# OECD ANTI-BRIBERY CONVENTION

# PHASE 2 MONITORING INFORMATION RESOURCES


ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT

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## INTRODUCTION

The OECD *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions* calls for a systematic monitoring process to promote and oversee the implementation of the Convention. The OECD Working Group on Bribery monitors and evaluates countries' efforts to implement the Convention and the *1997 Revised Recommendation of the Council on Combating Bribery in International Business Transactions* through a rigorous peer review mechanism.

After an initial assessment of countries' national legislation to determine its conformity with the Convention (Phase 1), the second phase of the monitoring process examines the structures in place to enforce these laws, assesses countries' application and implementation of the Convention and the Revised Recommendation, and recommends concrete actions for improvement. All Phase 2 reports are available on the OECD Anti-Corruption Division Website, at www.oecd.org/bribery.

The resources listed below provide information on the Phase 2 process, describe the steps of a Phase 2 review, and include the standard questionnaire used in the Phase 2 review as well as the text of the Convention and related documents.

**REVISED GUIDELINES FOR PHASE 2 REVIEWS**
These guidelines give an overview of the Phase 2 review process. They describe the written examination, the on-site visit, the Working Group evaluation, follow-up action and the timeframe in which the review takes place. They also outline the roles and responsibilities of the lead examiners, the examined country, the Working Group, and the Secretariat.

**PROCEDURE FOR SELF- AND MUTUAL EVALUATION OF IMPLEMENTATION OF THE CONVENTION AND THE REVISED RECOMMENDATION - PHASE 2**
This note, adopted prior to the beginning of Phase 2 reviews, recalls the general issues adopted by the Working Group concerning Phase 2 reviews and sets out draft terms of reference for on-site visits.

**PHASE 2 QUESTIONNAIRE**
This questionnaire contains the standard set of questions used in Phase 2 reviews to assess how countries address the principal issues under the

Convention in the application of their implementing laws, and to gain a clear overview of how the Convention has been applied as a multilateral instrument.

**CONVENTION ON COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS AND RELATED DOCUMENTS**

This document comprises the *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and Related Documents – Commentaries on the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, the *Revised Recommendation of the Council on Combating Bribery in International Business Transactions*, and the *Recommendation of the Council on the Tax Deductibility of Bribes to Foreign Public Officials*.

# REVISED GUIDELINES FOR PHASE 2 REVIEWS

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## INTRODUCTION

In October 2003, on the basis of its experience in conducting Phase 2 examinations, the Working Group adopted guidance and best practices for future lead examiners, countries to be reviewed, the Secretariat, and the Working Group as a whole. The Working Group further agreed that to be effective the Phase 2 process must be transparent, rigorous, and credible.

The following document is largely descriptive of existing practice. It is not intended to make formal what has heretofore been informal or to impose a rigid structure on future reviews. Indeed, the Working Group believes that the hallmark of a successful review has been, and must be, flexibility. It is not necessary or productive for every review to cover a laundry list of topics nor is it necessary or desirable to devote time and resources to issues already being examined and addressed in other fora, *e.g* the Financial Action Task Force (FATF), if the Group is satisfied that these issues have been adequately addressed. Instead the review must be focused on the particular issues raised by the examined country's implementation of the Convention and its governmental, economic, and geographic organisation. Further, the facts and circumstances presented by a particular country may require that issues not addressed in previous Phase 2 reviews be included in the review of that country.

In June 2005, the Working Group agreed on the revised guidelines by introducing the new agreed steps contained in a non-paper by the Secretariat on monitoring issues. The update deals with written follow-up reports, the exceptional cases where implementation of the Convention is not adequate, enhancing public relations concerning the Phase 2 reports, and increasing the effectiveness of the discussion of the Phase 2 reports.

In January 2006, the guidelines were further revised by introducing (i) the third reading to agree on the Phase 2 reports on the third day of the Working Group meeting; and (ii) a process to agree on news release regarding Phase 2 reports.

## REVISED GUIDELINES FOR PHASE 2 REVIEWS

I. GENERAL PROGRAMME OF PHASE 2 REVIEWS

A. *Written examination* consisting of the examined country's response to the Phase 2 Questionnaire as well as additional written questions posed by the Secretariat, the lead examiners, and other members of the Working Group.

B. *On-site visit* consisting of up to one week of meetings with government, private sector and civil society representatives of the examined country.

C. *Working Group evaluation* consisting of the presentation of a report by the lead examiners and adoption of recommendations.

II. RESPONSIBILITY OF SECRETARIAT

A. *Phase 2 schedule* In consultation with the Working Group and the countries to be examined under Phase 2, the Secretariat will establish a schedule for examinations up to the end of the Phase 2 process (2007). Once approved by the Working Group, any changes to the schedule must be approved by the full Working Group. Thus, a country seeking a postponement of its examination must make its request in time for it to be placed on the Agenda of the Working Group's meeting immediately preceding the scheduled written examination phase (*i.e.* before the country is scheduled to receive its supplementary Phase 2 questionnaire). The Working Group must agree to any postponements of scheduled examinations.

B. *Examination schedule* In consultation with the lead examiners and the examined country, the Secretariat will establish a schedule for submitting questions, questionnaire responses, the on-site visit, and drafting and review of the report.

C. *Examination team* Secretariat will name a team led by a senior analyst to staff the Phase 2 Review. The size of this team may vary depending on the complexity of the review and the available budget. For example, it may require a larger team to review a G-7 country; a smaller team may be adequate for a smaller country. It may not be necessary for

the full team to travel to the on-site visit depending on the structure and schedule of the meetings. Further, as appropriate, the team may draw upon the expertise existing within the Secretariat in areas critical to a successful review.

D. *Questionnaire* The Secretariat will review the examined country's Phase 1 Review and additional materials and prepare a list of additional or more specific questions to supplement the Phase 2 Questionnaire including questions submitted by the lead examiners. Any member of the Working Group may also submit written questions to be included in this supplemental questionnaire. The supplemental questionnaire will be sent to the examined country after consultation with the lead examiners.

E. *Preparation for on-site visit* In consultation with the lead examiners and the examined country, the Secretariat will prepare the agenda. The Secretariat will perform the necessary preparatory work for the on-site visit, including assembling a summary of preliminary issues in consultation with the lead examiners. This summary is intended to guide the examined country toward the issues that should be addressed in the on-site visit and is not intended to be a supplemental questionnaire and must be provided sufficiently in advance of the on-site visit to permit the examined country to prepare. It is within the examined country's discretion whether to provide, either before, during, or after the on-site visit, a written response.

F. *On-site visit* At the conclusion of each day, the Secretariat will convene a meeting of the examiners to share preliminary conclusions and commentaries. In addition, the Secretariat will maintain a list of follow-up questions and additional materials requested of the examined country during the on-site visit.

G. Preparation of report

1. *Pre-Working Group discussion* Following the on-site visit, the Secretariat will draft a report based upon the examined country's response to the Phase 2 questionnaires, the on-site visit, and any additional materials. The draft report will incorporate the lead examiners' preliminary conclusions. After being reviewed by the lead examiners, this draft will be provided to the examined country. The Secretariat, in consultation with the lead examiners, will make any appropriate changes in response to comments and corrections submitted by the examined country.

2. *Post-Working Group discussion* The Secretariat will be responsible for editing and publishing the report following its adoption in the third reading by the Working Group.

H. Follow-up to Phase 2 Reviews

1. *Pre-Working Group discussion* Countries that are due to provide an oral or a written report will be reminded by the Secretariat in advance of the meeting. In the case of a written follow-up report, the Secretariat will also send the relevant template in advance to the concerned country.

2. *Post-Working Group* discussion Following the discussion of the oral follow-up report, the Secretariat will prepare a brief summary to be included in the record of the meeting. As for the written follow-up reports, a summary of the discussion will be prepared by the Secretariat in consultation with the lead examiners and the examined country (see also section VII, B).

## III. RESPONSIBILITY OF LEAD EXAMINERS

A. *General* Each country that agrees to act as a lead examiner should fully accept all of the obligations relating to such service, including the provision of timely comments and full attendance at all meetings (preparatory, on-site, and Working Group). Countries that are not able to carry out their obligations should notify the Secretariat and the other lead examiner as soon as possible to allow another country to substitute as lead examiner. The Working Group shall be notified if the Secretariat is unable to find a substitute lead examiner and will decide on how to proceed.

B. *Central point of contact* Each country serving as a lead examiner should designate a central point of contact (CPOC) for communicating with the Secretariat and the examined country, as well as with its own agencies.

C. Written Review

The CPOC will

1. Provide the Secretariat with a preliminary list of questions to be included in the supplemental questionnaire.

2. Ensure that materials are received and distributed to appropriate experts within their government.

3. Consult with the appropriate experts within the government to identify issues raised by the examined country's response to the Phase 2 questionnaire and will then communicate these issues to the Secretariat for inclusion in the preliminary issues.

D. *On-site visit* Each country will provide a team of experts to conduct the on-site visit. Each country shall provide at least one law enforcement expert (*e.g*. prosecutor, investigating magistrate, or police) with experience in domestic or foreign bribery investigations and prosecutions or complex international investigations and prosecutions. In addition, the examination team as a whole should include other experts relevant to the issues presented by a specific country's examination, *e.g.* securities regulation, accounting, auditing, tax, antitrust, corporate compliance, export control, etc. The lead examiners may consult with each other to ensure that, among the experts appointed by both countries, there is adequate coverage of relevant issues.

E. *Working Group examination* The lead examiners shall attend the Working Group meeting to present the draft report. The lead examiners shall also attend the Working Group meetings which will discuss the follow-up reports to the Phase 2 Reviews.

F. *Written follow-up report* In principle, the lead examiners would review the contents of the follow-up written reports and be prepared to raise substantive or policy issues that need to be addressed in order to initiate the discussion of such reports. In the event that the lead examiners are not available or no longer in charge of anti-bribery issues, "special interveners"[1] should be appointed.

## IV. RESPONSIBILITY OF THE EXAMINED COUNTRY

A. *Central Point of Contact* The examined country shall designate a Central Point of Contact who will be responsible for communicating with the Secretariat and the lead examiners, coordinating the drafting of the examined country's response to the Phase 2 questionnaire and supplemental questions, and coordinating the preparation for the on-site visit.

B. *Questionnaire and supporting materials*. In accordance with the schedule established by the Secretariat, the examined country shall submit a written response to the Phase 2 questionnaire and to any additional questions collectively submitted by the lead examiners and the Secretariat as well as supporting materials, including summaries of relevant cases.

1. Although it is preferable that these answers be integrated into a single written response, the examined country should not delay

[1] The Secretariat will liaise with the lead examiners or will approach "special interveners" if necessary, following consultation with the Management Group.

providing a response for that purpose. Further, if the answers to specific questions are not complete by the deadlines set in the Secretariat's schedule, the examined country should submit the answers that are complete and supplement its response as needed.

2. Where appropriate or requested by the lead examiners or the Secretariat, the examined country shall provide supporting materials, such as laws, regulations, and judicial decisions. It is essential that all materials be provided sufficiently in advance of the on-site for the lead examiners and the Secretariat to review them.

3. Wherever possible, supporting materials should be provided in English or French. Where the materials are voluminous, the examined country should discuss with the Secretariat which items should be translated on a priority basis.

C. On-site visit

1. The examined country shall assemble panels in accordance with the agenda and in consultation with the Secretariat and the lead examiners. The names, titles, and responsibilities of each participant shall be provided to the Secretariat in advance of the on-site visit. The examined country should do its utmost to ensure that the composition of the panels reflects the proposals of the examination team (see Section V *infra*).

2. The examined country is responsible for providing a venue for the on-site visit.

3. Although the examined country is not required to make travel arrangements for the examination team, it may consider negotiating for a block of hotel rooms at a government rate at a location convenient to the venue for the examination.

4. The language in which the examination will be conducted will be agreed upon in advance. The examined country may be required to provide interpretation and translation as deemed necessary by the examination team.

5. The examined country will be responsible for providing additional information requested by the examination team during the on-site visit as well as a complete list of all participants in the on-site visit.

D. The draft report

1. The examined country should carefully review the draft report and submit any corrections or clarifications it deems appropriate. Such comments should be limited to corrections or clarifications and should be indexed to specific paragraphs of the draft report. This should not be viewed as an opportunity to rewrite the report. The examined country, however, should note significant points of disagreement to allow the Secretariat to draw up a list of preliminary issues for the preparatory meeting between the lead examiners, the Secretariat, and the examined country.

2. Provided the draft report is transmitted on time, comments must be submitted within the time limits set in the examination schedule. To ensure that the Working Group receives the draft report in time to review it prior to the Working Group meeting, comments that are submitted late will not be included in the draft report circulated to the Working Group but will be circulated separately.

3. The examined country may present its views regarding any of the lead examiners' recommendations during the Working Group consideration. The examined country should, however, remember that this is a constructively critical exercise and guard against being overly defensive.

E. Post-examination

1. The examined country is expected to consider seriously the recommendations made in the Working Group's report.

2. Within one year of the Working Group's approval of the report of the examination, the examined country shall, at a minimum, provide an oral report, of what steps it has taken or is planning to take to implement the Working Group's priority recommendations. A detailed written report shall be provided within two years, which shall be made public as an addendum to the Phase 2 report.

3. The oral reports, which deal with the full recommendations (and not with the issues for follow-up), will take place separately from the tour de table exercise. For each oral report there will be a half hour session divided into parts: a presentation by the concerned country; a questions and answers session. The information provided by the reporting countries in this context will be reflected in the summary record of the meeting.

4. The written reports should be made according to the template agreed by the Working Group (see Annex 2). Answers should be given to each and every recommendation (and not only to specific ones), which have been made to the examined country for action. If a country has not taken any steps to implement a recommendation which requires action, an explanation should be given as regards the reasons for the lack of action. In addition, the country in question should provide information as to the intended or planned action and the timing of such action. The issues for follow-up by the Working Group should also be covered.

## V. ORGANISATION OF ON-SITE VISIT

### A. Agenda

Each on-site visit should include panels on

1. Criminal enforcement of anti-bribery laws. The panel(s) should consist of prosecutors, investigating magistrates, investigators, and, where appropriate, judges. Where applicable, a particular panel may be devoted to the lessons learned during a particular enforcement action brought under the examined country's law implementing the Convention.

2. Accounting – securities regulation, books and records, and auditing.

3. Tax – auditing and deductibility.

4. Role of private sector[2] – including the role of internal and external lawyers and accountants, corporate compliance programs, and whistle blowing protections.

5. Civil society[3] views on implementation and enforcement.

6. Other panels may be appropriate based upon the issues identified by the lead examiners and the Secretariat. Where related to the

[2] For purposes of the Phase 2 examinations, the private sector should be deemed to include businesses, professionals (lawyers and accountants), and labour organisations.

[3] For purposes of the Phase 2 examinations, Civil Society should be deemed to include non-governmental organisations, academics, and the media. To the extent the media is included in a panel, it should only be for the purpose of providing information to the examiners and not for reporting on the examination.

operation and implementation of the Convention in the Examined Country, such issues may include money laundering, mutual legal assistance, and extradition, export, development aid, and procurement agencies.

B. Composition and format of panels:

1. The examined country should consult with the examination team concerning the composition of the panels. The examination team should seek to obtain the views of multiple agencies in both the government and non-government sectors. It is particularly important to compare and contrast the answers to determine, among other things, the actual state of public awareness, the true degree of cooperation amongst governmental agencies, and the degree of uniformity in the interpretation of laws and regulations.

2. The panels should be composed of a sufficient number of experts to adequately comment on issues relevant to the implementation and enforcement. However, the panels should be of a manageable size to permit productive discussions with the examiners. For the most part, formal presentations should be kept to a minimum and dialogue and discussion encouraged.

3. The private sector panel(s) shall be organised by the examined country in consultation with the Secretariat and the lead examiners. BIAC, TUAC, and other groups, such as bar associations, may be consulted to identify the most qualified experts.

4. With respect to the civil society panel, no single organisation should be the sole selector or presenters, thus ensuring a diverse selection of civil society views.

5. There should be a significant effort to include differing views and the views of a range of companies that include both large companies with international experience and small and medium size enterprises just entering the international arena.

6. Representatives of the examined country's government may be present as observers at all non-governmental panels so that they may prepare responses, where appropriate, to the views expressed by panel members. The government representatives should not, however, participate in the private sector and civil society panels. The government's views on issues raised in these panels should be conveyed at a later time.

C. *Preliminary Conclusions* At the end of the on-site visit, there should be a final "wrap-up" session with the examined country and the examination team. The purpose of this session will be to request additional information, to pose outstanding questions, or to review matters that were not sufficiently addressed. The examination team may also decide to communicate their preliminary conclusions and commentaries. In addition, of course, the examined country may choose to submit additional information to, among other things, clarify issues and/or correct what it perceives as confusion or misunderstandings of the examination team.

## VI. PHASE 2 REPORT

A. *Drafting* The Secretariat will prepare a draft report incorporating the preliminary views of the lead examiners. The lead examiners will then review the draft report and propose any necessary revisions. The revised draft report will then be provided to the examined country, which can offer corrections and comments to be considered by the lead examiners. In the event the lead examiners disagree amongst themselves or with the Secretariat concerning any proposed commentary, such disagreement shall be noted in the draft report as an issue that must be resolved by the full Working Group.

B. Working Group consideration

1. The Secretariat will circulate the draft report to the delegations at least three weeks in advance of the Working Group meeting, provided that the schedule has been strictly respected, to ensure that all countries have an adequate opportunity to review the draft report. If the country examined has not sent its comments within the time limits set in the schedule, the Secretariat may send the draft report to the Group noting that the examined country's comments will be sent separately. This is meant to ensure that the Group has the draft report at least two weeks before the Group meeting.

2. Delegations may, and are encouraged to, submit written questions to the Secretariat and the lead examiners in advance of the Working Group meeting to assist the lead examiners, the Secretariat, and the examined country in preparing for the plenary meeting. The examined country may provide written answers to these questions to be distributed to the Working Group.

3. Immediately prior to the Working Group meeting, the lead examiners and the Secretariat will meet to prepare for the Working Group meeting and to finalise their proposed recommendations and the executive summary. The lead examiners and the Secretariat

will then meet with the examined country to review the final draft report and their proposed commentaries as well as the draft executive summary.

4. The Working Group will consider the draft report in a plenary session. After the conclusion of the first reading, the lead examiners and the Secretariat will draft recommendations, which will be reviewed with the examined country (although the examined country, of course, need not agree with the recommendations). The recommendations will identify certain issues that are deemed to be priority items. The revised draft report, the recommendations and the executive summary will be presented to and debated by the Working Group on the second day of the plenary session.

5. If any changes are necessary following the second reading in the Working Group meeting, the Secretariat and the lead examiners will revise the draft report accordingly and the report will be circulated for approval in third reading on the third day of the plenary session. The same process will apply for the executive summary.

6. An executive summary will be attached to the Phase 2 report. As it will summarise the findings of the main report and recap the recommendations, the executive summary should be submitted to the Working Group after the first reading of the report and once the recommendations have been agreed. The executive summary will follow the same drafting procedure as for the main report but will have a different structure (see the standard structure in Annex 4). The draft executive summary will be prepared by the Secretariat under the guidance of the lead examiners and in consultation with the examined country. The executive summary will need to be approved by the plenary.

7. Appropriate timing and scheduling are essential to a smooth handling of the discussion of the reports at the plenary meeting. A Guidance Note on the Phase 2 examinations in the Working Group (see Annex 5) aims at ensuring a disciplined process for Phase 2 examinations while providing the necessary flexibility in some of the timeframes.

C. *Publication of the report and news release* Once approved, the report will be published on the OECD website and announced through an OECD news release which will be drafted concurrently with the executive summary and will be adopted in accordance with the rule of "consensus minus one" (*i.e*. the Party under examination does not have a right of veto). In drafting the news release, input should be obtained from the OECD Media Division. The Secretariat should

coordinate the release with the examined country, which may wish to make a public announcement and publish the report in-country as well. The examined country should consider ways to publicise the report including, for example, translating the report into the national language and publishing it on the government's website.

## VII. WRITTEN FOLLOW-UP REPORTS TO PHASE 2 REVIEWS

A. *Working Group consideration* The discussion of the follow-up reports will be held separately from the regular *tour de table* exercise, under a specific agenda item ("Follow-up to Phase 2 Reviews"). Following a presentation by the reporting country, and interventions by the lead examiners or any other "special intervener", the chairperson will initiate a discussion of the follow-up report.

B. *Finalisation and disclosure of the follow-up reports* Following discussion at a plenary meeting of the follow-up report, the latter will be appended to the Phase 2 report and made available on the OECD website. Given the nature of this exercise, the follow-up report will be published as provided by the reporting country (subject to editorial corrections). However, a one-page document summarising the discussion of the follow-up report in the Working Group will be prepared by the Secretariat as a cover note to the report. The summary will be submitted to the Working Group for approval through a written procedure. In the case of disagreement, it will be discussed at the next meeting of the Working Group.

C. *Next steps* In the event that a country has failed to take action to implement effectively the recommendations of a Phase 2 report which require concrete action and which constitute core matters under the Convention[4], it will be required to provide additional reports on its progress in implementing these recommendations within a fixed timeframe. The latter will need to be agreed by the Working Group on the basis of a proposal by the chairperson, following consultations with the reporting country. Information provided on the recommendations which simply require countries "to consider" taking measures will not be used for requesting additional follow-up reports. In the case of non-compliance with the recommendations of the Working Group amounting to a critical lack of implementation, even after additional

[4] Given the need for flexibility and the need to assess the effective implementation of the Convention, it is not possible to formulate quantitative criteria.

follow-up reports have been provided, the Working Group should consider the possibility of conducting a Phase 2bis Review.

## VIII. INADEQUATE IMPLEMENTATION OF THE CONVENTION

A. *General* In the event of inadequate implementation of the Convention, the Working Group will be prepared to consider conducting a Phase 2bis Review. The Phase 2bis Reviews should be conducted under the same procedure as for the Phase 2 examinations. The Phase 2bis reports should be made available on the OECD website and would focus on the more severe deficiencies identified in the Phase 2 review. When there is continued failure to implement adequately the Convention, some further steps might be considered by the Working Group. Annex 3 describes the linkage between the Phase 2 reviews, the follow-up reports and the Phase 2bis.

B. *Phase 2bis review:* The Working Group could consider the possibility of conducting a second on-site evaluation of a country whose implementation of the Convention has appeared to be inadequate in practice (Phase 2bis Review). Such an on-site visit, which would be conducted as an "extraordinary" measure, would be a simplified one and will focus on issues of concern. Ideally it could be led by the same examiners as the ones of the original Phase 2 report, but in certain cases it would be necessary to call upon new examiners. A decision to conduct such a review could be made by the Working Group on the occasion of the discussion of the Phase 2 report or after it has considered the oral and written follow-up reports of the Phase 2 Review.

C. *Continued failure to implement adequately the Convention* In cases where there is continued failure to implement adequately the Convention following a Phase 2bis Review or the follow-up to the Phase 2 review, further steps might be considered by the Working Group such as:

   (i) Requiring the country to provide regular reports on an expedited basis of its progress in implementing the Convention and the 1997 Recommendation. Thus the country could be asked to report to each meeting of the Working Group on its progress and it would be expected to be significantly in compliance within a fixed timeframe. The reports could be accompanied by a brief analysis of the progress that has been made, which could be prepared by the Secretariat.

   (ii) A group of Working Group members, selected by the plenary, could in conjunction with the Secretariat be given responsibility for reviewing any progress, including holding face to face meetings

with the country, and making recommendations to the Working Group on the next steps to be taken.

(iii) A letter could be sent from the chairperson of the Working Group to the relevant minister(s) in the concerned country to draw their attention to the failure to implement adequately the Convention and the 1997 Recommendation.

(iv) A high-level mission (comprised of the chairperson of the Working Group, the Head of the Anti-Corruption Division, several heads of delegation of Working Group members) could be arranged to the country in question to reinforce this message. The mission would meet with Ministers and senior officials.

(v) Issuing a formal public statement that a participating country is insufficiently in compliance with the Convention and the 1997 Recommendation, and request expeditious implementation of the Convention.

## IX. ROLE AND RESPONSIBILITIES OF OTHER MEMBERS OF THE WORKING GROUP

A. *Pre-examination* Working Group members are encouraged to submit questions at any stage of the process. The Secretariat and the lead examiners should carefully consider whether this aspect has been addressed in the questions and answers they are already considering.

B. *Plenary review* Each Working Group member should ensure that a qualified expert has reviewed the draft Phase 2 report and written follow-up report in advance of the plenary session and that, whenever possible, a qualified expert attend and participate in the plenary review of the draft Phase 2 reports, written follow-up reports, and discussion of oral follow-up reports.

C. *Written procedure for adoption of the written follow-up reports* Summaries of the discussions of the Phase 2 follow-up written reports will be circulated for approval under the written procedure. Each Working Group member should ensure that the summaries are reviewed by a qualified expert to ensure that they correctly reflect both that member's views and that of the Working Group.

## ANNEX 1

### Phase 2 Reviews – Template Schedule

| STAGE | RESPONSIBILITY | TIMING |
|---|---|---|
| 1. Preparation of Phase 2 supplementary questions<br><br>▪ Research of cases<br>▪ Review of Phase 1 and Phase 1bis<br>▪ Checking legislation<br>▪ Preparation of supplemental questionnaire | Secretariat | 3-4 weeks |
| Comments by lead examiners | lead examiners | 1 week |
| 2. Submission of written responses to the Phase 2 questionnaires | examined country | 8 weeks (from time questionnaires received) |
| 3. Preparation of on-site review<br><br>▪ Preparation of schedule for visit (agenda)<br>▪ Consultation with the examined country<br>▪ Analysis of replies to the questionnaires<br>▪Summary of outstanding issues | Secretariat and lead examiners | 5-6 weeks |
| 4. Finalisation of on-site agenda | Examined country | 2 weeks prior to on-site visit |
| 5. On-site review<br><br>▪ Interviews | Secretariat, | 1 week |

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| ▪ Evening consultations with lead examiners | examined country, and lead examiners | |
| 6. Preparation of draft report<br><br>▪ Analysis of information from Phase 2 questionnaires and the on-site visit<br>▪ Inclusion of lead examiner's preliminary conclusions | Secretariat | 6 weeks |
| 7. Review of draft report<br><br>▪ Comments by lead examiners<br>▪ Incorporation of lead examiners' comments<br>▪ Submission of corrections and comments by examined country<br><br>▪ Incorporation of corrections<br><br>▪ Revision (if necessary) or preliminary conclusions | <br><br>lead examiners<br>Secretariat<br><br>examined country<br><br>Secretariat<br><br>lead examiners | <br><br>2 weeks<br>1 week<br><br>4 weeks (plus 2 weeks if translation is required)<br><br>1 week<br><br>1 week |
| 8. Circulation of draft report | Secretariat | 3 weeks prior to the Working Group meeting |
| 9. Pre-Working Group meeting<br><br>▪ Preparation of list of issues<br><br>▪ Drafting of recommendations and executive summary<br><br>▪ Consultation with examined country | <br><br>Secretariat<br><br>Secretariat and lead examiners<br><br>Secretariat, lead examiners, and Examined Country | <br><br>day before Working Group meeting |
| 10. Working Group consultation | Working Group | three readings on consecutive days |
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| 11. Finalisation of the report<br><br>▪ Editing and publication of the report, recommendations and executive summary | Secretariat | 1 week after Working Group meeting |
| 12. Translation | Secretariat | 4 weeks |
| 13. Disclosure of the final report by publication on website | Secretariat | as soon as report is approved |
| 14. Oral follow-up report<br><br>▪ Reminding countries that they are due to deliver an oral follow-up report | Secretariat | as soon as possible |
| 15. Written follow-up report<br><br>▪ Submit the template for written follow-up reports to the concerned countries | Secretariat | preferably two months prior to the meeting when the reporting is required |
| ▪ Completion of the follow-up report template | concerned country | preferably one month after the Secretariat has sent the template |
| ▪ Circulation of the follow-up report | Secretariat | Preferably two weeks prior to the relevant meeting |
| ▪ Liaise with lead examiners or approach “special interveners” if necessary following consultation with the Management Group | Secretariat | as soon as possible |
| ▪ Prepare summary of discussion of the written follow-up report, submit it | Secretariat | as soon as possible |

| | | |
|---|---|---|
| to lead examiners and examined country and publish it together with the written report on the website | | |

## ANNEX 2

### Proposed Template for Written Follow-up to Phase 2 Reports

Name of country:

Date of approval of Phase 2 report:

Date of information:

### Part I: Recommendations for Action

| |
|---|
| Text of recommendation 1:<br><br>[For the sake of convenience and for practical reasons, the Secretariat will send the template including the text of all the Recommendations]. |

| |
|---|
| Actions taken as of the date of the follow-up report to implement this recommendation: |

| |
|---|
| If no action has been taken to implement recommendation 1, please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken: |

## Part II: Issues for Follow-up by the Working Group

| Text of issue for follow-up: |
|---|

| With regard to the issue identified above, describe any new case law, legislative, administrative, doctrinal or other relevant developments since the adoption of the report. Please provide relevant statistics as appropriate: |
|---|

**Instructions**

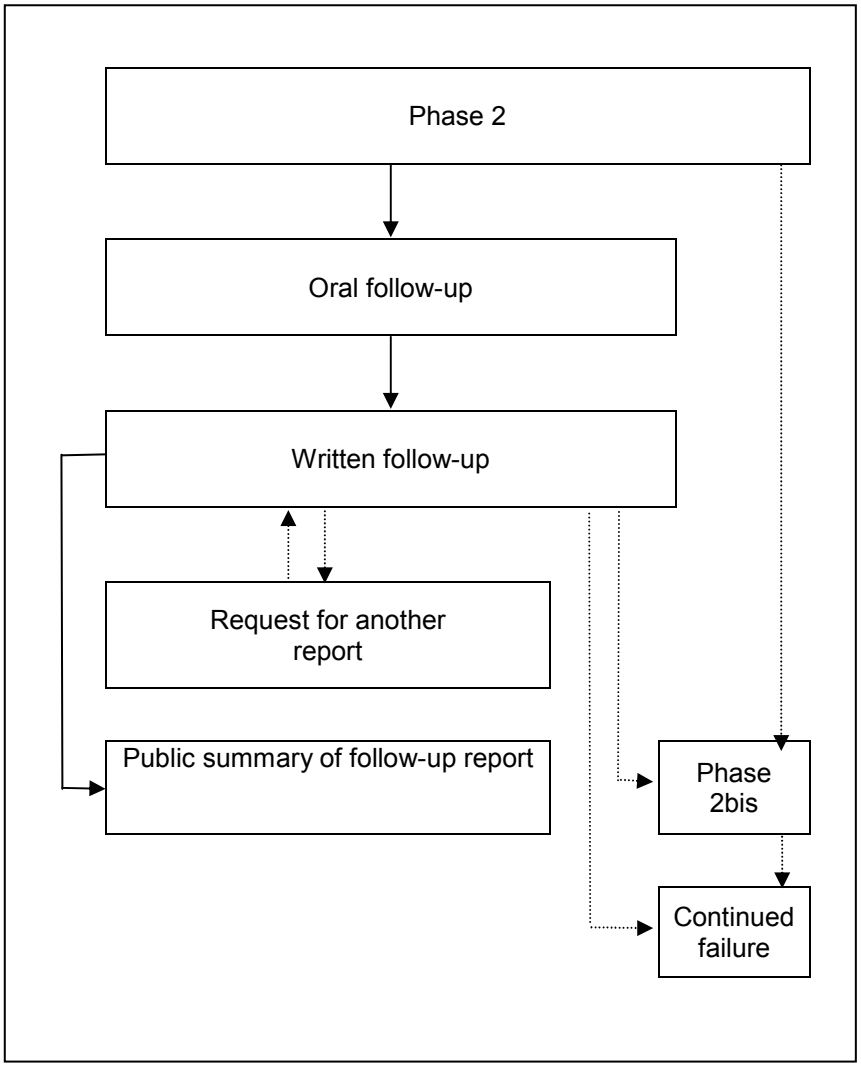
1. This document seeks to obtain information on the progress each participating country has made in implementing the recommendations of its Phase 2 Review.

2. Responses to the first question should reflect the current situation in your country, not any future or desired situation or a situation based on conditions which have not yet been met. For each recommendation, separate space has been allocated for describing future situations or policy intentions.

3. Countries are asked to answer all recommendations as completely as possible. Please submit completed answers to the Secretariat on or before____.

**ANNEX 3**

**Box on the linkage between the Phase 2 Reviews, the Follow-up Reports, and the Phase 2bis**



## ANNEX 4

### Standard Structure for Executive Summary

- The executive summary shall be organised as follows:

(i) Paragraph 1 contains a short introduction, and provides the tone of the report. It refers to a mixture of positive and critical features. It will also contain a reference to the oral and written follow-up reports to the Phase 2 Review.

(ii) Paragraphs 2-3 outline 3-4 main problems identified in the report, along with the resulting recommendations of the Working Group.

(iii) Paragraph 4 outlines the main positive features of the report (the order of the critical and positive paragraphs may end up being reversed, depending upon the decision of the Working Group, but the general rule should be to have the critical features appear first in the draft to be presented to the Working Group).

(iv) Paragraph 5 summarises the goal and procedure of Phase 2 examinations.

- The executive summary must not be longer than one page.

# ANNEX 5

## Guidance Note on Phase 2 Examinations in the Working Group

This note outlines the steps to be taken by all the relevant participants—the examined country, lead examiners, Secretariat and Working Group—in preparing for and during Phase 2 examinations in the Working Group. The note covers the responsibilities of the participants beginning with the circulation of the draft Phase 2 report to the Working Group, followed by the preliminary meetings, first reading in the Working Group, break-away sessions, continues with the second reading in the Working Group in which the Group adopts a set of recommendations, further break-away sessions and ends up with adoption of the report in the third reading. The objective of this note is to ensure the smooth and efficient running of the meetings with resulting Phase 2 reports and recommendations that are focused and effective.

## I. STEPS PRIOR TO WORKING GROUP MEETING

### *A. Review of Draft Phase 2 Report*

4. The Secretariat shall issue the Phase 2 draft report of the examined country prior to the Working Group meeting in order to ensure that the members have sufficient time to review the report before attending the meeting. On condition that the schedule for providing input by the lead examiners and examined country on the draft Phase 2 report has been strictly followed, the Secretariat shall issue the draft report at least three weeks before the Working Group meeting. [Revised Guidelines for Phase 2 Reviews (DAF/INV/BR/WD(2005)12/REV3, Part VI.B.1.)

5. Since the draft Phase 2 report is normally around fifty pages in length and covers several highly technical legal and other issues, the member countries need to ensure that sufficient time is set aside for qualified experts to thoroughly review the report before the meeting. (Revised Guidelines, Part IX.B.)

### *B. Preliminary Meetings in Paris*

(3 to 4 hours)

6. (1 hour) One day prior to the Working Group meeting the Secretariat shall meet with the lead examiners to discuss any outstanding issues in the draft Phase 2 report of the examined country including the draft commentaries of the lead examiners. (Revised Guidelines VI.B.3, and established practice)

7. (2 to 3 hours) The Secretariat and lead examiners shall then meet with the examined country to review outstanding issues in the draft Phase 2 report and the commentaries of the lead examiners in the report. This meeting shall be focused on the main points of disagreement between the lead examiners and examined country, and shall not involve discussion of technical drafting issues. Following this meeting, the Secretariat and the lead examiners will revise the report (in tracked changes mode). (Revised Guidelines VI.B.3., and established practice)

## II. WORKING GROUP MEETING

Attendance and coordination of meetings in the Working Group and break-away sessions

- The Secretariat shall coordinate the participation of the lead examiners and the examined country, and shall organise all break-away meetings between the Secretariat, lead examiners and examined country. The Secretariat shall also provide logistical and drafting support at all stages. (Established practice.)

- The lead examiners shall attend the Working Group meeting to present the draft Phase 2 report. It is essential that all the lead examiners who participated in the on-site visit are present at the Working Group meeting. (Revised Guidelines III.E.)

- The examined country shall bring the relevant experts to the Working Group meeting, including authorities involved in the enforcement of the foreign bribery offence, in order to be able to respond effectively to questions from the Working Group. [Procedure for Self-and Mutual Evaluation of the Convention and Revised Recommendation—Phase 2 (DAFFE/IME/BR(99)33/FINAL)]

- Each member of the Working Group shall ensure that one or more well-prepared, qualified expert(s) review the draft reports prior to the meeting and that such expert(s) attend the meeting

of the Working Group to actively participate in the review and debates concerning issues raised by the draft report and recommendations. (Revised Guidelines IX.B.)

### *A. First Reading in the Working Group*

(2 - 3 hours)

8. The first reading by the Working Group involves a review and debate of the draft Phase 2 report including the commentaries of the lead examiners. Depending on the complexity of the changes to the report arising from the preliminary meeting, the Secretariat may circulate a copy of the revised draft report (in tracked changes mode) to the Working Group at the first reading. The lead examiners will highlight significant changes to the draft report in their oral presentation to the Working Group. The following steps and time limits shall generally apply:

a) (15 minutes) The lead examiners shall present a summary of the following regarding the examined country (Revised Guidelines III.E., and established practice):

- The on-site visit.
- Main unresolved concerns about the implementation in practice of the Convention and Revised Recommendation.
- Major issues that have been resolved to their satisfaction.
- Places in the draft Phase 2 report and commentaries that have been amended due to discussions in the preliminary meeting.

b) (15 minutes) The examined country shall respond to the concerns of the lead examiners. Since the examination process is a constructively critical exercise the examined country shall guard against being overly defensive in its response. (Revised Guidelines IV.D.3.)

c) (1 hour 30 minutes – 2 hours 30 minutes) The Working Group shall have the opportunity to react to the draft report and presentations of the lead examiners and the examined country. Working Group members shall indicate where they agree and disagree with the concerns of the lead examiners, and may raise other issues of concern or interest that may have been missed by the lead examiners. The Working Group may also propose and agree upon changes to parts of the draft Phase 2 report where necessary. This shall be an open debate, and shall afford the examined country and the lead examiners adequate opportunity to respond to queries and

comments by the Working Group. (Revised Guidelines VI.B.4. and established practice.)

### *B. Break-Away Sessions*

(2 hours 30 minutes)

9. (1 hour) Following the first reading in the Working Group the Secretariat shall meet with the lead examiners to formulate draft recommendations and the draft executive summary to be presented at the second reading in the Working Group. The lead examiners and the Secretariat will revise the draft report based on the discussion in the Working Group. The Secretariat will circulate the revised draft report (in tracked changes mode) to the Working Group at the second reading.

10. (1 hour) The Secretariat and lead examiners shall then provide the examined country with the draft recommendations and subsequently with the draft executive summary. The Secretariat, lead examiners and examined country shall meet once the examined country has had an opportunity to review the draft recommendations and executive summary to hear the country's reaction to these documents. The lead examiners will then decide on how to divide up responsibility for presenting the recommendations. (Established practice.)

11. (30 minutes) Where necessary the Secretariat, lead examiners and examined country shall meet again (the following morning) prior to the second reading in the Working Group to ensure that the draft recommendations and executive summary are ready to be circulated in the Working Group. In addition, the Secretariat shall provide the chairperson with an updated list of the main issues to be discussed. (Established practice.)

### *C. Second Reading in the Working Group*

(2 hours – 2 hours 30 minutes)

12. (15 minutes) The lead examiners shall present the draft recommendations to the Working Group (copies of which shall have been circulated in the Working Group prior to the opening of the second reading). The lead examiners shall outline the areas where disagreement on the draft recommendations remains between the lead examiners and the examined country.

13. (15 minutes) The examined country shall be given the opportunity to respond to the draft recommendations.

14. (1 hour 30 minutes – 2 hours) The discussions shall be open to the Working Group, which shall debate and finally adopt a comprehensive set of

recommendations identifying areas for (i) action by the examined country, and (ii) follow-up by the Working Group. The Working Group may also agree upon changes to the draft Phase 2 report where necessary. During this session the examined country and the lead examiners shall be afforded adequate opportunity to respond to comments by the Working Group. Finally, the Working Group will need to discuss and agree on the executive summary of the Phase 2 report. The examined country shall not block the Working Group's decision to adopt the recommendations and the executive summary, but it has the right to have its views, comments and explanations fully reflected in the Phase 2 report.

[Revised Guidelines VI.B.4 and 5, Procedure for Self- and Mutual Evaluation of the Convention and Revised Recommendation III (iv) para.15 and (v) para.17, and established practice.]

### *D. Further Break-Away Sessions*

(1 hour 30 minutes)

15. (1 hour) Following the second reading in the Working Group, the Secretariat should meet with the lead examiners to review the revised draft report including the recommendations and the executive summary in order to check that they reflect the Working Group discussions.

16. (30 minutes) Where necessary, the Secretariat, the lead examiners and the examined country shall meet again prior to the third reading in the Working Group to ensure that the draft report, recommendations and executive summary are ready to be circulated to the Working Group. The Secretariat will circulate the final revised draft report (in tracked changes mode) to the Working Group at the third reading.

### *E. Third Reading in the Working Group*

(15 minutes)

17. (5 minutes) The lead examiners or the Secretariat shall present any major changes made in the revised version of the report (including the recommendations and the executive summary).

18. (5 minutes) The examined country shall be given an opportunity to respond.

19. (5 minutes) The chairperson will propose the adoption of the Phase 2 report.

[Revised Guidelines VI.B.5.]

# PROCEDURE FOR SELF- AND MUTUAL EVALUATION OF IMPLEMENTATION OF THE CONVENTION AND THE REVISED RECOMMENDATION – PHASE 2

1 March 2001
DAFFE/IME/BR(99)33/FINAL

**Procedure for Self- And Mutual Evaluation of Implementation of the Convention and the Revised Recommendation - Phase 2 (Note by the Secretariat)**

## I. Introduction

1. In April 1999, the Working Group on Bribery began Phase 1 of the procedure for self- and mutual evaluation of implementation of the Convention and the Revised Recommendation according to the general principles and procedures agreed by the Group in DAFFE/IME(98)17. Part IV of that document set out a preliminary outline of Phase 2 but noted that a number of substantial elements, notably the questionnaire for Phase 2 and the terms of reference for on-site visits would need to be further developed.

2. This note recalls the general issues adopted by the Group which are also relevant to Phase 2 and proposes modalities for carrying out Phase 2 based on the preliminary outline in DAFFE/IME(98)17. It sets out draft terms of reference for on-site visits. This latest revision reflects the comments made by delegates at the 5-7 December 2000 meeting.

## II. "General issues[5]

Delegates agree that the monitoring procedure should conform to a number of general principles:

**Purpose.** The purpose of monitoring is to ensure compliance with the Convention and implementation of the Revised Recommendation. Monitoring also provides an opportunity to consult on difficulties in implementation and to learn from the solutions found by other countries.

**Effectiveness.** Monitoring must be systematic and provide a coherent assessment of whether a participant has implemented the Convention and 1997 Revised Recommendation.

**Equal treatment**. Monitoring must be fair and this means equal treatment for all participants. Monitoring performance is an exercise among peers who can be frank in their evaluations. The Secretariat has an important role in ensuring uniform application of the procedures.

**Recommendation and Convention.** The Recommendation and the Convention are very different instruments: the Convention contains detailed binding commitments in the field of criminal law; the Recommendation has a wider scope and is written in more general terms. Both are important elements

5 The General issues are taken from DAFFE/IME(98)17.

of the activity to combat bribery in international business transactions. There are also important interconnections between the two instruments, for example, in the areas of accounting and money laundering.

**Cost-efficient.** The monitoring procedure should be efficient, realistic, concise and not overly burdensome. It is necessary, however, to ensure that monitoring is effective, since together with the Convention and the Recommendation, it guarantees the level playing field.

**Co-ordination with the Council of Europe and other organisations.** International organisations such as the Council of Europe, the European Union, and the OAS, share the goal of combating corruption though the scope of their respective efforts and their more specific objectives may differ. All participants want to avoid duplication of effort. Since the Council of Europe has launched a procedure to monitor implementation of its anti-corruption principles and instruments, particular efforts should be made to keep abreast of its activities as well as those of other organisations monitoring country commitments.

**Public information.** The 1997 Revised Recommendation calls on the Working Group to provide regular information to the public on its work and activities and on implementation of the Recommendation. This general responsibility must be balanced against the need for confidentiality which facilitates frank evaluation of performance."

## III. Outline of Phase 2

### Objective

3. The purpose of Phase 2 is to study the structures put in place to enforce the laws and rules implementing the Convention and to assess their application in practice. Phase 2 should broaden the focus of monitoring to encompass more fully the non-criminal law aspects of the 1997 Revised Recommendation. Phase 2 would also serve an educational function as participants discuss problems and different approaches.

4. As for Phase 1, the evaluations in Phase 2 will be country examinations in order to obtain an overall impression of the functional equivalence of participants' efforts. The Group may decide to carry out horizontal analysis of some issues that emerge during Phase 2.

### Timing of Phase 2

5. As to the commencement of Phase 2, the Group confirmed that priority should be given to finalising Phase 1 examinations, including analysing those issues emerging from Phase 1 that need further discussion (Phase 1 bis). However, delegates agreed that Phase 2 should not be indefinitely postponed

due to countries that may still be lagging in finalising ratification and implementation of the Convention.

6. The Group agreed to begin a Phase 2 examination for one country that could start prior to the next Ministerial; it may not be feasible to finalise the examination until the June 2001 meeting of the Group. In principle, a first cycle of Phase 2 examinations of all participants should be completed by 2005 at the latest.[6]

**Elements in Phase 2 Evaluations:**

(i) Reply to a questionnaire;

(ii) On-site visits to country examined;

(iii) Preparation of a preliminary report on country performance;

(iv) Consultation in the Working Group;

(v) Adoption by the Working Group of a report, including an evaluation, on country performance;

(vi) Transmission to the OECD Council.

***(i) Questionnaire***

7. The Working Group adopted a questionnaire for Phase 2 at its December 2000 session [DAFFE/IME/WD/BR(2000)36/FINAL]. The questionnaire will be sent to the country to be examined shortly thereafter. The time limits for countries to be examined will be fixed by the Secretariat in co-ordination with the country concerned and the lead examiners.

8. Supplementary questions, specific to the country concerned, would take account of the results of the evaluation of that country in Phase 1 in order to follow up on issues identified in its review. The questionnaire should also elicit information concerning implementation of the Revised Recommendation.

***(ii) On-site visits by the Secretariat and lead examiners***

9. On-site visits, which would be approximately 2-3 days, would be carried out in accordance with pre-determined terms of reference. The terms of reference for all on-site visits is set out in the Annex to this note. During on site visits, a country should not be required to disclose information that is otherwise protected by a country's laws and regulations.

6 This would work out to approximately 7-8 Phase 2 examinations per year.

10. On-site visits by the Secretariat and lead examiners would be an effective way to obtain information on practice with respect to a number of elements such as enforcement and prosecution. It also offers the possibility to talk with magistrates, police, tax and other authorities responsible for applying the law. The on-site visits would also be an opportunity to consult on other matters covered by the Recommendation.

11. Taking account of the considerations in paragraphs 28-29, there would be an overall benefit in Phase 2 from an informal exchange of views with key representatives of the private sector and civil society which could contribute to determining the impact that the laws and enforcement have had on behaviour, including compliance schemes. Each country would be consulted on the best manner of obtaining input from the private sector and civil society.

12. Two lead examiners for each country undergoing evaluation would be chosen, in consultation with the country examined. The countries acting as lead examiners will choose the experts who take part in the on-site visits as well as preparation of the preliminary report and the conduct of the examination in the Group.

***(iii) Preliminary reports assessing performance***

13. As for Phase 1, the report would have a standard format that follows the order of issues raised in the questionnaire. The format could include sections on description, evaluation and recommendations for improvement. The preliminary report would be based on the reply to the questionnaire and information obtained during the on-site visit to the examined country. The country undergoing evaluation would have an opportunity to comment on the preliminary report.

14. The preliminary report would be drafted by the Secretariat together with the lead examiners.

***(iv) Consultation in the Working Group***

15. The mutual evaluation would be undertaken through a consultation in the Working Group. The consultation would provide an opportunity to discuss difficult issues, to listen to the country evaluated explain its legal system and approach, and to formulate the recommendations that the Group would agree to make.

16. The examined country may bring a number of experts to the session, including from the enforcement community, in order to be able to respond to questions from the Group.

### *(v) Adoption of a report on the performance of the country evaluated*

17. The Working Group would formulate an evaluation concerning the country's performance which would be incorporated in a report. Discussions in the Working Group, as well as interaction between Secretariat, lead examiners, and the country examined, should ensure that the evaluation reflects the fullest possible understanding of the country's approach. The examined country will not block the Group's decision to adopt the evaluation. However it has the right to have its views, comments, and explanations fully reflected in the report and the evaluation.

18. Clear, well-structured questionnaires and reports would be important to achieving a qualitative assessment of the country's performance which could be accepted as the result of a fair process applying an equal standard to all countries.

19. The Working Group will adopt reports according to the rules set out in the terms of reference.

### *(vi) Transmission to the OECD Council*

20. The Working Group should report to the Council annually on the progress made in the Phase 2 evaluations. This report should include an agreed summary of individual country reports adopted by the Working Group in the course of the year, and would also attach individual country reports. The Working Group, via the CIME, should transmit the report to the Council.

### Budget for on-site visits

21. The cost of on-site visits includes the travel and per diem of the Secretariat which is charged to the budget of the Organisation. A request for increased resources will be necessary in the Organisation's budget for 2001 to provide for sufficient funding for Phase 2, including the travel and per diem expenses of the Secretariat.

22. In principle, each country will take part in evaluations of two other countries, Parties to the Convention, over the period of the complete review cycle. For each country they evaluate, countries acting as lead examiners would bear the costs of travel and expenses for 1-3 experts from their countries.

23. The examined country would bear the cost of replying to the questionnaire and preparing the on-site visits.

**Mutual review**

24. Lead examiners shall be chosen, in the first instance, from countries for which a Phase 1 examination has been completed by the Group**.** The discussions and consultations in the Working Group would be open to both full participants and observers (if any). Only full participants, however, could take part in the adoption of the report, including the evaluation of whether the examined country had fulfilled the obligations of the Convention.

**Other OECD Bodies**

25. The Working Group is responsible for overall review of performance in implementing the Convention and the 1997 Revised Recommendation.

26. The monitoring of practical applications of broader issues might require specific expertise that may be found in the other parts of the Organisation. In conducting its evaluation, the Working Group would draw on information and expertise developed by other OECD bodies, particularly the Committee on Fiscal Affairs, the Development Assistance Committee, and the Working Party on Export Credits and Credit Guarantees, on implementation of elements of the Revised Recommendation in their respective fields.

**Council of Europe and other Organisations**

27. The OECD Secretariat will communicate regularly with the Secretariats of the Council of Europe, the European Union and other organisations, with a view to avoiding duplication among respective exercises to monitor commitments to combat corruption in international business transactions. Contacts with these organisations should be particularly attentive to avoiding burdening a particular country with multiple on-site visits.

**Civil Society**

28. Because peer review is an intergovernmental process, business and civil society groups would not be invited to participate in the formal evaluation process, in particular, in the evaluation exercise and the consultation in the Working Group.

29. Participants agreed that while civil society does not take part in the formal evaluation exercise, there should be an opportunity for their views to be expressed and reflected in Phase 2 where enforcement in the private sector will also be examined. Providing public information on the schedule of the country examinations would permit such groups to provide information or opinions in a timely way. Different options for involvement, or opportunity to express views, could be considered by the country to be examined. The country concerned would be consulted on the programme for on-site visits.

**Public information - Confidentiality**

30. Given the interest of the business sector and the public in this matter, transparency of the monitoring process is important. The Working Group therefore should consider making as much information available, including dissemination of the questionnaire. Participants emphasised, however, that the mutual review itself needed confidentiality if it were to be frank and efficient. If the examined country makes available to the examiners information it considers confidential, confidentiality of this information will be respected. In principle, reports on country performance would remain confidential until such time that they have been transmitted to the Council. A country concerned could, however, take whatever steps it felt appropriate to release information concerning its report, or to make it publicly available.

## ANNEX

## TERMS OF REFERENCE FOR ON-SITE VISITS

### 1. Aim of Phase 2 Self- and Mutual Evaluation

The aim of Phase 2 self- and mutual evaluation of implementation of the Convention and the Revised Recommendation is to improve the capacity of Parties to the Convention and the Recommendation to fight bribery in international business transactions by following up, through a dynamic process of self- and mutual evaluation and peer pressure, compliance with their undertakings in this field.

### 2. Functions of Phase 2 Self- and Mutual Evaluation

2.1 In order to achieve the aim in paragraph 1 above, the Working Group shall monitor the implementation of the Convention and the Revised Recommendation on Combating Bribery of Foreign Public Officials in International Business Transactions, in conformity with the provisions contained in such instruments.

2.2 Phase 2 Self- and Mutual Evaluation should include on-site visits to be carried out in accordance with these terms of reference.

### 3. Evaluation Procedure

3.1 The Working Group will conduct a self- and mutual evaluation procedure, including on-site visits, for each country that has already completed a Phase 1 examination.

3.2 The evaluation for each country will be conducted within a period of time determined by the Working Group.

3.3 The evaluation will be based on the replies by the country evaluated to the Phase 2 questionnaire, the results of the on-site visits, and the consultation in the Working Group.

## 4. Phase 2 Questionnaire

4.1 The Working Group shall adopt a questionnaire for Phase 2 evaluation which shall be addressed to all members of the Group.

4.2 The questionnaire will provide the framework of the evaluation procedure.

4.3 The time limits for replying to the questionnaire and for commenting on the preliminary report will be fixed by the Secretariat in co-ordination with the country concerned and the lead examiners. The replies, in English or French, should be sent to the Secretariat together with supporting material.

## 5. On-Site Visits

5.1 Each country agrees to allow an on-site visit of approximately 2-3 days.[7] for the purpose of providing information concerning its law or practice, including enforcement and prosecution, which is useful for Phase 2 evaluation.

5.2 The Working Group should give a minimum of two months notice to the country concerned prior to carrying out the on-site visit.

5.3 The country undergoing evaluation will play an active role in fixing the date for and preparing the visit.

5.4 The on-site visit should be carried out in accordance with a programme agreed between the country undergoing evaluation and the on-site visit team, taking account of the specific requests expressed by the on-site team.

## 6. Composition and functions of Evaluation Teams

6.1 On-site visit teams will be composed of 1-2 members of the Secretariat and up to 3 experts from each lead examining country chosen in consultation with the country examined. The composition of the team would ensure adequate expertise for the areas to be examined. Lead examiners shall be chosen, in the first instance, from countries for which a Phase 1 examination has been completed by the Group.

6.2 The on-site visit teams will examine the replies given to the questionnaire and may request, where appropriate, additional information from the country undergoing evaluation, to be submitted either orally or in writing.

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[7] It is envisaged that there would be at least one visit per round (five years).

6.3 The on-site teams will consult with the country concerned on the possibility of meeting with representatives of the private sector and civil society to ascertain their views.

6.4 Costs of experts taking part in on-site teams will be funded in accordance with the provisions of paragraph 10.2, below.

**7. Evaluation Reports**

7.1 On the basis of the information gathered from the questionnaire and the on-site visits, the Secretariat and the lead examiners (the evaluation team) will prepare a preliminary draft report on the state of enforcement and application of the law implementing the Convention and on measures taken to implement the provisions of the Revised Recommendation.

7.2 The preliminary draft report should be transmitted to the country undergoing evaluation for comments. These comments shall be taken into account when finalising the preliminary report.

7.3 The preliminary report will be submitted to the Working Group.

**8. Discussion and Adoption of Reports by the Working Group**

8.1 The Working Group, in plenary, will discuss the preliminary report submitted by the evaluation team.

8.2 The country undergoing evaluation can submit observations orally, and or in writing, to the plenary.

8.3 After full discussion, the Working Group will adopt the preliminary report, including an evaluation, in respect of the country evaluated.

8.4 After modification to take account of the discussion in the Working Group, the revised report will be adopted by the Group in plenary or under written procedure.

8.5 The Working Group will adopt evaluation reports on the basis of consensus. The country undergoing evaluation shall not block the decision to adopt the evaluation but has the right to have its views and opinions fully reflected in the report.

8.6 Only full participants in the Working Group can take part in the decision to adopt the evaluation reports.

8.7 The evaluation reports may contain recommendations addressed to the country concerned in order to improve its domestic laws and practices to combat bribery of foreign public officials in international business transactions.

## 9. Confidentiality

9.1 Consultations and discussions of the Working Group on the self- and mutual evaluations shall take place *in camera*. Non-governmental groups will have a possibility to express their views and submit information to the Working Group.

9.2 Evaluation reports shall be confidential until their transmission to the Council. They would then be made publicly available.

## 10. Funding for Phase 2 On-Site Visits

10.1 The budget of the Organisation will bear the expenses for the travel and *per diem* expenses for the members of the Secretariat part of the on-site visit teams.

10.2 The countries taking part in the evaluations as lead examiners will bear the costs of travel and per diem expenses for their experts assigned to the on-site visit teams.

10.3 The country undergoing evaluation will bear the cost of replying to the questionnaire and preparing the on-site visits.

# PHASE 2 QUESTIONNAIRE

24 January 2001
DAFFE/IME/BR/WD(2000)36/FINAL

## PHASE 2 QUESTIONNAIRE
## (Note by the Secretariat)

### Objective

The purpose of the second phase of the self-evaluation and mutual review of implementation of the Convention and the 1997 Recommendation (Phase 2) is to study the structures put in place to enforce the laws and rules implementing the Convention and to assess their application in practice. Phase 2 should also broaden the focus of monitoring to encompass more fully the non-criminal aspects of the 1997 Revised Recommendation. Phase 2 would also serve an educational function as participants discuss problems and different approaches. Phase 2 will be carried out according to the Terms of Reference adopted by the Working Group in DAFFE/IME/BR(99)33/FINAL.

The Phase 2 examinations will be carried out in order to obtain an overall impression of the functional equivalence of participants' efforts to apply the Convention effectively. One central issue will be how participants have actually dealt with concrete cases that have arisen in their territories with respect to the Convention. The institutional mechanisms put in place in individual countries to deal with cases covered by the Convention (prosecution authorities, means to provide mutual legal assistance, etc.) need to be examined. Participants will also be asked what promotional efforts they have undertaken to make the Convention better known (seminars, workshops, press communication, private sector dialogue, etc.).

During Phase 1, the WG identified deficiencies in the domestic legislation of some countries concerning the implementation of the Convention. In Phase 2, countries will be asked what remedial steps they have taken in the meantime if they have not already taken action to address them. However, as these are issues concerning individual countries only, country-specific questions are not included in this general Phase 2 questionnaire.

Also in Phase 1, the WG concluded that a number of issues are of a broader nature and therefore merit an in-depth horizontal analysis. These horizontal issues therefore will be dealt with separately from the Phase 2 questionnaire. Nevertheless, parts of the questionnaire are also relevant for these horizontal issues.

The questionnaire will assist the Group in assessing how participants address the principal issues under the Convention in the application of their implementing laws, and in gaining a clear overview of how the Convention has been applied as a multilateral instrument.

**Scope of Replies**

The replies to the questionnaire should be precise and provide sufficient detail to permit an assessment of the actual application of the Convention's implementing legislation. During on-site visits, countries should not be expected or required to disclose information otherwise protected by a country's laws and regulations.

Where appropriate, copies of relevant laws, regulations, administrative guidance, or court decisions should be provided in English or in French. In formulating replies to the questionnaire participants should also take account of the Commentaries.

**Confidentiality**

Replies to the questionnaire received by the Secretariat will be treated as confidential. Each participant may release information concerning its questionnaire, or make it publicly available, subject to its domestic laws on the protection of privacy and secrecy.

**Deadline**

The Working Group will decide the date of examination for each country. Participants should address their replies to the Secretariat within the time limits fixed by the Secretariat for each individual country.

**Submission of replies**

Replies should be submitted in either English or French and preferably in electronic format.

**Contact persons**

Please insert here the name and contact numbers of a person(s) within your country who can be contacted in relation to the reply to the questionnaire, if different from Phase 1 contacts.

## QUESTIONS CONCERNING PHASE 2

## A GENERAL ISSUES

### 1. General approach

1.1 Please describe your country's policy with regard to the means put in place (besides implementing the Convention into domestic legislation) to fight bribery of foreign public officials. In addressing this question, please include specific information on measures your government may have taken (or plans to take) with respect to items listed in section II of the 1997 Recommendation (see Part C of questionnaire).

1.2 If you have dependent or overseas territories, is the Convention and your implementing legislation applicable to them? If not, have you taken any steps (or do you plan to take steps) to make the Convention applicable to those territories?

1.3 If more than one level of government has legislative-making powers, and another level of government has enacted legislation that applies to the situation of foreign bribery, please explain the relationship of these laws and whether one would supersede in certain circumstances.

### 2. Institutional Mechanisms

2.1 If there are specific bodies that include in their competence the fight against bribery of foreign public officials in your country, please specify their legal basis, composition, functions, and powers.

2.2 What measures are in place to ensure that persons or bodies in charge of combating bribery of foreign public officials have the necessary independence and autonomy to perform their functions?

2.3 What resources (human and financial) are available for the implementation of the Convention? (Please include information about training programmes, if any). If private resources have also been available for implementation activities, please specify the nature and level of such resources.

2.4 Have there been any cases in your country of domestic officials reporting cases to superiors, prosecutors, or other public authority, that they have been promised, offered or given a bribe by foreign nationals or companies? Is there any mechanism for such reporting? Are there safeguards such as whistleblowing or witness protection programmes for such officials?

2.5 Have there been instances where competitors have filed complaints or provided information, or where company employees have brought a violation to the attention of the authorities? Do procedures exist for the public to provide information (e.g., hot lines)? Are there safeguards to protect "whistle-blowers"? Are there mechanisms to make such information available to other countries concerned?

2.6 Have your authorities provided any assistance to companies in case of direct or indirect solicitation of bribery of foreign public officials? In particular, have any initiatives been taken or mechanisms developed concerning greater public recognition of solicitation, the setting-up of bodies providing assistance to enterprises, and organised concerted actions in exceptional cases, including joint actions by governments?

2.7 Does your government provide a procedure whereby persons and companies may submit a request for an opinion, based on the facts of a prospective transaction, on whether the transaction would constitute the offence of bribing a foreign public official? If so, please describe the process and explain to what extent, if any, the opinion would be binding on the courts.

### 3. Public Awareness

3.1 What activities have been undertaken or what activities are planned to make the Convention better known in your country (e.g. workshops, seminars, public campaigns, encouraging compliance in the private sector, training programs for lawyers, etc.)?

3.2 Are you aware of guidelines or of any public or private initiative to develop codes of conduct, including corporate compliance schemes concerning adequate internal company controls? What efforts do you undertake to promote the OECD Guidelines for Multinational Enterprises and the OECD Principles on Corporate Governance as they relate to issues of bribery?

3.3 Does your government maintain contact and organise consultations with business, labour, and NGOs in anti-corruption activities with a view to promoting public awareness of the Convention?

## B. APPLICATION OF THE CONVENTION

Preliminary remark: The following questions have been designed to provide participants with some guidance in addressing the relevant issues concerning the application of their implementing legislation. Ideally, participants would answer these questions by referring to concrete cases that have arisen under their implementing legislation or any other legislation (such as trafficking in influence or misuse of company assets, etc.) with regard to the bribery of foreign public officials (whether or not these cases have been successfully

prosecuted). However, if a country cannot provide examples that relate directly to the bribery of foreign public officials, it is invited to provide other relevant examples. Cases of bribery of domestic public officials would be the best alternative.

(i) Have there been any concrete cases in your country that fall under the scope of the Convention? If yes, please describe the facts and explain how your authorities have dealt with such cases.

ii) Please describe what has been done in your country in order to provide for an effective application of your country's implementing legislation? Have guidelines been developed concerning the interpretation of the Convention?

(iii) Has a coherent interpretation of the Convention and/or its implementing legislation been developed by legal science? What is the legal weight given to secondary sources of law, such as the Commentaries to the Convention and articles in legal journals?

(iv) If relevant, have there been practical examples to show how your country has/has not been able to use the concept of "direct applicability" of the Convention in order to compensate for discrepancies or gaps in the national implementing legislation?

## 4. Article 1. The Offence

4.1 Please describe how your authorities have applied the offence in cases involving bribery of foreign public officials (by natural or legal persons). If no cases have arisen concerning the bribery of foreign public officials, please refer to cases involving bribery of domestic public officials where appropriate.[8] In answering this question, please pay particular attention to the following elements:

a) Since Phase 1, have there been any significant interpretations (by courts or other authorities) of Article 1? How have the following elements of the offence of bribery of foreign public officials or equivalent domestic bribery laws been interpreted: intent, the offer, promise or giving of a bribe, undue pecuniary or other advantage (provide examples of advantages that have been covered), intermediaries (provide examples, where available), third party

[8] A reference to cases of bribery of domestic public officials would be appropriate with regard to all questions listed below except a. (elements of "obtaining or retaining business"; "international business") and b. ("foreign public official").

beneficiaries (especially cases where the benefit went directly to the third party), in relation to performance of official duties (what acts/omissions have been covered), obtaining or retaining business or other improper advantage (where relevant, how have the courts applied facilitation payments or bona fide expenses), and international business (compared to domestic business).

b) Many countries did not adopt in their national laws, per se, the autonomous definition of foreign public official provided in the Convention. Can you please describe how the definition adopted in your legislation has been applied to foreign bribery cases and whether you have encountered any difficulties? Please provide examples of cases involving interpretation of the terms "public function", "public enterprises", and "public agencies".

c) Please provide examples of cases involving incitement, aiding, abetting, or authorisation, attempt (if relevant), conspiracy (if relevant).

d) Have cases been dismissed due to successful pleading of defences (either general or defences specific to the bribery offence)?

## 5. Responsibility of Legal Persons

5.1 Can you provide examples of the application of the law ascribing the liability of legal persons (including state enterprises) to the bribery of foreign public officials? If not, please refer to cases involving bribery of domestic public officials. In describing the cases, please pay careful attention to describing the types of entities that have been prosecuted and how the standard of liability (e.g. breach of supervisory duty, leading person theory, etc.) has been applied to bribery offences.

5.2 Concerning the relationship of liability between the legal person and the natural person:

a) What has been the outcome when the individual(s) responsible for the bribery transaction (e.g. directors, managers, shareholders) has (have) not been convicted or identified before assigning liability to the legal person?

b) Is responsibility of the legal person determined in the same proceedings as the individual(s) responsible for the bribe or as a consequence of the proceedings in relation to the individual(s)?

c) If the standard of liability for legal persons involves the identification of someone in the legal person who is responsible for the bribe, would information about the identity of the directors, shareholders and beneficial owners be available on a timely basis to the investigating authorities? Please explain what information would be available and how it would have to be obtained.

5.3 Does the state have the same powers for investigating an offence in relation to a legal person as in relation to a natural person (e.g. search and seizure, including the search and seizure of bank records, subpoenaing witnesses, etc.)? Who are the competent authorities for investigating such cases?

## 6. Sanctions

### -- *Natural and Legal Persons*

6.1 On the basis of available information, please describe all criminal, administrative, and civil sanctions that have been applied in practice to natural persons for the offence of bribing a foreign public official and compare them with those that have been applied for domestic bribery as well as other similar offences (e.g. fraud, theft and embezzlement).

6.2 On the basis of available information, please describe all criminal, administrative, and civil sanctions that have been applied in practice to legal persons found liable for bribing foreign public officials and compare them with the sanctions that have been applied for domestic bribery as well as other similar offences (e.g. fraud, theft and embezzlement).

6.3 Where possible, in cases where persons have been found liable for foreign bribery cases, what were the grounds for determining the severity of the sentence (including the amount of the fine and/or term of the imprisonment, or for the non-imposition of a sanction)?

6.4 If your country provides a procedure for out-of court settlements (e.g. plea-bargaining or other procedure), please describe how this process has been applied to cases of bribery of foreign public officials, and include information about the resulting sanctions. If information is available, please compare these sanctions with those obtained under other judicial procedures.

## 7. Seizure and Confiscation

### *-- Pre-trial Search, Seizure and Confiscation*

7.1 Please provide cases where your authorities have granted or denied pre-trial search, seizure and confiscation in relation to the bribe and the proceeds of bribing a foreign public official.

7.2 Please provide cases where your authorities requested access to bank records or other financial records held by a financial institution for the purpose of obtaining information, searching and seizing, or freezing property in relation to the bribery of foreign public officials and note any difficulties encountered in carrying out these powers.

### *-- Confiscation or Comparable Monetary Sanctions*

7.3 Please describe how confiscation of the bribe and the proceeds has been exercised in relation to the foreign bribery offence. In responding, please answer the following questions:

a) In practice, have the authorities confiscated the bribe and the proceeds of bribing a foreign public official or just one or the other? In practice, how far have the authorities been able to trace the assets generated by the foreign bribery offence (i.e. where they have been converted from their original form)? Have the authorities encountered difficulties in tracing the proceeds?

b) If confiscation is not possible because the assets cannot be traced or are no longer available (because, for instance, they are in the possession of a bona fide third party, or they have been gambled away), or confiscation is not available under your laws, what monetary sanctions of a comparable effect have been applied?

c) If confiscation of the bribe when it is still in the possession of the briber is available, can you provide examples of having applied this power in practice?

d) Can you report cases concerning legal persons subject to confiscation? If so, is it available on the same terms as it is for natural persons?

## 8. Jurisdiction

### *-- Territorial Jurisdiction*

8.1 In practice, have there been any difficulties in establishing territorial jurisdiction over cases of bribery of a foreign public official? For natural persons? For legal persons? In particular, if your country has identified certain requirements such as government authorisation, the requirement that a particular person report the offence (e.g. an employer or a victim), or that some test is met (e.g. that prosecution is in the public interest), how has this requirement(s) been applied in practice to the foreign bribery offence?

### *-- Nationality Jurisdiction*

8.2 In practice, have there been any difficulties in establishing nationality jurisdiction over cases of bribery of a foreign public official? For natural persons? For legal persons? In particular, if a requirement(s) must be satisfied for the establishment of nationality jurisdiction, such as reciprocity, dual criminality, government authorisation, the requirement that a particular person report the offence (e.g. an employer), or that some test is met (e.g. that the prosecution is in the public interest), how has this requirement(s) been applied in practice to the foreign bribery offence?

8.3 Can you report whether your country has established jurisdiction over cases where a foreigner (non-national) working for a domestic company bribes a foreign public official abroad?

8.4 Please explain what criteria you apply in determining the "nationality" of a legal person in your country (e.g. place of registry or main seat). Has a legal person established in your country been held responsible for bribery of foreign public officials by one of its subsidiaries abroad?

## 9. Enforcement (Investigation and Prosecution)

9.1 How do you apply existing rules concerning the opening and closing of investigation and prosecution (principle of legality, principle of discretion)? Are there any special investigative techniques that can be used in your country in cases of bribery, especially in regard to bribery of foreign public officials?

9.2 What difficulties have you experienced concerning investigation and prosecution of offences of bribery of foreign public officials?

9.3 If available, please provide statistical information concerning the number of investigations, prosecutions, court cases, and convictions. If information is available, how long has it taken your authorities to conclude the

prosecution of any foreign bribery cases that have occurred to date? Are there any time limits for any of the stages of the criminal process from investigation to appeal?

9.4 In practice, does the prosecution of a case of foreign bribery depend on the consent of a person or body other than the normal prosecutorial authorities (e.g. Minister of Justice)? On what grounds did this authority grant or deny consent?

9.5 If there are examples of where the determination of whether to prosecute a case of bribing a foreign public official involved consideration of the public interest, on what grounds was it decided that the public interest was or was not satisfied and by whom?

9.6 If you give victims the opportunity to intervene at any stage of the proceedings, please provide examples of how you identify the victim in the case of bribery of foreign public officials. In particular, can victims compel prosecution or have an impact on the sentence?

**10. Statute of Limitations**

If information is available, can you indicate approximately how many cases of bribery of foreign public officials could not be prosecuted because the statute of limitations had expired, even taking into account periods of suspension, interruption, reinstatement, or extension?

**11. Money Laundering**

11.1 Please explain how your money laundering legislation has been applied where the predicate offence was the bribery of a foreign public official, and include answers to the following questions:

a) What sanctions (including confiscation or monetary sanctions of comparable effect and sanctions under the laws that regulate the financial system) have been applied to cases involving bribery by natural and legal persons?

b) If applicable, can you provide examples of the application of the money laundering offence where the defendant should have known or was negligent as to whether the proceeds were derived from the commission of the offence of bribing a foreign public official?

c) Where the predicate offence takes place abroad have the courts required that certain additional conditions be met (e.g. dual criminality or a conviction of the predicate offence)?

d) Please explain any differences in the application of the money laundering offence where the predicate offence has been the bribery of a domestic public official.

11.2 Has your country applied sanctions for money laundering to employees and officers of financial institutions who have assisted or co-operated in laundering the illegal gains from the bribery of foreign public officials?

11.3 Have financial institutions provided information to the competent authorities about suspicious transactions involving the proceeds of bribing foreign public officials?

## 12. Accounting and Auditing Standards

12.1 Please provide examples of the civil, administrative and criminal penalties that have been applied for omissions and falsifications of books, records, accounts and financial statements of companies for the purpose of bribing foreign public officials or of hiding such bribery.

12.2 Please provide examples of prosecutions of the bribery of foreign public officials in your country that were initiated by a report by an auditor of a suspicious transaction to the company management, a corporate monitoring body or the competent authorities.

12.3 Does your country have books and records requirements, accounting standards, auditing standards and financial statement disclosure requirements in place that are effectively used as a tool to deter and detect the bribery offences discussed in Article 8.1 of the Convention? If so, please describe such books and records requirements, accounting standards, auditing standards and financial statement disclosure requirements, as well as how they are used.

12.4 How are such books and records requirements, accounting/auditing standards and financial statement disclosure requirements enforced in practice to deter and detect the bribery offences through the accounting and auditing standards discussed in Article 8.1 of the Convention?

12.5. What mechanisms, resources and structures does your country devote to deterring and detecting the bribery offences discussed in Article 8.1 of the Convention?

## 13. Mutual Legal Assistance

13.1 Please describe the requests for MLA your authorities have received (including requests for financial information such as bank records) regarding the

bribery of a foreign public official, and include answers to the following questions:

a) How many requests have your authorities received since the Convention entered into force in your country? How many requests have been granted/rejected and on what grounds?

b) How many requests have you made to other countries? How long has it taken for your country to receive a reply to a request for MLA? How many of them were granted/rejected and on what grounds?

c) How long has it taken your country to reply to requests for MLA? Have you been able to reply to requests promptly (see Article 9)? Are there time limits for responding to requests for the various forms of MLA?

d) How have any existing requirements (such as dual criminality or reciprocity) been applied?

f) Have you granted or denied requests for MLA concerning a legal person; if so, under what circumstances?

13.2 If your authorities have received requests for MLA regarding the offence of money laundering where the predicate offence is the bribery of a foreign public official, please explain how you responded, and comment on whether you provided the same range of MLA as has been provided for other offences?

13.3 Have your authorities been able to promptly grant MLA in cases where a request is for (a) information from a financial institution, such as a customer's name or about a customer's transaction, or (b) information about a company, including the identity of the owner, proof of incorporation, legal form, address, the name of directors, etc.?

13.4 Can MLA be provided by dependent or overseas territories?

13.5 Have you entered into new arrangements or agreements for the purpose of facilitating mutual legal assistance since the Convention became effective for your country?

**14. Extradition**

14.1 Please describe the requests for extradition that you have received in relation to the offence of bribing a foreign public official, and include answers to the following:

a) How many requests have your authorities received since the Convention entered into force for your country? How many requests have been granted/rejected and on what grounds?

b) How many requests have you made to other countries? How many of them were granted/rejected and on what grounds?

c) How have any existing requirements (such as dual criminality or reciprocity) that must be met in order to grant extradition been applied? How have other grounds (such as offences of a political nature, "ordre public" or other essential interests) been interpreted and applied?

d) If you have denied any requests for extradition on the basis that the requests concerned your nationals, were these cases submitted to your own prosecutorial authorities?

e) How long has it taken for your authorities to respond to these requests? Are there time limits for granting/denying extradition.

14.2 Have you entered into new arrangements or agreements for the purpose of facilitating extradition since the Convention became effective for your country?

## C. APPLICATION OF THE REVISED RECOMMENDATION

### 15. Public subsidies, licences, or other public advantages

Have you taken steps to ensure that public subsidies, licences, or other public advantages be denied as a sanction for bribery of foreign public officials, pursuant to Section II (v) of the Revised Recommendation? How do you ensure that public subsidies, licences, or other public advantages are not inadvertently granted in cases of bribery of foreign public officials?

### 16. Accounting and Auditing Standards

16.1 Have civil, administrative, or criminal penalties pursuant to Section V.A of the Revised Recommendation been imposed since the Convention went into effect? If so, please provide a list of cases or examples.

16.2 How do you effectively ensure the independence of external auditors (Section B. (ii)). If your country requires independent external audits as described in the Revised Recommendation Section V.B, what mechanisms are in place to ensure that they are being carried out? Please provide examples or a list of cases.

16.3 If your country requires independent auditors to report irregularities indicating possible illegal acts, pursuant to Revised Recommendation Section V.B, what mechanisms exist in your country to ensure that auditors are carrying out this obligation? Please provide examples or a list of cases.

16.4 What steps has your country taken to encourage the development and adoption of adequate internal company controls, as described in Revised Recommendation Section V.C?

**17. Tax Deductibility of Bribes**

17.1 How do you ensure that bribes paid to foreign public officials are not inadvertently permitted a deduction? In providing your response, please address the following questions:

(i) Please describe the categories of expenses and methods of payment that your tax examiners would examine to identify suspicious payments that could be bribe payments to a foreign public official.

(ii) Please describe the measures that have been taken to sensitise your tax examiners to the need to focus on suspicious payments that might constitute bribes and to provide guidance to your tax authorities on how to identify suspicious payments (e.g. guidelines, tax manuals, training programmes).

(iii) Who has the burden of proving that a particular deduction is permissible or impermissible and what is the standard of proof?

17.2 Under what conditions and in what circumstances can your tax authorities share information about suspicious bribery transactions with the following authorities:

(a) the criminal law enforcement authorities in your own country;

(b) the tax authorities in another country; and

(c) the criminal law enforcement authorities in another country?

17.3 Are financial institutions in your country obliged to provide financial information (e.g. identification of bank customers and beneficial owners of accounts as well as suspicious bribery transactions) where requested by the tax authorities for tax purposes? If so:

(a) under what circumstances; and

(b) what procedures must be followed?

17.4 Have your tax authorities permitted tax deductions for payments to foreign public officials that fall within an exception to the offence (e.g. small facilitation payments or a payment permitted by the written law of the foreign public official's country—Commentaries 8 and 9 of the Convention), or a defence to the offence? If so when?

**18. Public Procurement**

18.1 Can you report cases concerning bribery of foreign public officials with regard to public procurement? In particular, are there cases where your authorities suspended from competition for public contracts enterprises that have bribed foreign public officials in contravention of your national laws? Did your authorities apply any other (additional) procurement sanctions in such cases?

18.2 Have you taken steps to require anti-bribery provisions in bilateral aid-funded procurement, to promote the proper implementation of anti-bribery provisions in international development institutions, and to work closely with development partners to combat bribery in all development co-operation efforts?

**19. International Co-operation**

Please provide an overview of cases of international co-operation involving your country in relation to combating bribery in international business relations (other than Mutual Legal Assistance and Extradition). In particular, please respond to the following:

(a) What have been the specific means of co-operation?

(b) Did you enter into new arrangements or agreements for this purpose since the Recommendation became effective for your country?

(c) Did you find it necessary to take steps to ensure that your domestic laws afford adequate basis for international co-operation? If yes, please describe the measures taken.

# CONVENTION ON COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS AND RELATED DOCUMENTS

10 April 1998
DAFFE/IME/BR(97)20

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# CONVENTION ON COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS

Adopted by the Negotiating Conference on 21 November 1997

## Preamble

***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;

**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:**

**Article 1**

**The Offence of Bribery of Foreign Public Officials**

1. Each Party shall take such measures as may be necessary to establish that it is a criminal offence under its law for any person intentionally to offer, promise or give any undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign public official, for that official or for a third party, in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business.

2. Each Party shall take any measures necessary to establish that complicity in, including incitement, aiding and abetting, or authorisation of an act of bribery of a foreign public official shall be a criminal offence. Attempt and conspiracy to bribe a foreign public official shall be criminal offences to the same extent as attempt and conspiracy to bribe a public official of that Party.

3. The offences set out in paragraphs 1 and 2 above are hereinafter referred to as “bribery of a foreign public official”.

4. For the purpose of this Convention:

   a) “foreign public official” means any person holding a legislative, administrative or judicial office of a foreign country, whether appointed or elected; any person exercising a public function for a foreign country, including for a public agency or public enterprise; and any official or agent of a public international organisation;

   b) “foreign country” includes all levels and subdivisions of government, from national to local;

c) "act or refrain from acting in relation to the performance of official duties" includes any use of the public official's position, whether or not within the official's authorised competence.

**Article 2**

**Responsibility of Legal Persons**

Each Party shall take such measures as may be necessary, in accordance with its legal principles, to establish the liability of legal persons for the bribery of a foreign public official.

**Article 3**

**Sanctions**

1. The bribery of a foreign public official shall be punishable by effective, proportionate and dissuasive criminal penalties. The range of penalties shall be comparable to that applicable to the bribery of the Party's own public officials and shall, in the case of natural persons, include deprivation of liberty sufficient to enable effective mutual legal assistance and extradition.

2. In the event that, under the legal system of a Party, criminal responsibility is not applicable to legal persons, that Party shall ensure that legal persons shall be subject to effective, proportionate and dissuasive non-criminal sanctions, including monetary sanctions, for bribery of foreign public officials.

3. Each Party shall take such measures as may be necessary to provide that the bribe and the proceeds of the bribery of a foreign public official, or property the value of which corresponds to that of such proceeds, are subject to seizure and confiscation or that monetary sanctions of comparable effect are applicable.

4. Each Party shall consider the imposition of additional civil or administrative sanctions upon a person subject to sanctions for the bribery of a foreign public official.

## Article 4

## Jurisdiction

1. Each Party shall take such measures as may be necessary to establish its jurisdiction over the bribery of a foreign public official when the offence is committed in whole or in part in its territory.

2. Each Party which has jurisdiction to prosecute its nationals for offences committed abroad shall take such measures as may be necessary to establish its jurisdiction to do so in respect of the bribery of a foreign public official, according to the same principles.

3. 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.

4. Each Party shall review whether its current basis for jurisdiction is effective in the fight against the bribery of foreign public officials and, if it is not, shall take remedial steps.

## Article 5

## Enforcement

Investigation and prosecution of the bribery of a foreign public official shall be subject to the applicable rules and principles of each Party. They shall not be 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.

## Article 6

## Statute of Limitations

Any statute of limitations applicable to the offence of bribery of a foreign public official shall allow an adequate period of time for the investigation and prosecution of this offence.

## Article 7

## Money Laundering

Each Party which has made bribery of its own public official a predicate offence for the purpose of the application of its money laundering legislation shall do so on the same terms for the bribery of a foreign public official, without regard to the place where the bribery occurred.

## Article 8

## Accounting

1. In order to combat bribery of foreign public officials effectively, each Party shall take such measures as may be necessary, within the framework of its 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.

2. Each Party shall 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.

## Article 9

## Mutual Legal Assistance

1. Each Party shall, to the fullest extent possible under its laws and relevant treaties and arrangements, provide prompt and effective legal assistance to another Party for the purpose of criminal investigations and proceedings brought by a Party concerning offences within the scope of this Convention and for non-criminal proceedings within the scope of this Convention brought by a Party against a legal person. The requested Party shall inform the requesting Party, without delay, of any additional information or documents needed to support the request for assistance and, where requested, of the status and outcome of the request for assistance.

2. Where a Party makes mutual legal assistance conditional upon the existence of dual criminality, dual criminality shall be deemed to exist if the offence for which the assistance is sought is within the scope of this Convention.

3. A Party shall not decline to render mutual legal assistance for criminal matters within the scope of this Convention on the ground of bank secrecy.

**Article 10**

**Extradition**

1. Bribery of a foreign public official shall be deemed to be included as an extraditable offence under the laws of the Parties and the extradition treaties between them.

2. If a Party which makes extradition conditional on the existence of an extradition treaty receives a request for extradition from another Party with which it has no extradition treaty, it may consider this Convention to be the legal basis for extradition in respect of the offence of bribery of a foreign public official.

3. Each Party shall take any measures necessary to assure either that it can extradite its nationals or that it can prosecute its nationals for the offence of bribery of a foreign public official. A Party which declines a request to extradite a person for bribery of a foreign public official solely on the ground that the person is its national shall submit the case to its competent authorities for the purpose of prosecution.

4. Extradition for bribery of a foreign public official is subject to the conditions set out in the domestic law and applicable treaties and arrangements of each Party. Where a Party makes extradition conditional upon the existence of dual criminality, that condition shall be deemed to be fulfilled if the offence for which extradition is sought is within the scope of Article 1 of this Convention.

**Article 11**

**Responsible Authorities**

For the purposes of Article 4, paragraph 3, on consultation, Article 9, on mutual legal assistance and Article 10, on extradition, each Party shall notify to the Secretary-General of the OECD an authority or authorities responsible for making and receiving requests, which shall serve as channel of communication

for these matters for that Party, without prejudice to other arrangements between Parties.

**Article 12**

**Monitoring and Follow-up**

The Parties shall co-operate in carrying out a programme of systematic follow-up to monitor and promote the full implementation of this Convention. Unless otherwise decided by consensus of the Parties, this shall be done in the framework of the OECD Working Group on Bribery in International Business Transactions and according to its terms of reference, or within the framework and terms of reference of any successor to its functions, and Parties shall bear the costs of the programme in accordance with the rules applicable to that body.

**Article 13**

**Signature and Accession**

1. Until its entry into force, this Convention shall be open for signature by OECD members and by non-members which have been invited to become full participants in its Working Group on Bribery in International Business Transactions.

2. Subsequent to its entry into force, this Convention shall be open to accession by any non-signatory which is a member of the OECD or has become a full participant in the Working Group on Bribery in International Business Transactions or any successor to its functions. For each such non-signatory, the Convention shall enter into force on the sixtieth day following the date of deposit of its instrument of accession.

**Article 14**

**Ratification and Depositary**

1. This Convention is subject to acceptance, approval or ratification by the Signatories, in accordance with their respective laws.

2. Instruments of acceptance, approval, ratification or accession shall be deposited with the Secretary-General of the OECD, who shall serve as Depositary of this Convention.

## Article 15

## Entry into Force

1. This Convention shall enter into force on the sixtieth day following the date upon which five of the ten countries which have the ten largest export shares set out in DAFFE/IME/BR(97)18/FINAL (annexed), and which represent by themselves at least sixty per cent of the combined total exports of those ten countries, have deposited their instruments of acceptance, approval, or ratification. For each signatory depositing its instrument after such entry into force, the Convention shall enter into force on the sixtieth day after deposit of its instrument.

2. If, after 31 December 1998, the Convention has not entered into force under paragraph 1 above, any signatory which has deposited its instrument of acceptance, approval or ratification may declare in writing to the Depositary its readiness to accept entry into force of this Convention under this paragraph 2. The Convention shall enter into force for such a signatory on the sixtieth day following the date upon which such declarations have been deposited by at least two signatories. For each signatory depositing its declaration after such entry into force, the Convention shall enter into force on the sixtieth day following the date of deposit.

## Article 16

## Amendment

Any Party may propose the amendment of this Convention. A proposed amendment shall be submitted to the Depositary which shall communicate it to the other Parties at least sixty days before convening a meeting of the Parties to consider the proposed amendment. An amendment adopted by consensus of the Parties, or by such other means as the Parties may determine by consensus, shall enter into force sixty days after the deposit of an instrument of ratification, acceptance or approval by all of the Parties, or in such other circumstances as may be specified by the Parties at the time of adoption of the amendment.

## Article 17

## Withdrawal

A Party may withdraw from this Convention by submitting written notification to the Depositary. Such withdrawal shall be effective one year after the date of the receipt of the notification. After withdrawal, co-operation shall continue between

the Parties and the Party which has withdrawn on all requests for assistance or extradition made before the effective date of withdrawal which remain pending.

## ANNEX STATISTICS ON OECD EXPORTS

| OECD EXPORTS | | | |
|---|---|---|---|
| | | | |
| | 1990-1996 | 1990-1996 | 1990-1996 |
| | US$ million | % | % |
| | | of Total OECD | of 10 largest |
| United States | 287 118 | 15,9% | 19,7% |
| Germany | 254 746 | 14,1% | 17,5% |
| Japan | 212 665 | 11,8% | 14,6% |
| France | 138 471 | 7,7% | 9,5% |
| United Kingdom | 121 258 | 6,7% | 8,3% |
| Italy | 112 449 | 6,2% | 7,7% |
| Canada | 91 215 | 5,1% | 6,3% |
| Korea (1) | 81 364 | 4,5% | 5,6% |
| Netherlands | 81 264 | 4,5% | 5,6% |
| Belgium-Luxembourg | 78 598 | 4,4% | 5,4% |
| **Total 10 largest** | **1 459 148** | **81,0%** | **100%** |
| | | | |
| Spain | 42 469 | 2,4% | |
| Switzerland | 40 395 | 2,2% | |
| Sweden | 36 710 | 2,0% | |
| Mexico (1) | 34 233 | 1,9% | |
| Australia | 27 194 | 1,5% | |
| Denmark | 24 145 | 1,3% | |
| Austria* | 22 432 | 1,2% | |
| Norway | 21 666 | 1,2% | |
| Ireland | 19 217 | 1,1% | |
| Finland | 17 296 | 1,0% | |
| Poland (1) ** | 12 652 | 0,7% | |
| Portugal | 10 801 | 0,6% | |
| Turkey * | 8 027 | 0,4% | |
| Hungary ** | 6 795 | 0,4% | |
| New Zealand | 6 663 | 0,4% | |
| Czech Republic *** | 6 263 | 0,3% | |
| Greece * | 4 606 | 0,3% | |
| Iceland | 949 | 0,1% | |
| | | | |
| **Total OECD** | **1 801 661** | **100%** | |

Notes: * 1990-1995; ** 1991-1996; *** 1993-1996
Source: OECD, (1) IMF

Concerning Belgium-Luxembourg: Trade statistics for Belgium and Luxembourg are available only on a combined basis for the two countries. For purposes of Article 15, paragraph 1 of the Convention, if either Belgium or Luxembourg deposits its instrument of acceptance, approval or ratification, or if both Belgium and Luxembourg deposit their instruments of acceptance, approval or ratification, it shall be considered that one of the countries which have the ten largest exports shares has deposited its instrument and the joint exports of both countries will be counted towards the 60 percent of combined total exports of those ten countries, which is required for entry into force under this provision.

# COMMENTARIES ON THE CONVENTION ON COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS

Adopted by the Negotiating Conference on 21 November 1997

**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.

**Article 1. The Offence of Bribery of Foreign Public Officials:**

Re paragraph 1:

3. Article 1 establishes a standard to be met by Parties, but does not require them to utilise its precise terms in defining the offence under their domestic laws. A Party may use various approaches to fulfil its obligations, provided that conviction of a person for the offence does not require proof of elements beyond those which would be required to be proved if the offence were defined as in this paragraph. For example, a statute prohibiting the bribery of agents generally which does not specifically address bribery of a foreign public official, and a statute specifically limited to this case, could both comply with this Article. Similarly, a statute which defined the offence in terms of payments "to induce a breach of the official's duty" could meet the standard provided that it was understood that every public official had a duty to exercise judgement or discretion impartially and this was an "autonomous" definition not requiring proof of the law of the particular official's country.

4. It is an offence within the meaning of paragraph 1 to bribe to obtain or retain business or other improper advantage whether or not the company concerned was the best qualified bidder or was otherwise a company which could properly have been awarded the business.

5. “Other improper advantage” refers to something to which the company concerned was not clearly entitled, for example, an operating permit for a factory which fails to meet the statutory requirements.

6. The conduct described in paragraph 1 is an offence whether the offer or promise is made or the pecuniary or other advantage is given on that person’s own behalf or on behalf of any other natural person or legal entity.

7. It is also an offence irrespective of, inter alia, the value of the advantage, its results, perceptions of local custom, the tolerance of such payments by local authorities, or the alleged necessity of the payment in order to obtain or retain business or other improper advantage.

8. It is not an offence, however, if the advantage was permitted or required by the written law or regulation of the foreign public official’s country, including case law.

9. Small “facilitation” payments do not constitute payments made “to obtain or retain business or other improper advantage" within the meaning of paragraph 1 and, accordingly, are also not an offence. Such payments, which, in some countries, are made to induce public officials to perform their functions, such as issuing licenses or permits, are generally illegal in the foreign country concerned. Other countries can and should address this corrosive phenomenon by such means as support for programmes of good governance. However, criminalisation by other countries does not seem a practical or effective complementary action.

10. Under the legal system of some countries, an advantage promised or given to any person, in anticipation of his or her becoming a foreign public official, falls within the scope of the offences described in Article 1, paragraph 1 or 2. Under the legal system of many countries, it is considered technically distinct from the offences covered by the present Convention. However, there is a commonly shared concern and intent to address this phenomenon through further work.

Re paragraph 2:

11. The offences set out in paragraph 2 are understood in terms of their normal content in national legal systems. Accordingly, if authorisation, incitement, or one of the other listed acts, which does not lead to further action, is not itself punishable under a Party's legal system, then the Party would not be required to make it punishable with respect to bribery of a foreign public official.

Re paragraph 4:

12. "Public function" includes any activity in the public interest, delegated by a foreign country, such as the performance of a task delegated by it in connection with public procurement.

13. A "public agency" is an entity constituted under public law to carry out specific tasks in the public interest.

14. A "public enterprise" is any enterprise, regardless of its legal form, over which a government, or governments, may, directly or indirectly, exercise a dominant influence. This is deemed to be the case, inter alia, when the government or governments hold the majority of the enterprise's subscribed capital, control the majority of votes attaching to shares issued by the enterprise or can appoint a majority of the members of the enterprise's administrative or managerial body or supervisory board.

15. An official of a public enterprise shall be deemed to perform a public function unless the enterprise operates on a normal commercial basis in the relevant market, i.e., on a basis which is substantially equivalent to that of a private enterprise, without preferential subsidies or other privileges.

16. In special circumstances, public authority may in fact be held by persons (e.g., political party officials in single party states) not formally designated as public officials. Such persons, through their *de facto* performance of a public function, may, under the legal principles of some countries, be considered to be foreign public officials.

17. "Public international organisation" includes any international organisation formed by states, governments, or other public international organisations, whatever the form of organisation and scope of competence, including, for example, a regional economic integration organisation such as the European Communities.

18. "Foreign country" is not limited to states, but includes any organised foreign area or entity, such as an autonomous territory or a separate customs territory.

19. One case of bribery which has been contemplated under the definition in paragraph 4.c is where an executive of a company gives a bribe to a senior official of a government, in order that this official use his office -- though acting outside his competence -- to make another official award a contract to that company.

**Article 2. Responsibility of Legal Persons:**

20. In the event that, under the legal system of a Party, criminal responsibility is not applicable to legal persons, that Party shall not be required to establish such criminal responsibility.

**Article 3. Sanctions:**

Re paragraph 3:

21. The “proceeds” of bribery are the profits or other benefits derived by the briber from the transaction or other improper advantage obtained or retained through bribery.

22. The term “confiscation” includes forfeiture where applicable and means the permanent deprivation of property by order of a court or other competent authority. This paragraph is without prejudice to rights of victims.

23. Paragraph 3 does not preclude setting appropriate limits to monetary sanctions.

Re paragraph 4:

24. Among the civil or administrative sanctions, other than non-criminal fines, which might be imposed upon legal persons for an act of bribery of a foreign public official are: exclusion from entitlement to public benefits or aid; temporary or permanent disqualification from participation in public procurement or from the practice of other commercial activities; placing under judicial supervision; and a judicial winding-up order.

**Article 4. Jurisdiction:**

Re paragraph 1:

25. The territorial basis for jurisdiction should be interpreted broadly so that an extensive physical connection to the bribery act is not required.

Re paragraph 2:

26. Nationality jurisdiction is to be established according to the general principles and conditions in the legal system of each Party. These principles deal with such matters as dual criminality. However, the requirement of dual criminality should be deemed to be met if the act is unlawful where it occurred, even if under a different criminal statute. For countries which apply nationality jurisdiction only to certain types of offences, the reference to "principles" includes the principles upon which such selection is based.

**Article 5. Enforcement:**

27. Article 5 recognises the fundamental nature of national regimes of prosecutorial discretion. It recognises as well that, in order to protect the independence of prosecution, such discretion is to be exercised on the basis of professional motives and is not to be subject to improper influence by concerns of a political nature. Article 5 is complemented by paragraph 6 of the Annex to the 1997 OECD Revised Recommendation on Combating Bribery in International Business Transactions, C(97)123/FINAL (hereinafter, "1997 OECD Recommendation"), which recommends, inter alia, that complaints of bribery of foreign public officials should be seriously investigated by competent authorities and that adequate resources should be provided by national governments to permit effective prosecution of such bribery. Parties will have accepted this Recommendation, including its monitoring and follow-up arrangements.

**Article 7. Money Laundering:**

28. In Article 7, "bribery of its own public official" is intended broadly, so that bribery of a foreign public official is to be made a predicate offence for money laundering legislation on the same terms, when a Party has made either active or passive bribery of its own public official such an offence. When a Party has made only passive bribery of its own public officials a predicate offence for money laundering purposes, this article requires that the laundering of the bribe payment be subject to money laundering legislation.

**Article 8. Accounting:**

29. Article 8 is related to section V of the 1997 OECD Recommendation, which all Parties will have accepted and which is subject to follow-up in the OECD Working Group on Bribery in International Business Transactions. This paragraph contains a series of recommendations concerning accounting requirements, independent external audit and internal company controls the implementation of which will be important to the overall effectiveness of the fight against bribery in international business. However, one immediate consequence of the implementation of this Convention by the Parties will be that companies which are required to issue financial statements disclosing their

material contingent liabilities will need to take into account the full potential liabilities under this Convention, in particular its Articles 3 and 8, as well as other losses which might flow from conviction of the company or its agents for bribery. This also has implications for the execution of professional responsibilities of auditors regarding indications of bribery of foreign public officials. In addition, the accounting offences referred to in Article 8 will generally occur in the company's home country, when the bribery offence itself may have been committed in another country, and this can fill gaps in the effective reach of the Convention.

**Article 9. Mutual Legal Assistance:**

30. Parties will have also accepted, through paragraph 8 of the Agreed Common Elements annexed to the 1997 OECD Recommendation, to explore and undertake means to improve the efficiency of mutual legal assistance.

Re paragraph 1:

31. Within the framework of paragraph 1 of Article 9, Parties should, upon request, facilitate or encourage the presence or availability of persons, including persons in custody, who consent to assist in investigations or participate in proceedings. Parties should take measures to be able, in appropriate cases, to transfer temporarily such a person in custody to a Party requesting it and to credit time in custody in the requesting Party to the transferred person's sentence in the requested Party. The Parties wishing to use this mechanism should also take measures to be able, as a requesting Party, to keep a transferred person in custody and return this person without necessity of extradition proceedings.

Re paragraph 2:

32. Paragraph 2 addresses the issue of identity of norms in the concept of dual criminality. Parties with statutes as diverse as a statute prohibiting the bribery of agents generally and a statute directed specifically at bribery of foreign public officials should be able to co-operate fully regarding cases whose facts fall within the scope of the offences described in this Convention.

**Article 10. Extradition**

Re paragraph 2:

33. A Party may consider this Convention to be a legal basis for extradition if, for one or more categories of cases falling within this Convention, it requires an extradition treaty. For example, a country may consider it a basis for extradition of its nationals if it requires an extradition treaty for that category but does not require one for extradition of non-nationals.

**Article 12. Monitoring and Follow-up:**

34. The current terms of reference of the OECD Working Group on Bribery which are relevant to monitoring and follow-up are set out in Section VIII of the 1997 OECD Recommendation. They provide for:

i) receipt of notifications and other information submitted to it by the [participating] countries;

ii) regular reviews of steps taken by [participating] countries to implement the Recommendation and to make proposals, as appropriate, to assist [participating] countries in its implementation; these reviews will be based on the following complementary systems:

-- a system of self evaluation, where [participating] countries' responses on the basis of a questionnaire will provide a basis for assessing the implementation of the Recommendation;

-- a system of mutual evaluation, where each [participating] 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 [participating] country in implementing the Recommendation.

iii) examination of specific issues relating to bribery in international business transactions;

...

v) provision of regular information to the public on its work and activities and on implementation of the Recommendation.

35. The costs of monitoring and follow-up will, for OECD Members, be handled through the normal OECD budget process. For non-members of the OECD, the current rules create an equivalent system of cost sharing, which is described in the Resolution of the Council Concerning Fees for Regular Observer Countries and Non-Member Full Participants in OECD Subsidiary Bodies, C(96)223/FINAL.

36. The follow-up of any aspect of the Convention which is not also follow-up of the 1997 OECD Recommendation or any other instrument accepted by all the participants in the OECD Working Group on Bribery will be carried out by the Parties to the Convention and, as appropriate, the participants party to another, corresponding instrument.

**Article 13. Signature and Accession:**

37. The Convention will be open to non-members which become full participants in the OECD Working Group on Bribery in International Business Transactions. Full participation by non-members in this Working Group is encouraged and arranged under simple procedures. Accordingly, the requirement of full participation in the Working Group, which follows from the relationship of the Convention to other aspects of the fight against bribery in international business, should not be seen as an obstacle by countries wishing to participate in that fight. The Council of the OECD has appealed to non-members to adhere to the 1997 OECD Recommendation and to participate in any institutional follow-up or implementation mechanism, i.e., in the Working Group. The current procedures regarding full participation by non-members in the Working Group may be found in the Resolution of the Council concerning the Participation of Non-Member Economies in the Work of Subsidiary Bodies of the Organisation, C(96)64/REV1/FINAL. In addition to accepting the Revised Recommendation of the Council on Combating Bribery, a full participant also accepts the Recommendation on the Tax Deductibility of Bribes of Foreign Public Officials, adopted on 11 April 1996, C(96)27/FINAL.

# REVISED RECOMMENDATION OF THE COUNCIL ON COMBATING BRIBERY IN INTERNATIONAL BUSINESS TRANSACTIONS

**Adopted by the Council on 23 May 1997**

**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;

**Considering** that bribery is a widespread phenomenon in international business transactions, including trade and investment, raising serious moral and political concerns and distorting international competitive conditions;

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

**Considering** that enterprises should refrain from bribery of public servants and holders of public office, as stated in the OECD Guidelines for Multinational Enterprises;

**Considering** the progress which has been made in the implementation of the initial Recommendation of the Council on Bribery in International Business Transactions adopted on 27 May 1994, C(94)75/FINAL and the related Recommendation on the tax deductibility of bribes of foreign public officials adopted on 11 April 1996, C(96)27/FINAL; as well as the Recommendation concerning Anti-corruption Proposals for Bilateral Aid Procurement, endorsed by the High Level Meeting of the Development Assistance Committee on 7 May 1996;

**Welcoming** other recent developments which further advance international understanding and

co-operation regarding bribery in business transactions, including actions of the United Nations, the Council of Europe, the European Union and the Organisation of American States;

**Having regard to** the commitment made at the meeting of the Council at Ministerial level in May 1996, to criminalise the bribery of foreign public officials in an effective and co-ordinated manner;

**Noting** that an international convention in conformity with the agreed common elements set forth in the Annex, is an appropriate instrument to attain such criminalisation rapidly.

**Considering** the consensus which has developed on the measures which should be taken to implement the 1994 Recommendation, in particular, with respect to the modalities and international instruments to facilitate criminalisation of bribery of foreign public officials; tax deductibility of bribes to foreign public officials; accounting requirements, external audit and internal company controls; and rules and regulations on public procurement;

**Recognising** that achieving progress in this field requires not only efforts by individual countries but multilateral co-operation, monitoring and follow-up;

**General**

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

II. **RECOMMENDS** that each Member country examine the following areas and, in conformity with its jurisdictional and other basic legal principles, take concrete and meaningful steps to meet this goal:

i) criminal laws and their application, in accordance with section III and the Annex to this Recommendation;

ii) tax legislation, regulations and practice, to eliminate any indirect support of bribery, in accordance with section IV;

iii) company and business accounting, external audit and internal control requirements and practices, in accordance with section V;

iv) banking, financial and other relevant provisions, to ensure that adequate records would be kept and made available for inspection and investigation;

v) public subsidies, licences, government procurement contracts or other public advantages, so that advantages could be

denied as a sanction for bribery in appropriate cases, and in accordance with section VI for procurement contracts and aid procurement;

vi) civil, commercial, and administrative laws and regulations, so that such bribery would be illegal;

vii) international co-operation in investigations and other legal proceedings, in accordance with section VII.

**Criminalisation of Bribery of Foreign Public Officials**

III. **RECOMMENDS** that Member countries should criminalise the bribery of foreign public officials in an effective and co-ordinated manner by submitting proposals to their legislative bodies by 1 April 1998, in conformity with the agreed common elements set forth in the Annex, and seeking their enactment by the end of 1998.

**DECIDES**, to this end, to open negotiations promptly on an international convention to criminalise bribery in conformity with the agreed common elements, the treaty to be open for signature by the end of 1997, with a view to its entry into force twelve months thereafter.

**Tax Deductibility**

IV. **URGES** the prompt implementation by Member countries of the 1996 Recommendation which reads as follows: "that those Member countries which do not disallow the deductibility of bribes to foreign public officials re-examine such treatment with the intention of denying this deductibility. Such action may be facilitated by the trend to treat bribes to foreign officials as illegal."

**Accounting Requirements, External Audit and Internal Company Controls**

V. **RECOMMENDS** that Member countries take the steps necessary so that laws, rules and practices with respect to accounting requirements, external audit and internal company controls 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.

A. Adequate accounting requirements

i) Member countries should require companies to maintain adequate records of the sums of money received and expended by the company, identifying the matters in respect of which the receipt and

expenditure takes place. Companies should be prohibited from making off-the-books transactions or keeping off-the-books accounts.

ii) Member countries should require companies to disclose in their financial statements the full range of material contingent liabilities.

iii) Member countries should adequately sanction accounting omissions, falsifications and fraud.

B. Independent External Audit

i) Member countries should consider whether requirements 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 auditor who discovers indications of a possible illegal act of bribery to report this discovery to management and, as appropriate, to corporate monitoring bodies.

iv) Member countries should consider requiring the auditor to report indications of a possible illegal act of bribery to competent authorities.

C. Internal company controls

i) Member countries should encourage the development and adoption of adequate internal company controls, including standards of conduct.

ii) Member countries should encourage company management to make statements in their annual reports about their internal control mechanisms, including those which contribute to preventing bribery.

iii) Member countries should encourage the creation of monitoring bodies, independent of management, such as audit committees of boards of directors or of supervisory boards.

iv) Member countries should encourage 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.

**Public procurement**

VI. **RECOMMENDS**:

i) Member countries should support the efforts in the World Trade Organisation to pursue an agreement on transparency in government procurement;

ii) Member countries' laws and regulations should permit authorities to suspend from competition for public contracts 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.[9]

iii) In accordance with the Recommendation of the Development Assistance Committee, 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.[10]

**International Co-operation**

VII. **RECOMMENDS** that Member countries, in order to combat bribery 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 appropriate authorities in other countries in investigations and other legal proceedings concerning specific cases of such bribery through such means as

9 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.

10 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.

sharing of information (spontaneously or upon request), provision of evidence and extradition;

ii) 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;

iii) ensure that their national laws afford an adequate basis for this co-operation and, in particular, in accordance with paragraph 8 of the Annex.

**Follow-up and institutional arrangements**

VIII. **INSTRUCTS** the Committee on International Investment and Multinational Enterprises, through its Working Group on Bribery in International Business Transactions, to carry out a programme of systematic follow-up to monitor and promote the full implementation of this Recommendation, in co-operation with the Committee for Fiscal Affairs, the Development Assistance Committee and other OECD bodies, as appropriate. This follow-up will include, in particular:

i) receipt of notifications and other information submitted to it by the Member countries;

ii) regular reviews of steps taken by Member countries to implement the Recommendation and to make proposals, as appropriate, to assist Member countries in its implementation; these reviews will be based on the following complementary systems:

-- a system of self-evaluation, where Member countries' responses on the basis of a questionnaire will provide a basis for assessing the implementation of the Recommendation;

-- a 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 Recommendation.

iii) examination of specific issues relating to bribery in international business transactions;

iv) examination of the feasibility of broadening the scope of the work of the OECD to combat international bribery to include private sector

bribery and bribery of foreign officials for reasons other than to obtain or retain business;

v) provision of regular information to the public on its work and activities and on implementation of the Recommendation.

IX. **NOTES** the obligation of Member countries to co-operate closely in this follow-up programme, pursuant to Article 3 of the OECD Convention.

X. **INSTRUCTS** the Committee on International Investment and Multinational Enterprises to review the implementation of Sections III and, in co-operation with the Committee on Fiscal Affairs, Section IV of this Recommendation and report to Ministers in Spring 1998, to report to the Council after the first regular review and as appropriate there after, and to review this Revised Recommendation within three years after its adoption.

**Co-operation with non members**

XI. **APPEALS** to non-member countries to adhere to the Recommendation and participate in any institutional follow-up or implementation mechanism.

XII. **INSTRUCTS** the Committee on International Investment and Multinational Enterprises through its Working Group on Bribery, to provide a forum for consultations with countries which have not yet adhered, in order to promote wider participation in the Recommendation and its follow-up.

**Relations with international governmental and non-governmental organisations**

XIII. **INVITES** the Committee on International Investment and Multinational Enterprises through its Working Group on Bribery, to consult and co-operate with the international organisations and international financial institutions active in the combat against bribery in international business transactions and consult regularly with the non-governmental organisations and representatives of the business community active in this field.

## ANNEX

### Agreed Common Elements of Criminal Legislation and Related Action

1) Elements of the offence of active bribery

i) Bribery is understood as the promise or giving of any undue payment or other advantages, whether directly or through intermediaries to a public official, for himself or for a third party, to influence the official to act or refrain from acting in the performance of his or her official duties in order to obtain or retain business.

ii) Foreign public official means any person holding a legislative, administrative or judicial office of a foreign country or in an international organisation, whether appointed or elected or, any person exercising a public function or task in a foreign country.

iii) The offeror is any person, on his own behalf or on the behalf of any other natural person or legal entity.

2) Ancillary elements or offences

The general criminal law concepts of attempt, complicity and/or conspiracy of the law of the prosecuting state are recognised as applicable to the offence of bribery of a foreign public official.

3) Excuses and defences

Bribery of foreign public officials in order to obtain or retain business is an offence irrespective of the value or the outcome of the bribe, of perceptions of local custom or of the tolerance of bribery by local authorities.

4) Jurisdiction

Jurisdiction over the offence of bribery of foreign public officials should in any case be established when the offence is committed in whole or in part in the prosecuting State's territory. The territorial basis for jurisdiction should be

interpreted broadly so that an extensive physical connection to the bribery act is not required.

States which prosecute their nationals for offences committed abroad should do so in respect of the bribery of foreign public officials according to the same principles.

States which do not prosecute on the basis of the nationality principle should be prepared to extradite their nationals in respect of the bribery of foreign public officials.

All countries should review whether their current basis for jurisdiction is effective in the fight against bribery of foreign public officials and, if not, should take appropriate remedial steps.

5) Sanctions

The offence of bribery of foreign public officials should be sanctioned/punishable by effective, proportionate and dissuasive criminal penalties, sufficient to secure effective mutual legal assistance and extradition, comparable to those applicable to the bribers in cases of corruption of domestic public officials.

Monetary or other civil, administrative or criminal penalties on any legal person involved, should be provided, taking into account the amounts of the bribe and of the profits derived from the transaction obtained through the bribe.

Forfeiture or confiscation of instrumentalities and of the bribe benefits and the profits derived from the transactions obtained through the bribe should be provided, or comparable fines or damages imposed.

6) Enforcement

In view of the seriousness of the offence of bribery of foreign public officials, public prosecutors should exercise their discretion independently, based on professional motives. They should not be influenced by considerations of national economic interest, fostering good political relations or the identity of the victim.

Complaints of victims should be seriously investigated by the competent authorities.

The statute of limitations should allow adequate time to address this complex offence.

National governments should provide adequate resources to prosecuting authorities so as to permit effective prosecution of bribery of foreign public officials.

7) Connected provisions (criminal and non-criminal)

-- Accounting, recordkeeping and disclosure requirements

In order to combat bribery of foreign public officials effectively, states should also adequately sanction accounting omissions, falsifications and fraud.

-- Money laundering

The bribery of foreign public officials should be made a predicate offence for purposes of money laundering legislation where bribery of a domestic public official is a money laundering predicate offence, without regard to the place where the bribery occurs.

8) International co-operation

Effective mutual legal assistance is critical to be able to investigate and obtain evidence in order to prosecute cases of bribery of foreign public officials.

Adoption of laws criminalising the bribery of foreign public officials would remove obstacles to mutual legal assistance created by dual criminality requirements.

Countries should tailor their laws on mutual legal assistance to permit co-operation with countries investigating cases of bribery of foreign public officials even including third countries (country of the offeror; country where the act occurred) and countries applying different types of criminalisation legislation to reach such cases.

Means should be explored and undertaken to improve the efficiency of mutual legal assistance.

# RECOMMENDATION OF THE COUNCIL ON THE TAX DEDUCTIBILITY OF BRIBES TO FOREIGN PUBLIC OFFICIALS

**adopted by the Council on 11 April 1996**

THE COUNCIL,

**Having regard** to Article 5 b) of the Convention on the Organisation for Economic Co-operation and Development of 14th December 1960;

**Having regard** to the OECD Council Recommendation on Bribery in International Business Transactions [C(94)75/FINAL];

**Considering** that bribery is a widespread phenomenon in international business transactions, including trade and investment, raising serious moral and political concerns and distorting international competitive conditions;

**Considering** that the Council Recommendation on Bribery called on Member countries to take concrete and meaningful steps to combat bribery in international business transactions, including examining tax measures which may indirectly favour bribery;

On the proposal of the Committee on Fiscal Affairs and the Committee on International Investment and Multinational Enterprises:

I. **RECOMMENDS** that those Member countries which do not disallow the deductibility of bribes to foreign public officials re-examine such treatment with the intention of denying this deductibility. Such action may be facilitated by the trend to treat bribes to foreign public officials as illegal.

II. **INSTRUCTS** the Committee on Fiscal Affairs, in cooperation with the Committee on International Investment and Multinational Enterprises, to monitor the implementation of this Recommendation, to promote the Recommendation in the context of contacts with non-Member countries and to report to the Council as appropriate.