legal persons, to offer, promise or give a bribe to a foreign public official on its behalf.

D) *Article 5: Enforcement*

1) Member countries should be vigilant in ensuring that investigations and prosecutions of the bribery of foreign public officials in international business transactions are not influenced by considerations of national economic interest, the potential effect upon relations with another State or the identity of the natural or legal persons involved, in compliance with Article 5 of the OECD Anti Bribery Convention.

2) Complaints of bribery of foreign public officials should be seriously investigated and credible allegations assessed by competent authorities.

3) Member countries should provide adequate resources to law enforcement authorities so as to permit effective investigation and prosecution of bribery of foreign public officials in international business transactions, taking into consideration Commentary 27 to the OECD Anti Bribery Convention.