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978-1-107-03574-4 - The Oecd Convention on Bribery: A Commentary: 2nd Edition
Edited by Mark Pieth, Lucinda A. Low and Nicola Bonucci
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PART I

Introduction

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Introduction

MARK PIETH

Preamble to the OECD Convention

The Parties,

Considering 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;

Considering that all countries share a responsibility to combat bribery in international business transactions;

Having regard to the Revised Recommendation on Combating Bribery in International Business Transactions, adopted by the Council of the Organisation for Economic Co-operation and Development (OECD) on 23 May 1997, C(97)123/FINAL, which, *inter alia*, called for effective measures to deter, prevent and combat the bribery of foreign public officials in connection with international business transactions, in particular the prompt criminalisation of such bribery in an effective and co-ordinated manner and in conformity with the agreed common elements set out in that Recommendation and with the jurisdictional and other basic legal principles of each country;

Welcoming other recent developments which further advance international understanding and co-operation in combating bribery of public officials, including actions of the United Nations, the World Bank, the International Monetary Fund, the World Trade Organisation, the Organisation of American States, the Council of Europe and the European Union;

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

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Recognising the role of governments in the prevention of solicitation of bribes from individuals and enterprises in international business transactions;

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

Recognising that achieving equivalence among the measures to be taken by the Parties is an essential object and purpose of the Convention, which requires that the Convention be ratified without derogations affecting this equivalence;

Have agreed as follows: ...

Official Commentaries

General

1. *This Convention deals with what, in the law of some countries, is called 'active corruption' or 'active bribery', meaning the offence committed by the person who promises or gives the bribe, as contrasted with 'passive bribery', the offence committed by the official who receives the bribe. The Convention does not utilise the term 'active bribery' simply to avoid it being misread by the non-technical reader as implying that the briber has taken the initiative and the recipient is a passive victim. In fact, in a number of situations, the recipient will have induced or pressured the briber and will have been, in that sense, the more active.*

2. *This Convention seeks to assure a functional equivalence among the measures taken by the Parties to sanction bribery of foreign public officials, without requiring uniformity or changes in fundamental principles of a Party's legal system.*

Recommendation 2009

General

I. [THE COUNCIL] NOTES that the present Recommendation for Further 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 taking 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 examine or 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 on Implementing Specific Articles of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, as set out in Annex I 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.*

...

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

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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 is 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 serve as channels of communication for the purpose of facilitating international co-operation 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.*

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I. History and development of the legal framework

1. *Why attempt to combat corruption now?*

Corruption is by no means a new phenomenon. It is as old as human nature itself; however, political and economic corruption has taken on a specific meaning during the latter half of the twentieth century. With decolonisation, former colonial states, but also newcomers amongst exporting nations, tried to maintain or establish their power basis with the emerging elites in the southern hemisphere by buying allegiances. Whereas the motivation to bribe will have been primarily economic, to a large extent corruption was also used as a political means in the struggles of the Cold War to secure influence across the world. If therefore the East-West *détente* has not immediately brought a substantial reduction in political and economic bribery, the opening of the East and the growing pace of globalisation are essential conditions for a process towards openly addressing corruption as a serious impediment to worldwide

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development.¹ It is no coincidence that, since 1990, a dramatic change in public attitudes regarding corruption has taken place. This development can be identified in both the northern and southern hemispheres. There are commentators who maintain that the rampant bribery in industrialised centres of, for instance, Italy, could be attacked by law enforcement only following the East-West *détente*, since the highly corrupt former political structures were until then perceived as necessary bulwarks against Soviet influence. In a similar way, it became possible to criticise persons holding high political or legal office in other European states, such as Germany, France and Belgium, for their lack of sensitivity to conflicts of interest.²

This is not to say that political change or globalisation as such have led to a reduction of bribery. In fact, in an initial period the contrary may have been the case.³ Whereas the extent of ‘graft’ by political exponents in potentially rich countries in the South (e.g. Angola, Brazil, Nigeria or the Philippines) is common knowledge,⁴ we still need to develop a clear understanding of the full dimensions of commercial bribery. So far, we are getting used to dramatic headlines about payments worth hundreds of millions of dollars, or euros, in order to acquire contracts, obtain exploitation rights or permits to build pipelines, etc.⁵ Reliable analyses of the dimensions of the problem are, however, still rare,⁶ and we are only just beginning to understand some of the reasons for the persistence of the problems.⁷ Legislative

¹ Crutchfield George, Lacey and Birmele 1999, 9; Pieth 1997a, 119 *et seq.*

² Belgium: *Neue Zürcher Zeitung*, 9 December 1994, 1; France: *Neue Zürcher Zeitung*, 13 November 2003, 5, *New York Times*, 14 November 2003, 9, *Guardian*, 13 November 2003 (online edn); Germany: BBC News, 29 June 2000 (online edn), *Focus*, 11/2004, 18 *et seq.*

³ Even the Preamble to the OECD Recommendation 2009 (cited as OECD 2009a) suggests that ‘bribery of foreign public officials is a widespread phenomenon in international business transactions’ (6th indent); see also the Selected Documentation at the end of this book.

⁴ Angola: Global Witness 2004, 36; Brazil: *Neue Zürcher Zeitung*, 26 July 2005, 5, *Financial Times*, 22 July 2005, 11; Nigeria: *Basler Zeitung*, 21 October 2002, 44, BBC News, 20 October 2000 (online edn), *Neue Zürcher Zeitung*, 4 October 2000, 25; Philippines: BBC News, 1 February 2002 (online edn), *Neue Zürcher Zeitung*, 22 April 1998, 7.

⁵ Acres: M2 Pressure, 23 July 2004; World Bank List of Debarred Firms, available at www.worldbank.org/projects&operations/procurement; Giffen: *Neue Zürcher Zeitung*, 2 April 2003, *Financial Times*, 30 May 2003, 4; Halliburton: *Financial Times*, 30 March 2004, 6, *Neue Zürcher Zeitung*, 14/15 February 2004; Siemens-Enelpower: *Süddeutsche Zeitung*, 20 August 2004 (online edn).

⁶ Mauro 1995, 681 *et seq.*; according to research by the World Bank Institute, more than US\$1 trillion of bribes is paid each year: see World Bank 2004.

⁷ Cartier-Bresson 2000, 11; Rose-Ackerman 1999, 40.

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action against transnational commercial bribery in fact began well before these geopolitical changes, for reasons primarily linked to the local political agenda of the United States. The enactment of the Foreign Corrupt Practices Act (FCPA) in 1977 marked the first important step.

2. *US initiatives against 'foreign corrupt practices'*

2.1. Early legislative activities⁸

2.1.1. SEC disclosure programme and enactment of the FCPA In the mid 1970s media reports revealed that US companies were acquiring business at home and abroad through clandestine payments to foreign public officials. Such doubtful practices were exposed in particular by the Watergate Special Prosecutor examining questionable contributions to President Nixon's re-election campaign.⁹ Following a public outcry, the US Securities and Exchange Commission (SEC) created a voluntary disclosure programme and announced an amnesty for companies under the condition that they disclosed past payments to foreign public officials and introduced internal anti-bribery compliance procedures.¹⁰ Shocked by the extent of the revelations,¹¹ the administration of President Ford suggested legislation requiring US companies to disclose bribes. The draft of 1976, however, failed to pass the Democratic-dominated Congress. The administration of President Carter shortly afterwards pushed for legislation criminalising the bribery of foreign public officials and demanded the definition of additional accounting and auditing requirements and 'in-control standards' to be supervised and, if necessary, sanctioned by the SEC. The new law entered into force in December 1977.¹²

2.1.2. Interpreting the developments Scholars have taken the enactment of the FCPA more or less for granted; few discuss the reasons for such an unusual step in the 1970s. It is true that an international debate

⁸ Corr and Lawler 1999, 1255; Low 2003a, 3; Schoenlaub 1999, A-1057.

⁹ Fitzgerald 2011, 28 *et seq.*; Hines 1995, 3 *et seq.*; Tarullo 2004, 673; Weinstein *et al.* 2012, para. 1.03 [1] [a].

¹⁰ Hearings on Activities of American Multinational Corporations Abroad Before the Subcommittee on International Economics Policy of the House Committee on International Relations, 94th Cong. 57, 63 *et seq.* (1975). For the findings of the SEC, see the Report of the Comptroller General of the United States to Congress in 1981.

¹¹ More than 400 companies, over 177 of them ranked amongst the Fortune 500, owned up to having paid substantial bribes in the recent past.

¹² FCPA 1977 (Pub. L. No. 95-213, 91 Stat. 1494 (1977)).