



International Chamber of Commerce

The world business organization

Department of Policy and Business Practices

ICC note on “the most important obstacle to the effective enforcement of the OECD Anti-Bribery Convention”

Prepared by the ICC Commission on Anti-Corruption on the occasion of the OECD Working Group on Bribery informal consultation with representatives of the private sector, trade unions and civil society on Wednesday 20 June 2007 at OECD headquarters

Introduction

ICC has been engaged in the fight against corruption since 1977, demonstrating the business community's early awareness of the distorting effects of extortion and bribery on international competition. For thirty years, ICC has promoted self-regulation by enterprises to combat corruption within the framework of their own corporate integrity programmes.

From a business perspective, the adoption of the OECD Convention on Combating Bribery of Foreign Public Officials in 1997 remains a major milestone in the fight against corruption in international trade. The Convention, together with the 1997 Revised Recommendation on Combating Bribery in International Business Transactions, served as a new catalyst for further engagement of business in self-regulation activities. This engagement was based on the expectation that the Convention would create equal conditions for all market players across the major exporting countries. It was on the basis of the draft OECD Convention and Recommendation that in 1996 ICC revised completely its Rules of Conduct to Combat Extortion and Bribery in International Transactions.

Ten years on, even after the entry into the force of the United Nations Convention against Corruption (UNCAC), the OECD Convention remains the premier instrument against international corruption. This position is largely the result of its effective monitoring mechanism, which has played a significant role in the recognition by member states of their obligations and responsibilities under the Convention.

As the future of this mechanism is currently being debated, ICC wishes to stress the need for continuous monitoring from the outset. As ICC has expressed recently, it is of crucial importance that OECD member countries continue to provide the OECD with the necessary financial means to pursue its monitoring efforts beyond 2007. For its part, business reaffirms its readiness to contribute, in any appropriate capacity, to the success of this monitoring mechanism.

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Current obstacles and possible way forward

ICC notes that all the expectations raised by the OECD instruments have not been fulfilled, and that business leaders are often left with the impression that what is not allowed in one place, is condoned in another. The “level playing field”, which has been promised so many times, has not or only partly become a reality. This is a source of frustration for business, as the lack of common rules directly affects free and fair competition between market players.

The results from Phase 2 country examinations have revealed notable differences in the way member states have enforced their anti-foreign bribery laws. The wide variety in numbers of investigations and prosecutions in the different member states can be indicative of a difference in treatment. This leads ICC to question the capacity of the Convention, in the way it was conceived and made operational, to bring about the “level playing field” it is supposed to achieve.

In particular, ICC has identified the following limitations which will need to be addressed to improve the effectiveness of the Convention and to sustain business efforts against corruption in all its forms:

- ICC believes that the effective impact of the Convention has been limited by the absence of a holistic approach to the phenomenon of corruption. Business is sensitive to the fact that each and every form of extortion and bribery distorts competition and should therefore be equally condemned. By addressing one aspect only of corruption (i.e. active international bribery), the Convention has benefited from a strong focus but has missed another important element of the corruption equation: the demand side (i.e. bribe solicitation and extortion), which is addressed in UNCAC. The authors of the Convention made the assumption that by focusing the supply side, the demand side would dry up. This, however, is not what business is experiencing on the ground, as numerous company executives, frequently exposed to extortion, will confirm.
- A useful first step for the OECD would be to carry the anti-corruption message to importing countries through awareness raising and technical assistance programmes. Such initiatives could be organized in coordination with other intergovernmental bodies like the United Nations and the World Bank.
- The OECD instruments would also benefit from clarification on the extent to which certain specific forms of bribery are covered by their provisions. In particular, ICC seeks clarification on the following issues: indirect bribery (i.e. through agents, subsidiaries and other intermediaries), facilitation payments, political contributions and private-to-private bribery, which remain key areas of concern for international business.
- The international economic environment has changed significantly since 1997. While the Convention has been able to embrace new signatories over time, it still suffers today from a lack of geographic coverage which undermines its overarching goal of achieving a level playing field for all market participants. Without making any finger pointing, some major emerging economies may not



feel bound by the rules which prevail today in OECD economies. Therefore, ICC believes that OECD should encourage all emerging countries, including non-member states, to join and ratify, or in any case comply with, the Convention.

- The implementation of the Convention, both from a judicial and law enforcement perspective, covers different realities across OECD member countries. As a result, the Convention has not fully eliminated competitive distortions between market participants. ICC believes that it would be possible, without changing the basic rules concerning the judicial organisation of the OECD member states, to formulate provisions concerning the conduct and continuation of anti-corruption investigations and prosecutions.
- As the first cycle of country examinations has now been completed, ICC considers that future monitoring efforts should focus on the review of the issues identified in previous examinations as well as of the practical remedies that have been brought by member states. Monitoring needs to become a permanent process and a special coordination effort should be made to avoid duplication with the monitoring instruments of other anti-corruption conventions.

Conclusion

ICC is grateful for the opportunity to submit this note in preparation for the informal civil society consultation of 20 June 2007 with the OECD Working Group on Bribery. In summary, ICC has identified two main challenges in creating the conditions for a more effective enforcement of the OECD Convention, which can be described as follows:

1. Widen the scope of the Convention and other relevant OECD instruments, both in terms of content and geographical coverage, to create a multi-front and global approach against corruption;
2. Apply more effectively the concept of “functional equivalence”, notably in the judicial and law enforcement spheres, so as to create a proper legal climate which will allow companies to fully compete in open markets without the fear of being exposed to extortion or unfair practices by their competitors.

ICC is confident that the OECD Working Group on Bribery, with the support of OECD member countries, is fully able to take up these challenges effectively, thanks especially to its long-standing practice of closely associating the business community to its work and discussions. ICC looks forward to contributing its experience and expertise to this effort.

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About ICC

ICC is the world business organization, a representative body that speaks with authority on behalf of enterprises from all sectors in every part of the world. ICC promotes an open international trade and investment system and the market economy, and helps business corporations meet the challenges and opportunities of globalization. Business leaders and experts drawn from ICC's global membership establish the business stance

