MAKING THE OECD-INITIATIVE WORK

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(1) INTRODUCTION

"Why do you believe this initiative is going to succeed, whereas many others in the past have failed to make a difference to the world of corruption?

This and similar questions are asked regularly by members of the private sector when discussing the OECD's work on corruption. Officials in turn, even in a more formal setting, inquire what assurances the OECD can give their country that they will not be the only ones to thoroughly implement the new anti-corruption programme. Indeed, these questions have to be taken very seriously. Only ten years ago the prospects of doing something significant against corruption world-wide were very bleak. Only few experienced observers would have believed that in 1997 Ministers of 33 countries representing collectively over 70% of exports world-wide and over 90% of foreign direct investments would sit around a table and pledge that their country would do all in their power to prevent and repress the bribery of foreign public officials in international business. It is therefore a very relevant question why even sceptical diplomats are now confident that significant advances in reducing corruption, one of the world's most serious and difficult problems, are at hand. The question actually goes to the heart of the OECD's initiative: What is the motor that drives this so dynamic process? What are the mechanisms of "soft law" that make it look like anything but a "soft option"?

This chapter will follow up on the working of "soft law" as it has been developed in the OECD context (section 2.). Since the aim is to implement a common standard, mutual trust depends on the ability of countries to discuss their individual approaches in a peer group setting and to give each other a frank feedback. This paper will give some insight into the mechanisms of evaluation of implementing legislations (section 3.). Sceptics of course would not be satisfied by mere harmonisation of law. Establishing a "level playing field of commerce" implies comparable practice by official agencies and compliance by the private sector. OECD's projects to monitor practice will be outlined in detail in section 4. Finally, this chapter will touch upon the future work programme of the OECD Working Group in combating bribery (section 5.).

(2) DEVELOPING A COMMON STANDARD

The current standard of OECD and associated countries[1] to prevent and combat transnational and commercial bribery is enshrined in the (revised) **Recommendation** of May 1997[2] as well

[1] Additionally to the 29 OECD Member States five non-OECD Members are Parties to the anti-bribery initiative (Argentina, Brazil, Bulgeria, Chile, Slovak Republic)

[2] Revised Recommendation of the Council on Combating Bribery in International Business Transactions, 23 May 1997.

as in the **Convention** of December 1997[3]. Whereas the Recommendation contains the entire programme as far as it has been agreed by participant countries[4], the Convention is a close-up on one specific issue, the criminalising of bribery of foreign public officials in a commercial framework.[5] To the outside observer it may seem strange that parts of the programme are still in a "soft law" status, others in a legally more binding instrument. This, however, merely mirrors the particular process OECD has gone through over the last few years.

a) From "soft law" to a Convention

It is not generally known that the work on corruption in the OECD reaches back into the 1980s. The first policy statement – in rather general terms – is contained in the OECD Guidelines for Multinational Enterprises.[6] The initiatives for action addressing Governments dates from 1989 when the US suggested work on an anti-corruption instrument in the OECD, basically picking up the work the UN had abandoned ten years previously after their work on a Convention had run into serious political problems. It seemed that with the opening of the East and the general globalisation of economy picking up chances were greater in the 90s. Nevertheless, work on the OECD took until 1994 to produce a first policy instrument to be adopted and published by Ministers: The 1994 Recommendation[7] has all the advantages and disadvantages of genuine "soft law": Bold statements could be made (e.g. *"...that countries take effective measures to deter, prevent and combat the bribery of foreign public officials..."*(I, Recomm. 1994)) without immediate legal obligations to act. Moreover, the 1994 Recommendation contained a so-called "shopping list" of items to be further examined. The real value of the document was to initiate a dynamic process of close-up examinations of these items (especially criminal law, tax treatment, accounting provisions and rules on public procurement) over the next three years.

This stage was crucial, since it made it possible to build up the awareness that concerted action was beneficial to all participants at the same time as well as giving the sub-items a concrete profile. The outcome of this phase of in-depth detail work is still a "soft law" instrument, however written in a far more concrete and prescriptive language: the so-called "Revised Recommendation of 1997".[8] In many respects the process has drawn from procedures well established in the OECD, but also from recently developed initiatives like the Financial Action Task Force (FATF) on money laundering. Most notably the Recommendation included a follow-up procedure allowing to monitor progress in implementing the Recommendation by Member States.

This was the moment when a group of countries would no longer continue the harmonisation process on a mere "soft law" basis, since they felt that in such a highly sensitive area terms

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[3] Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, 21 November 1997, signed on 19 December 1997, in force since 15 February 1999.

[4] Including such issues as tax treatment of bribes, accounting and auditing rules as well as public procurement procedures. The details of the instruments are described in chapter II by *Prof. Giorgio Sacerdoti* of Bocconi University, Milan, who as Vice-Chairman of the Working Group has contributed decisively to the elaboration of the standards.

[5] This context is defined by the mandate of the Organisation, other fora may have a wider approach (e.g. the Council of Europe).

[6] OEDC Guidelines for Multinational Enterprises, first adopted in 1976, newest edition in 1997.

[7] Recommendation of the Council on Bribery in International Business Transactions, 27 May 1994.

[8] Above note 2.

needed to be defined as clearly as possible. The request originally met with some resistance, because the rest of the Group feared that the dynamic process could be stalled by a too early move into binding law.

The compromise carrying the current phase relies on the one hand on the criminalisation-convention which defines illegal behaviour and establishes the toughest set of sanctions - thereby indirectly also influencing non-penal sanctions and preventive measures defined in the Recommendation. On the other hand Ministers hoped to maintain the momentum by insisting on a tight timetable, on a stringent monitoring mechanism and an outreach programme to invite further countries to participate and to link up with other organisations working on the topic of corruption. Simultaneously the substantive work continued on the basis of the "soft law" method. It is evident that the main risk of the approach adopted is not disagreement in substance but overburdening of the institution.

b) The "soft law" method

OECD is a particularly experienced organisation in the area of "soft law". Much of its work leads to politically, but not legally binding "Recommendations".[9] One of the most essential working principles of the OECD is decision by **unanimity**, if not foreseen otherwise. Other organisations – at least in their subsidiary bodies – allow for the majority – or a qualified majority principle. Now this seems a rather formal issue. However, it has tremendous consequences for the working atmosphere and the methodology adopted. Whereas it may be easier to advance by majority, serious difficulties might arise on a higher, political level of the body. In the OECD context most of the politically touchy issues are already addressed in the subsidiary bodies. Working on the basis of unanimity implies a specific style. Typical for the OECD is the "peer negotiation" approach: Amongst peers it is wise to be subtle, but it is also possible to be very frank, and of course the **"peer pressure"** to go along with the Group can be substantial – it is the correlate to the unanimity principle.

Very direct questions may be asked, and with all its respect for diplomatic culture the OECD does not shy away from dissent. Unanimity, however, also means that arguments have a chance to be considered on their merits rather than based on the mere political and economic clout of the speaker. Of course there is power play involved and sometimes things can get rough, especially when countries use the media to support their point in a crucial negotiation phase. Politically participants are of course used to the methods of forming alliances to prevent hegemony. In specific areas – especially within the monitoring mechanism – there are clear rules of fairness, a formalised procedure of adopting reports and strict confidentiality before final decisions by the Council. In fact, these rules are fundamental to the "peer review approach", since organised public censure by the highest body of the organisation is the main sanction for slow or insufficient compliance.

Beyond procedures and the "style of the house" there are of course reasons **inherent to the topic** that allowed for extremely rapid progress towards a Convention, once the general outlines had been concluded in the 1997 Recommendation: Even if some countries may have doubted that it would be possible to bring about a radical change of policy on transnational corruption in such a short time on a world-wide scale, amongst Parties a consensus developed over the years of preparation that **competition** will greatly benefit from concluding a strict no-

[9] Article 5 of the OECD-Convention of 28 October 1961, cf. also Articles 18-20 of the Procedural Order of 1961.

corruption pact. Beyond the "fair trade" agenda the position of everybody doing business abroad will profit from a drastic reduction of the influx of large illicit payments into any country. Apart from no longer having to compete on irrational meta-markets of bribery, finding an objective uncorrupted judiciary helps to reduce uncertainties. Of course citizens of the countries affected and investors alike will benefit from the promotion of the **rule of law**, of economic and social conditions and ultimately **democracy**.

Given the Parties' overarching common interest, the main difficulty in constructing an anti-bribery instrument - that would be operational in a reasonable time frame - was the creation of a standard that would **respect the fundamental legal** structure and **principles of Parties**, but at the same time would **allow an insistance on compliance**. The theory behind the approach chosen by the OECD in its Convention is code-worded "functional equivalence".

(3) MONITORING OF LEGAL IMPLEMENTATION

a) Functional equivalence

Paragraph 2 of the Official Commentaries to the OECD Convention states:

> *"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 the Party's legal system."*

The Convention borrows a principle developed in comparative law. According to the **functional approach** of comparison[10] attention is drawn to the overall working of systems rather than individual institutions. The assumption is that each legal system has its own logic and is not necessarily determined by the legal texts alone. Practices and informal rules are part of this approach as well as other aspects of the legal system taking over ancillary functions. Therefore the focus of comparison would lie on overall effects produced by a country's legal system rather than the individual rules. To give a few examples taken from the monitoring of the OECD Convention:

1. Article 3 para 3 of the Convention requires Parties to take appropriate measures to ensure that bribery and proceeds of bribes as defined in the Treaty or their value be subject to **seizure** and **confiscation** *"...or that monetary sanctions of comparable effect are applicable."*. Here the Convention itself demonstrates its flexibility. European Countries have introduced broad-sweeping confiscation laws following the Vienna Convention of 1988 on illicit trafficking in drugs[11] and the Council of Europe Convention 141 on Money Laundering, Search Seizure and Confiscation.[12] The US and Korea would attempt to achieve a similar result with a large fine. To a legal expert the two options are not at all equivalent, since confiscation depends upon provenance of the funds from crime, and fines are defined according to the culpability of the offender. In the OECD context both approaches are explicitly acceptable if their **effect** is

[10] Commentary No 2, cf. Commentaries on the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.

[11] United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Vienna 1988.

[12] Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, 8 November 1990.

comparable. This is certainly the case where a simple objective proportionality to the earnings is used as criterion. Where, however, the discretion of judges in lieu of confiscating is very wide **comparability** will have to be further examined. The OECD Working Group frequently reserves its right to pronounce itself on the efficiency of such a sanction in practice during a second round of evaluations (cf. below 4).

2. In a similar way the Convention indicates acceptable alternatives when defining corruption as a *"quid pro quo"*: When describing the *"pro quo"*, the goal of the bribor, it refers to an approach found in many legislations (take the French, the British or the US Legislation): *"...in order that the official act or refrain from acting in relation to the performance of official duties..."* (article 1 para 1 *in fine*). Commentary No 3, however, offers as an alternative the requirement of a (real or at least envisaged) "breach of duty". This variation is acceptable *"...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."* (an approach adopted by countries like Norway, Germany, Switzerland and Austria).

   The significance of this distinction might not be immediately evident: Acceptability of a breach of duty concept allows a country to evade all those tedious discussions on *de minimis* rules (facilitation payments, *bona fide* expenditures): By definition mere "grease payments" are excluded. This approach offers a simple concept to distinguish genuine corruption from gratuities and other forms of petty corruption.

3. The Convention gives far less directions on the highly relevant issue of **corporate liability**: Article 2 of the Convention asks countries to introduce the "responsibility of legal persons". Article 3 para 2 of the Convention indicates, however, that also **non-criminal** sanctions against a corporation are acceptable, provided they include monetary sanctions and that they are overall **"effective, proportionate and dissuasive"**.

   To experts it will be evident that the alternative (criminal versus administrative liability) is not the real issue, except where countries find it difficult to accord legal assistance to administrative proceedings abroad. The far more relevant topic is the approach to responsibility. Do we talk about strict or vicarious liability; do we hold a company liable for the misconduct of its employee or for its insufficient compliance structure? There are many more relevant questions in this area including the issue of adequate sanctions. Clearly the OECD Working Group was not in the position to unify criminal law with regard to such diverging systems represented by its Parties. However, if it drew a line here for the purpose of concluding the Convention in time, there it clearly left room for further work.

"Functional equivalence" is therefore the key principle in evaluating the countries' approach. Giving the demanding nature of such a comparison there is a danger of concentrating on such issues that seem easy to operationalise. The Convention does frame the statutes of limitation and/or the maximum penalties provided for by the individual countries.[13] I would, however, advise against such a simplistic reading of the concept of equivalence here. Although severe

[13] Such an approach has been taken e.g. by *Robert J. Gareis* in the "International Trade Corruption Monitor (ITCM), April 1999, A-1025.

penalties are outward signs of offence seriousness, for instance, in real practice maximum provisions are rarely used. What the Convention demands is that every country takes transnational bribery to be a serious offence, as serious as large scale fraud, embezzlement or theft.

> The reaction should be consistent with such central norms of criminal law in every Member State. So, a maximum of one year of imprisonment would seem very low if the maximum for fraud would be at five years in this country. More difficult is the situation where a whole cultural area (take the Nordic States in Europe) has a much lower level of maxima, where e.g. armed robbery is punished with a two year maximum of imprisonment. The OECD should not upset the entire system of "ordinal proportionality", just because other countries make a different use of criminal law.

b) Monitoring procedure

On the actual procedure of monitoring I will be brief: The OECD Working Group on Bribery has drawn from the experiences of the OECD's countries evaluations, especially accession procedures and the procedure of the Financial Action Task Force on money laundering, and developed its own procedural rules. In the current phase monitoring is concentrating on legal implementation of the Convention and the Recommendation. The evaluation is based again on the principle of peer reviews. The Secretariat drafts a descriptive text on the basis of answers to a questionnaire as well as of the legal materials submitted by the countries. Two examiners per country, recruited from other participant countries according to a delicately balanced rota give the group their opinion about the standard of implementation. There are procedures to secure a thorough exchange between examiners and the examined country, and finally the plenary of the Working Group adopts an evaluative text including an appreciation of the laws discussed. After an intensive one-year round all laws finalised will have been examined and the Ministerial Council will adopt all the reports for publication in May 2000. The procedure is open to participation by Members of the Civil Society. The plan of evaluation is published on internet and all submissions are included in the procedure.

(4) WILL LAWS ALSO BE APPLIED?

What are the guarantees that enacted legislation is actually applied? It would be all to easy to write strict laws and to ignore this "tedious" piece of legislation, since acts frequently take place abroad and evidence may be difficult to come by – especially where the administration of the home state of the bribee is not in favour of an investigation into dealings that might show the Government (or the leading Party) in a negative light (even if the enquiry is merely focusing on the conduct of the potential bribor). So the legislation **runs the risk of remaining dead letter**.

The OECD has therefore devised a **second phase** of monitoring, including on-site visits of examination teams, directed at the application of the implementing legislation. They would want to see structures in place that are capable of dealing with this type of case, sufficiant resources should be available, personnel trained etc. And possibly there also will be first cases to prove that the system is working – even though of course there may be many reasons for the absence of trials. Another indicator of serious implementation could be the introduction of thorough compliance structures in companies domiciled in Party States.

These are only some of the items to be looked into in the second phase of monitoring. The focus will include not only the Convention but also the other issues of the Recommendation of 1997, especially tax treatment of bribes.

Again, it is planned that results will be published by the Council in regular intervals.

(5) PLANNING THE FUTURE

a) Completing work on criminal law

The OECD work on corruption has been described as a process. The peer review is not the only means to keep the dynamic alive: During the negotiations of the Convention Parties agreed to give closer attention to a series of issues which have been touched upon in the text of the Convention but could be further clarified. They are commonly referred to as ”the five issues”. Since they relate to the coverage of **criminal law** they are attempts to finalise the ”first storey” of the building of an anti-money laundering structure. As mentioned criminal law is not the only approach to corruption, it is, however, crucial because it defines the illegal act and is said to have a strong preventive effect: Especially adding on **Party officials**, **Parties** and **Candidates** to the scope of beneficiaries beyond public officials has been further discussed. While the OECD saw no immediate necessity to enlarge the scope of the Convention, especially since such beneficiaries would partly be covered by the existing text and since most countries cover a further segment already in their national legislation, the general topic of **recipients** needs to be looked at in the light of practice in the near future. In a similar way the OECD deals with the issue of **foreign subsidiaries**. Various cases of bribery through foreign subsidiaries are already covered by the Convention and domestic law in most countries. For the time being the Working Group recommended that corporations extend their due diligence and compliance concepts to their foreign subsidiaries. A further, very delicate issue, which has been targeted especially in other fora - most notably the UN - is the abuse of **off-shore financial resorts** for the preparation of corruption, for bribed payments and the topic of corruption-money laundering.[14] Even though the last issue, **corruption-money laundering**, has been addressed in (article 7 of) the Convention, some uncertainty has remained whether the agreed standard requires the extension of the anti-money laundering concepts (criminal and prudential law[15]) to include active bribery of foreign officials as predicate offence. At least some countries have taken the position that the coverage is not mandatory. Therefore a further discussion of this topic is necessary.

b) A ”second storey” on the OECD’s building?

Already the Recommendation as the ”mother document” of the OECD action against corruption mentions a series of non-penal sanctions. Some items have been addressed in greater detail in the Recommendation itself, notably tax treatment, book-keeping and auditing

[14] M. *Thierry Francq* of the French Ministery of Finance has chaired a full day’s meeting of prosecutors of various countries on the dangers of off-shore resorts in the area of financing corruption and laundering of bribes and benefits of bribe-affected contracts.

[15] Cf. the regulatory issues addressed by the FATF in its 40 Recommendations of 1990/96.

as well as sanctions in public procurement procedures. These topics are part of the review process.

Other issues have not yet been concretised to the same level of detail, like Civil Law sanctions or sanctions in export credits. Finally the private sector has continuously placed two further issues, solicitation of bribes and private to private bribery, on the agenda of the Working Group. First intensive deliberations have taken place including contacts in sub-groups.[16] The first talks showed that especially the issue of private to private corruption needed some very profound analysis before it reaches the level of policy debate in this forum.[17]

Both, the mandate to monitor and to extend the issues on the agenda for future activities illustrate the heavy work-load the experts are facing. The list of new issues also indicates what kind of strategic decisions have to be faced. Parties must decide upon the best and most effective procedures, they have to sort out which parts of the global problem of corruption should be covered by this organisation and how to co-operate with other fora.

(6) FINAL REMARKS

The original question had been: Why should this initiative work, where others have failed in the past? The answer is relatively simple. The Parties to the OECD instruments are – as the pace of implementation shows – firmly committed to reducing corruption, and the peer process driving monitoring, the review of the programme and further work has developed into a very strong motivating force indeed. If the anxiety about the OECD process is currently voiced by Members of the private sector, it will be the primary task of companies to implement the preventive concepts internally. The role of an international organisation cannot go beyond establishing a common framework of rules amongst countries and insisting on their implementation.

[16] Sub-groups have held joint meetings with representatives of the private sector: the group on solicitation was chaired by Mr. *Puk van der Linde* of the Dutch Ministery of Economy; the group on private to private corruption was chaired by Mr. *Mark Jones* of the UK Department of Trade and Industry.

[17] Further work on this topic has already been completed in a regional setting both in the Council of Europe and the European Union.