



BUSINESSatOECD

Contribution to the consultation with the OECD Working Group on Bribery

10 December 2019

Business at OECD would like to thank the OECD for the opportunity to participate in the consultation with the Working Group on Bribery. We are very pleased to see that many items business brought up in the past have been reflected in the agenda.

While all agenda items are important, we would like to provide specific comments on the following topics: Enhancing and incentivizing compliance, taking into account the needs of SMEs, addressing the demand side of foreign bribery, fostering integrity in SOEs, and non-trial solutions of foreign bribery cases.



I. ENHANCING AND INCENTIVIZING COMPLIANCE

Compliance as a strategic consideration for business

Establishing and implementing compliance programs is part of the broader concept of responsible business conduct (RBC), aimed at preventing adverse impacts and making positive contributions to society. Compliance programs ensure that a company and its employees act in line with the rules and regulations and should therefore be seen as a strategic investment in the company's long-term success.

Good corporate governance and responsible business conduct are essential to leverage a company's reputation and are important tools for preventing high costs associated with potential misconduct both in the short term, as for instance due to criminal proceedings, and in the long term, since misconduct substantially affects reputation. This is especially important in today's hyper-connected economy where there is a lot of pressure and scrutiny from stakeholders and where the misconduct of a few undermines true efforts of the many and has the potential to erode trust in companies and markets alike.

Setting broad-based buy-in for compliance efforts

A company's compliance program needs to be visibly supported and implemented by senior management. It is the "tone from the top" that matters. Credibility is only ensured if executives live up to what they preach and commit to the company's values and standards of responsible business conduct.

In addition, a compliance program can only be effective if it is supported and embraced by the staff. Executives need to ensure that they communicate on the value and importance of these programs and make their employees understand how compliance affects them personally.

It is also important to ensure strong links between those managing compliance and those managing business operations. Moreover, compliance should not remain an isolated, 'tick the box' exercise. A compliance program is only effectively implemented if employees start to integrate compliance considerations in their day-to-day business and if compliance experts, at the same time, are not working in silos but start thinking of ways in which compliance checks can be integrated into a broad set of operations.

Business efforts must be supplemented by government action

While business is responsible for establishing compliance programs, governments can and must also play a role in setting up a conducive and enabling policy environment. Governments also need to lead by example, adhering to good governance standards in their own operations and processes. This is



particularly important for public procurement, where governments should ensure high levels of transparency in order to promote a culture of integrity.

In setting the right climate, governments also need to acknowledge adequate measures established in the business community. One way to do this is to recognize corporations' efforts to put in place effective compliance programs when imposing penalties. Governments can also establish policies that are explicitly incentivizing companies to set up compliance programs, for instance by taking into consideration the existence of such a programs when awarding public contracts or assigning public subsidies, exports credits, etc.

Another way to support private/corporate compliance efforts is to encourage self-disclosure and self-cleaning by offering reduced penalties and leniency programs, and allowing the re-inclusion of firms which have come clear in public tenders. What is important in this respect is that businesses and those considering to report internally are provided with sufficient legal certainty.

In terms of tone setting, governments should foster awareness-raising activities and capacity building with respect to integrity and anti-corruption. Governments should also promote the implementation of existing OECD instruments, such as the OECD Principles of Corporate Governance, the OECD Guidelines for Multinational Enterprises, the OECD Anti-Bribery Convention and the OECD Good Practice Guidance on Internal Controls, Ethics and Compliance. On the international level, cooperation between authorities should contribute to policy coherence and help avoid duplicative proceedings in multiple jurisdictions.

What is frequently reiterated from the business side is the need for more targeted guidance on what is expected from business and what are the most efficient approaches in setting up compliance programs, taking into account a company's specific characteristics, such as sectoral circumstances and firm size. This point is especially relevant to SMEs. The OECD could offer support in this regard, by compiling best practices, providing a platform for the sharing of experience and promoting practical and user-friendly guidance.

Review of the 2009 Recommendation

Business at OECD strongly supports the review of the 2009 Recommendation for Further Combating Bribery of Foreign Public Officials in International Business Transactions, recognizing the importance to align the Recommendation with recent changes in the regulatory environment and emerging trends and developments in the world of business.

In our previous comments on the review, we stressed that the Recommendation should take into account the responsibilities of all stakeholders in the fight against corruption, addressing businesses, governments as well as non-governmental organization. It should also foster consistency and coherence, for example by helping to avoid duplicative proceedings in several jurisdictions.



The review represents, in our view, an excellent opportunity to enhance the effectiveness of the Recommendation and ensure that it reflects current practices. The following items deserve particular consideration:

- Support for and recognition of proactive company engagement i.e. by taking the existence of compliance systems and self-cleaning measures into account in public procurement and debarment processes
- Encouragement of voluntary self-disclosure and harmonization of administrative and legal approaches to give companies certainty
- Explicit recommendations to use information and communication technologies in the fight against corruption
- A call to promote collective action efforts of companies to eliminate facilitation payments and foster ongoing integrity initiatives
- Support for practical guidance that is also useful to SMEs

The full position paper addressing the ongoing review process can be found on our [website](#).

Not only, in the context of the 2009 Recommendation, but also more broadly, we recommend OECD and policy makers to keep the wording of their recommendations and guidelines concise, accessible and focused. This can help ensure effective uptake and further enhance and incentivize compliance efforts.

The application of user-friendly technologies for compliance programs, i.e. online training programs, is also relevant in this context. It may further be useful to consider economic incentives (e.g. soft loans) for companies that invest in enabling technologies (i.e. big data analytics) related to compliance programs to support the implementation of compliance programs in both MNEs and SMEs.



II. TAKING INTO ACCOUNT THE NEEDS OF SMEs

In the context of the review of the 2009 Recommendation, *Business at OECD* has, among other issues, suggested to update the good practice guidance contained in Annex II, strengthening the focus on how companies can design an effective anti-corruption compliance program. This, we believe, is especially important with a view on SMEs, which need to be given a stronger focus in the debates about anti-corruption policies.

SMEs play a crucial role in our economies: Not only are they part of almost any supply chain, but they also represent the majority of business in OECD countries. Meanwhile, corruption is not limited to MNEs engaging with high levels of government. Smaller, ‘daily bribery’ can occur in all sectors and in companies of all sizes. This is also recognized by recent laws, such as the UK Anti-Bribery Act and the French Loi Sapin II, signaling that compliance must be taken seriously by all businesses.

In establishing compliance programs, however, SMEs can face a number of challenges. SMEs typically lack the resources, i.e. time, personnel and financing, to establish comprehensive compliance structures. Moreover, as opposed to large multinational companies (MNEs), SMEs usually do not have a detailed and documented compliance management system in place. It does therefore not come as a surprise that many SMEs fear they may be overburdened with the costs of compliance regulations which are not adapted to their capacities.

It is for the above reasons that SMEs should be given special attention in the discussion about compliance. The [German B20 Group on Responsible Business Conduct and Anti-Corruption in 2017](#), for instance, recommended the “promotion of key international instruments, supporting the capacity building and training for SMEs”. The [Argentinian B20 Integrity and Compliance Taskforce in 2018](#) concluded that private-public partnerships for anti-corruption may help to cope with the specific vulnerability and exposure of SMEs in public procurement. In our *Business at OECD* position paper regarding the ongoing review of the 2009 OECD Anti-Bribery Recommendation, we proposed the inclusion of practical guidance on how to put in place effective programs and the reinforcement of the dialogue with SMEs to help create more effective and tailored approaches.

A recent study on [“Combating bribery in the SME sector”](#) by the Association of Chartered Certified Accountants (ACCA) provided additional insights into the perceptions and needs of SMEs. Key findings of the report include that the willingness to misstate financial statements in order to cover up misconduct has increased. Meanwhile, the report also found that the awareness of bribery being a problem for SMEs requiring attention and determined counter-measures has risen, too. The study further underlined that 59% of SMEs which were surveyed believed that guidance on compliance for the SME sector was insufficient. Aside from filling this gap, investing in education and reinforcing the protection of whistle-blowers were also considered promising strategies for supporting SMEs in their fight against corruption and bribery.



These findings confirm that what SMEs need is practical guidance on what is likely to be the most effective and most cost-efficient approach to compliance. The OECD, with its analytical tools and dedicated work streams on SMEs, is well equipped to provide support on this issue, by compiling best practices of companies in different countries and sectors and providing a platform for the sharing of practical experiences and guidance.

To facilitate the development of practical guidance, cooperation and sharing of best practice among MNEs, SMEs, trade associations, and other relevant experts are important. More generally, any initiative should look into practical solutions and highlight flexibility according to a “building block” approach, where companies can identify and implement practical actions fitting their size, needs and internal control system maturity level.

To further support SMEs in their efforts to establish compliance systems, it may also be helpful to provide them with a roadmap or a practical checklist with ‘minimum requirements’ of compliance. Ensuring that the key requirements of compliance are met by SMEs may be more conducive to reinforcing overall compliance than if SMEs attempt to adopt systems, which are too complex to be implemented effectively. Transparency could also be enhanced by granting SMEs free access to relevant databases and information sources, which can support them in implementing compliance activities and conducting third party assessments.

Key recommendations

- Give special attention to the specificities of SMEs in the context of revision on the 2009 Recommendation
- Provide SMEs with more targeted practical guidance on how to set up compliance programs



III. TAKING CONCRETE STEPS TO ADDRESS THE DEMAND SIDE OF BRIBERY

Business at OECD has consistently underlined that, to effectively combat corruption, targeting the supply side of bribery is not enough. What we need is dialogue and concrete action to address corruption at every level and to propose a culture of integrity addressing both the supply and demand side of bribery.

We were therefore pleased to learn that the OECD started to address the demand side by publishing the 2018 [“flip side study”](#), which analysed whether public officials were also sanctioned in cases which had ended in sanctions for the supply side of a foreign bribery transaction. The results of the flip side study were concerning: In only one fifth of the 55 concluded foreign bribery cases that were analysed were formal sanctions imposed on one or more public officials.

This clearly underlines that work by the OECD Working Group on Bribery should not stop here, and that more must be done to effectively sanction public officials accepting bribes. The study should therefore be seen as the start of an ambitious OECD work program based on close cooperation among government, business and key stakeholders.

We welcome the fact that the issue of the demand side has been included in the agenda for the annual consultation with the Working Group on Bribery and that it has been prominent in the discussions on the update of the 2009 OECD Recommendation. It goes without saying that our call for more action on the demand side does not mean that business wants to downplay its own responsibility. Quite the contrary, actions to address the supply and demand side should be mutually supportive.

As is the case for private-sector representatives, public officials must face a credible risk of sanctions if they solicit or accept bribes. There is also a need for more clarity and guidance on what public authorities can do internally in order to prevent bribery, including putting in place codes of conduct to prevent solicitation. Furthermore, firms often experience difficulties communicating solicitation when it happens. Further action is urgently needed and governments should therefore support the establishment of reporting lines for companies that are faced with bribe solicitation, which can respond quickly and in a non-bureaucratic manner.

We recognize that all these efforts will not be free of cost. As in the private sector, putting efficient compliance programs in place requires high-level commitment and sufficient levels of funding so that these programs become workable and sustainable. Governments should not see this as a burden, but an important investment in effectively addressing the fight against corruption and creating a culture of integrity.

The OECD has an impressive track record in addressing the supply side of bribery. In our view, the experience of the Working Group on Bribery in addressing the supply side is equally relevant for the demand-side. Following up on the “flip side study”, the Working Group on Bribery should as a first step serve as a platform for improving the flow of information to demand-side jurisdictions about sanctioned supply side cases.



In addition, other parts of the OECD have concrete experience in promoting public sector integrity. We therefore encourage the Working Group to join forces with colleagues in the Directorate for Public Governance to address the demand side of corruption and promote integrity in the public sector

There is an urgent need for OECD leadership in this area. We encourage the OECD to build on the analysis of the “flip side study” to take concrete action addressing the demand side of bribery and to build momentum going forward. The review of the 2009 Recommendation presents an important opportunity in this respect.

To improve cooperation and facilitate information sharing, it would also be useful to foster the dissemination of legality and integrity values among all stakeholders, including through the organization of dedicated events.

Key recommendations

- Foster cooperation: The findings of the OECD “flip-side study” call for increased cooperation between parties working on related supply and demand side cases and further efforts to effectively sanction public officials who accept a bribe
- Focus on prevention: Increase awareness and competencies of government officials and minimize interactions with government officials for routine transactions, including through digital solutions
- Offer reporting lines for companies: While a lot of discussion has focused on whistleblowing lines in companies, create (anonymous) reporting lines for companies that are faced with bribe solicitation that can respond quickly and in a non-bureaucratic manner
- Support collective action: Join forces to promote better governance, including through codes of conduct for public and private employees to prevent both the solicitation and the payment of bribes
- Foster public sector integrity: Put additional emphasis on OECD standards on integrity of public officials and include a stringent peer review and follow up process to ensure implementation of the recommendations

IV. ANTI-CORRUPTION AND INTEGRITY IN SOEs

Addressing corruption in state-owned enterprises

Today more than a fifth of the world's largest companies are state owned. At the same time, the role of state-owned Enterprises (SOEs) as global competitors is growing, as SOEs are increasingly active as international investors. Unfortunately, SOEs have also been linked to some high-profile scandals. The challenge is daunting. According to an OECD survey carried out in 2018, two in five corporate insiders reported to have witnessed corruption or irregularities in their companies in recent years.

We therefore applaud OECD efforts in taking the lead in the field of SOE governance and addressing specific anti-corruption challenges related to SOEs. We particularly welcomed the adoption earlier this year of the [OECD Council Recommendation on the Guidelines on Anti-Corruption and Integrity in State-Owned Enterprises \(ACI Guidelines\)](#). These Guidelines are the first international instrument to offer the state, in its role as an enterprise owner, support in fighting corruption and promoting integrity in SOEs.

The ACI Guidelines were developed by the OECD Working Party on State Ownership and Privatization Practices in close dialogue with OECD anti-corruption and governance experts and with strong input and support from *Business at OECD*. This cross-cutting cooperation must continue, and the emphasis must now be on implementation. The implementation guide to be developed should be as practical as possible, include real life examples and good practices, lessons learned as well as practical questions and answers to be of concrete value to SOE owners.

We also underline the importance of setting up a platform for capacity building, exchange of best practices and discussion with the private sector, the promotion of integrity pacts, compliance programs, stakeholder engagement as well as high-level reporting mechanisms. In this context, we appreciate that the OECD Trust in Business Initiative and its Forum in October 2019 dedicated a session to exploring how compliance and integrity within SOEs can be reinforced in practice. In this regard, we anticipate the potential of the Trust in Business initiative and its focus on implementing OECD Guidelines on Anti-Corruption and Integrity in SOEs.

The forum also introduced the so-called *Compliance without Borders* program, which aims to support SOEs in their capacity building efforts with secondees provided by the private sector. Although SOEs are in parts operated differently from private sector companies, there are many shared principles and practices allowing SOEs to learn from private sector expertise, including on how to set up effective compliance systems. The program originated at the Argentinian B20 Integrity and Compliance Taskforce in 2018 and is now driven by the OECD and the Basel Institute on Governance.



Key recommendations

- Clearly define expectations towards public institutions and SOEs to lead by example and establish a level-playing field with private companies
- Support SOEs with practical guidance on how to establish effective compliance programs with an implementation guide for the ACI Guidelines and foster the exchange of best practices from the private sector side



V. NON-TRIAL RESOLUTION OF FOREIGN BRIBERY CASES

A [recent OECD study](#), launched at the 2019 Integrity Forum, notes that since the OECD Anti-Bribery Convention came into force, foreign bribery cases have increasingly been resolved through non-trial resolutions. Non-trial resolutions, commonly known as negotiated settlements, are used to resolve disputes before they reach court, thereby saving time and resources to investigate and prosecute. While not a substitute for prosecution, these early terminations of legal proceedings can be an effective way to deter bribery and support the implementation of law.

Based on these findings, we would like to offer support for the ongoing discussions to integrate such non-trial resolutions of foreign bribery cases into the 2009 OECD Recommendation, by adding a new Annex III. In this context, we would also like to draw attention to the recommendations regarding non-trial resolutions of cases involving foreign bribery of the “Recommendation 6 Network” (see [white paper](#)).

Key recommendations

- Add a new Annex to the 2009 Anti-Bribery Recommendation to provide general guidance for non-trial resolutions