

OECD WORKING GROUP ON BRIBERY: ENFORCEMENT IS THE KEY!

The adoption of the Resolution 73/191 of the General Assembly of the United Nations in December 2018, entitled “Special session of the General Assembly against corruption”, has brought a decision that in 2021 the Assembly will hold a special session on challenges and measures to prevent and combat corruption and strengthen international cooperation. It was also decided that a concise and action-oriented political declaration would be adopted at that special session. The Conference of the States Parties to the United Nations Convention against Corruption, which is leading the preparatory process, adopted a resolution entitled “Special session of the General Assembly against corruption” at its eighth session in December 2019, including the format for its preparation and organisation. An inclusive preparatory process is part of that format in order to advance consultations on the political declaration to be adopted at the Special session. Having that in mind, the OECD Working Group on Bribery in International Business Transactions (WGB or the Group) submits the following document to the United Nations Office on Drugs and Crime, with the aim to underline a pressing need to ensure full implementation of the existing international anti-corruption standards¹.

A. Introduction

1. The WGB was established in 1994 and is currently composed of 44 Member countries. The Group is engaged in rigorous monitoring of the implementation and enforcement of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions negotiated under the auspices of the OECD (AB Convention), the 2009 Recommendation for Further Combating Bribery of Foreign Public Officials in International Business Transactions (2009 Recommendation) and related instruments. This peer-review monitoring system is conducted in successive phases and is considered the “gold standard” of monitoring.² As is the case with many other monitoring bodies, the WGB evaluates the implementation by its Member countries of the above-mentioned legal instruments, assesses their institutional anti-bribery framework and places a special emphasis on monitoring of the enforcement of their domestic legal framework to implement the AB Convention and related instruments. The primary functions of the WGB’s monitoring mechanism are to encourage Member countries’ enforcement authorities to bring enforcement actions pursuant to their respective foreign bribery laws, and to cooperate with other countries’ law enforcement authorities.

2. In order to demonstrate why the UNGASS should emphasize the importance of compliance with existing international anti-corruption standards, the WGB will detail in this paper its efforts to ensure the highest possible rate of implementation of legal instruments and the commitments the Member countries have made to comply with these instruments. With that in mind, three types of WGB activities are of

¹ As such, this paper is closely related to the OECD paper entitled “OECD Contribution to UNGASS 2021”, https://ungass2021.unodc.org/uploads/ungass2021/documents/session1/contributions/OECD_Contribution-UNGASS_2021.pdf.

² Fritz Heimann, et al., Transparency Int’l, Exporting Corruption: Progress Report 2013: Assessing Enforcement of the OECD Convention on Combating Foreign Bribery, available at https://images.transparencycdn.org/images/2013_ExportingCorruption_OECDProgressReport_EN.pdf.

particular importance: rigorous monitoring of the enforcement of foreign bribery and related offences, Tour de Table discussions concerning concrete cases, and meetings of law enforcement officials.

B. Monitoring of enforcement efforts and results achieved

3. In addition to “traditional” monitoring activities also performed by other international monitoring bodies, the WGB focuses on monitoring how its Member countries are handling concrete cases of foreign bribery and related offences. This topic is by far the most important part of evaluation reports in the current phase of evaluation, and greatly influences the general assessment of countries’ anti-bribery efforts, serving as an important indicator of whether the countries’ anti-bribery mechanisms are functioning or not. This also enables the WGB to collect statistics concerning the enforcement efforts of its Member countries: 615 individuals and 203 entities have received criminal sanctions for foreign bribery between the time the AB Convention entered into force in 1999 and the end of 2018; 86 individuals and 108 entities have received sanctions for foreign bribery through administrative or civil proceedings; 53 individuals and 96 entities have been convicted or criminally sanctioned for related offences (false accounting or money laundering); 70 individuals and 165 entities have received sanctions for related offences (false accounting or money laundering) through administrative or civil proceedings; 528 investigations are ongoing in 28 Parties to the AB Convention; criminal proceedings against 157 individuals and 5 entities for foreign bribery are ongoing in 12 Parties; and administrative or civil proceedings against 6 entities for foreign bribery are ongoing in 2 Parties.

1.1 Increase in foreign bribery enforcement

4. The rigorous monitoring of domestic enforcement by the WGB has paid dividends. Over the past several years, there has been a significant increase in activity by law enforcement authorities in WGB Member countries regarding the investigation and prosecution of foreign bribery. A number of WGB Member countries successfully resolved their first foreign bribery case against a legal person, and a number of countries have entered into coordinated multijurisdictional resolutions with other countries. Even where enforcement authorities did not coordinate resolutions in a particular case, they typically received significant cooperation from other WGB Member countries.

1.2 Cooperation

5. Cooperation in foreign bribery cases can be formal or informal, and in some cases both. Formal cooperation often takes the form of a written request for evidence, usually pursuant to a treaty. Most commonly, prosecutors use bilateral treaties - Mutual Legal Assistance Treaties (MLATs). Almost all WGB Member countries can seek mutual legal assistance in foreign bribery cases pursuant to multilateral treaties, which are often the products of international conventions; or pursuant to bilateral treaties with the other countries in the group. Even where there is not a multi- or bilateral treaty, prosecutors can seek evidence from a foreign country pursuant to national law based on the implementation of EU law respectively pursuant to the principle of reciprocity such as UNCAC. The AB Convention can also be used in foreign bribery cases to seek mutual legal assistance, including evidence from abroad.

6. Unlike formal cooperation, informal cooperation between WGB enforcement authorities takes place on law enforcement to law enforcement basis, often beginning on the sidelines of a WGB meeting or based on relationships developed at the WGB. Such cooperation is an effective starting point for seeking and receiving evidence through formal channels. The WGB also acknowledges that sometimes there are difficulties faced by administrative authorities in obtaining international legal cooperation through formal channels and therefore reaffirms the need to strengthen both formal and informal cooperation between countries, where possible and appropriate.

1.3 The benefits of coordinating resolutions in multijurisdictional cases

7. In a growing number of cases involving WGB Member countries, investigations against an identical legal person in multiple countries are terminated by coordinated resolutions agreed upon by the authorities in each of those countries. Recently, the WGB has witnessed several coordinated resolutions between a number of WGB authorities, including Brazil, France, the Netherlands, Sweden, Switzerland, the United Kingdom and the United States. Examples include proceedings against the following companies: *Odebrecht S.A.*, (2016); *Braskem S.A.*, (2016); *Embraer S.A.*, (2016); *Keppel Offshore & Marine Ltd.*, (2017); *Telia Company AB*, (2017); *Credit Suisse* (2018); *Petróleo Brasileiro S.A.* (2018); *Société Generale S.A.* (2018) and *Airbus SE* (2020).

8. Coordinating resolutions, where appropriate, accomplishes several important objectives, benefiting the company and enforcement authorities. First, crediting fines, penalties, and/or disgorgement³ treats companies fairly, and does not increase the monetary amount paid by the company based solely on the number of enforcement authorities involved. In essence, the various authorities determine what the appropriate monetary sanction should be in a particular case, and that is the total amount paid by the company, with the authorities deciding what amount will be allocated to each jurisdiction. This avoids the “piling on” phenomenon, whereby the company faces duplicative monetary sanctions for the same conduct.

9. Second, because coordinating resolutions and crediting amounts paid to other jurisdictions benefits a company by avoiding duplicative penalties, doing so also incentivizes cooperation and voluntary self-disclosures by companies. Where a company discovers misconduct and is making the determination of whether to voluntarily self-disclose the misconduct and/or cooperate with a government’s investigation, one factor that the company will inevitably weigh is whether doing so will increase the chances that it will face sanctions in multiple jurisdictions and whether those sanctions will be coordinated or not.

10. Third, a number of WGB Member countries have double jeopardy or *non-bis in idem*, laws that prohibit the prosecution of a company or individual twice for the same crime. These rules are basic requirements balancing criminal law purposes with the minimum standards of protection of natural and legal persons. Thus, if prosecutors from different jurisdictions do not coordinate resolutions, prosecutors from a foreign country may be precluded from bringing a case.

11. Once prosecutors from one country decide to coordinate with foreign authorities, the coordinating authorities must decide how to credit one another. For example, one jurisdiction can impose the criminal penalty and the other can impose disgorgement. Alternatively, once an appropriate penalty amount is determined, the jurisdictions can divide that amount and credit the remaining amount to the other jurisdiction(s). In determining how much to credit a particular jurisdiction, there are a number of factors that can be instructive, including where the illegal conduct took place, where the harm occurred, the headquarters of the relevant entities and the nationality of culpable individuals, which jurisdiction initiated the investigation, and the time and resources expended by each jurisdiction. For example, in the case involving *Odebrecht S.A.*, a global construction conglomerate based in Brazil engaged in a widespread scheme to pay hundreds of millions of dollars in bribes to government officials around the world. The investigation was initiated by Brazilian authorities, Brazilian authorities expended significant time and resources on the case, and much of the scheme took place in Brazil. In addition to Brazil, however, the co-conspirators took significant acts in the United States and Switzerland. A number of bribes were laundered through Swiss financial institutions, prompting Swiss prosecutors to engage in a highly proactive cooperation with their Brazilian counterparts. A number of the offshore entities used to hold and disburse the bribes were established, owned, and/or operated by individuals located in the United States, and two *Odebrecht* employees participated in the scheme, including holding meetings and

³ Disgorgement is repayment of ill-gotten gains that is imposed on wrongdoers.

moving criminal proceeds, in the United States. Because the majority of the conduct took place in Brazil, and because Brazil otherwise had significant equities implicated by the case, authorities from Switzerland and the United States agreed to credit 80 % of the fine to Brazilian authorities, and divided the remaining 20 % evenly among them.

12. Despite the significant benefits for enforcement agencies, foreign authorities, and companies in reaching a coordinated resolution, some challenges remain. Notwithstanding the clear benefits of coordination in multinational cases with other WGB countries, there are also a number of obstacles and issues attendant to such cases, which have been discussed at length in the WGB's Law Enforcement Officials meetings. One such issue is that some countries have distinct laws and regulations that permit their enforcement agents to engage in investigative techniques that are prohibited under another country's law or constitutional principles. For example, certain jurisdictions permit criminal authorities to compel testimony even where the witness is not granted full immunity, while other countries prohibit compelled testimony. If prosecutors or witnesses from such countries become exposed to compelled testimony related to their case, it may prevent the prosecution of the compelled individual.

13. The WGB recognizes that some countries have data protection regulations that protect privacy rights of citizens. These regulations create new requirements for obtaining evidence from abroad. The WGB notes, however, that such regulations might impact the ability to obtain evidence from abroad, particularly about companies.

14. Yet another issue that is implicated by multijurisdictional cases is when multiple countries intend to prosecute the same individuals or entities. Some countries provide guidance for how prosecutors should determine whether to initiate or decline prosecution where another jurisdiction is also prosecuting. These factors usually include: (1) the strength of the other jurisdiction's interest in prosecution; (2) the other jurisdiction's ability and willingness to prosecute effectively; and (3) the probable sentence or other consequences if the person is convicted in the other jurisdiction.

15. Where prosecutors determine that it is appropriate to prosecute an individual or company despite the fact that a foreign authority is also doing so, it is important to attempt to coordinate with the foreign authority to ensure the greatest likelihood of successfully apprehending the individual and to secure the most just resolution with the individual or entity. Prosecution of individuals by multiple WGB countries poses certain logistical and constitutional issues. For example, an individual cannot be present for a trial in one country if he or she is being tried in another country and is then sentenced to a number of years in prison in that country. Accommodations or agreements may be reached with a foreign country to permit the extradition of an individual after trial and sentencing in the foreign country but before the defendant begins serving his or her sentence. It is also key that countries trust one another and avoid systematically prosecuting individuals or companies that are already and efficiently prosecuted by the authorities of other countries. In this spirit, the "*non bis in idem*" rule should prevail.

1.4 Conclusion

16. Multijurisdictional cases offer law enforcement officials a significant opportunity to obtain evidence they likely would otherwise not be able to secure, and as a result to build better cases with WGB counterparts. Coordination with foreign authorities also ensures that the culpable individuals and entities are more likely to be apprehended and prosecuted for their illicit actions. The law in these types of cases is continuing to develop, but one thing appears certain: with the significant increase in multinational crimes and the corresponding increase in multijurisdictional cases, such issues are here to stay, and likely new ones will continue to emerge. Through its meetings of Law Enforcement Officials and other initiatives, the WGB looks forward to taking a leading role with respect to these cutting-edge issues.

C. Tour de Table as an important feature of the WGB monitoring

17. As stated above, a very important part of the WGB mandate is the continuous rigorous monitoring of investigations and adjudications of concrete foreign bribery cases of its Member countries. Since its inception in 2005, the Tour de Table format has become an important part of this peer review mechanism and includes annual presentations by WGB members of alleged foreign bribery cases. Over these 15 years, the process has evolved from simple oral reports by Member countries on the steps taken in enforcement cases into a dynamic reporting process of alleged foreign bribery cases. The peer pressure generated within the Working Group has stimulated and guided the Member countries to take concrete actions to investigate and prosecute cases of foreign bribery, as well as to promote effective international cooperation.

18. The cornerstone of the Tour de Table has always been “the Matrix” – a compilation of foreign bribery enforcement cases in Member countries. Newly refined methodology and expanded sources of information today facilitate discussions of cases.⁴

19. Under the 2009 Recommendation, WGB Member countries engage in regular reporting on steps taken to implement the AB Convention, including non-confidential information on investigations and prosecutions. In practice, each Member country has to report to the entire WGB once a year. Member countries are encouraged to report on: (a) new developments for cases already on the Matrix; (b) new cases not on the Matrix yet; (c) comments they would like to hear on other Parties’ cases on the Matrix; and (d) cases they wish to see deleted from the Matrix.

20. The Tour de Table and its Matrix have benefited from their informal nature and the protection of sensitive law enforcement information. This exercise has proven to be particularly useful in fostering enforcement actions of the WGB Members countries. The format plays an important part in the fight against foreign bribery not only on a discussion level by exchanging best practices, but also on a more practical level – the WGB Member countries have demonstrated excellent examples of cooperation in foreign bribery investigations, especially in expediting outstanding mutual legal assistance requests. The Matrix serves as a source of allegations for opening new investigations while the Tour de Table reporting mechanism serves to place pressure on Member countries to pursue investigations of foreign bribery cases to their final adjudication.

21. The key to the success of the Tour de Table exercise is the willingness of the WGB Member countries to participate in this process based on a common understanding of its importance, mutual trust and common efforts to enhance the fight against foreign bribery.

D. Meetings of law enforcement officials

22. Since 2010, an informal law enforcement officials meeting has been held twice a year on the margins of the WGB’s plenary meetings. It is open only to officials from Member countries directly involved in the prosecution and investigation of foreign bribery offences and is a unique forum for them to (1) discuss best practices, foreign bribery enforcement topics, and the enforcement of specific cases, (2)

⁴ The Working Group on Bribery developed the “Matrix of Bribery Cases” as a tool to nudge countries into sharing information on allegations and cases of foreign bribery. This Matrix was first developed as a list of cases that raised allegations of bribery against companies from public media sources but eventually included expanded sources of information, such as input by prosecutorial authorities. It is the basis for the active sharing of case information across the Working Group. The Matrix provides the basis for regular review of progress of cases, MLA progress and multijurisdictional investigations. This discussion takes place at the Working Group on Bribery meetings and it is confidential.

provide or expedite mutual legal assistance, and (3) establish professional networks. Law enforcement officials also contribute via these meetings to the thematic work of the WGB to whom its chair reports back orally. The informal, voluntary meetings of Law Enforcement Officials, otherwise known as LEO, have been memorialized in the 2009 Recommendation and are part of the WGB follow-up and institutional arrangements.

23. In working on international cases it is very important to build professional contacts and trust and to be able to identify the right counterparts in a foreign jurisdiction. This can greatly facilitate the exchange of information. More generally, personal acquaintance may facilitate spontaneous sharing of information, which is vital to the prompt investigation of corruption cases. Law enforcement officials may also share information more willingly with peers they know, where there is no legal barrier to such sharing. Beyond the development of bilateral relationships, law enforcement officials may be able to rely on the contacts established through the networks to reach out to third countries.

24. The LEO also builds a foundation for smooth and speedy execution of MLA requests. Where formal MLA requests must be transmitted via central authorities, law enforcement officials may be able to reach out to their counterparts abroad before transmitting the official request to exchange advice on the procedures and substantive requirements with a view to obtaining prompt and effective MLA assistance, or to identify other means by which the information may be obtained on an informal basis. This can not only save resources in the requesting and requested country, but also ensure the admissibility of the evidence obtained. Where permitted, contacts can also be relied on to obtain information about the status of a request when delays are encountered, and to identify solutions to overcome the causes of such delays.

25. Beyond sharing of information on specific MLA requests, the LEO also offers opportunities for officials to share effective, practical methods for investigation and prosecution of complex multijurisdictional cases. Prosecutors or investigators provide presentations on cases at every meeting and discuss lessons learned. Experts from a range of institutions or companies are sometimes also invited for a part of the LEO meeting to share their knowledge on important issues and trends in combating foreign bribery.

26. A law enforcement network has also been set up since 1998 in the context of the Anti-Corruption Network for Eastern Europe and Central Asia, and a similar network under the auspices of the ADB-OECD Anti-Corruption Initiative for Asia and the Pacific since 2015. Regional studies on MLA in corruption cases are also being prepared by these two initiatives. In addition, the OECD Latin American Countries Law Enforcement Network (LACLEN) that was formed in 2018 meets annually, and the AfDB-OECD Initiative was established in 2008 to support Business Integrity and Anti-Bribery Efforts in Africa. The OECD Global Law Enforcement Network of Practitioners against Corruption (GLEN), an ad-hoc group that met for the first time in December 2015 in Paris, builds on these experiences and meets every two years. By bringing additional transnational bribery enforcement practitioners from outside the WGB together at a global level, the ad hoc meeting has connected members of various law enforcement networks and provided information to them of other regional activities that are supported by the OECD Secretariat and the Working Group on Bribery.

E. Conclusions and recommendations

27. The AB Convention establishes legally binding standards to criminalize bribery of foreign public officials in international business transactions and provides for a host of other related measures for countries to effectively enforce those standards. The AB Convention is the first and only international instrument focused primarily on the supply side of foreign bribery, and all Parties to the AB Convention have criminalized foreign bribery. Moreover, the AB Convention was enacted as a way to ensure that

every country would be held to the same standards in the fight against foreign bribery and level the playing field for the private sector.

28. The AB Convention also recognizes that the liability of legal persons plays an essential role in combating foreign bribery and other complex economic crimes. Specifically, Articles 2 and 3 of the AB Convention require each Party “to establish the liability of legal persons” for foreign bribery and to apply “effective, proportionate and dissuasive” criminal or non-criminal sanctions, including monetary sanctions, to legal persons for foreign bribery. The AB Convention aims to ensure that companies, not just individuals, can be held responsible for foreign bribery. Liability of legal persons is important because it subjects legal persons to the law enforcement process. Furthermore, some Member countries’ liability of legal person frameworks create additional incentives for companies to have effective compliance programs and cooperate in the law enforcement process in order to enhance the detection, prevention, investigation, and resolution of foreign bribery cases. All Parties to the AB Convention have changed their laws to make it possible to hold companies liable for foreign bribery.

29. The adoption of the AB Convention and subsequent accessions by the Member countries represent important steps in fighting foreign bribery around the world. However, as in the case with any other international anti-corruption convention or national legislation adopted, the implementation of those documents actually creates lasting change. Over the last two decades, many international organisations have made efforts to ensure full implementation of their legal instruments. Therefore, the need for continuation of all organisations’ efforts to enhance the level of ongoing implementation of existing anti-corruption legal instruments is crucial – much more than developing ideas on new ones. It is also important to ensure sufficient synergies between various anti-corruption conventions’ monitoring systems in view of gaining efficiency in the global fight against corruption.

30. In order to prevent bribery and enhance the implementation of international conventions and the enforcement of national laws addressing foreign bribery and corruption⁵, the WGB member countries recommend that:

1. UNCAC States Parties introduce and maintain robust legislative frameworks under their national laws consistent with their respective existing obligations in applicable global instruments that provide, in particular, for:
 - I. clear and explicit criminal law provisions on bribery of foreign public officials that cover key elements of such offenses, including the intentional promising, offering, giving or solicitation of any undue pecuniary or other advantage, directly or through intermediaries, to a foreign public official, for the 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;
 - II. broad jurisdiction over such offences, including jurisdiction over an offence committed by a national of that UNCAC State Party, in conformity with its legal system;
 - III. measures, as may be necessary, in conformity with their legal systems, to establish the liability of legal persons for the bribery of foreign public officials; and
 - IV. effective, proportionate, and dissuasive criminal or other sanctions for natural and legal persons, in conformity with their legal system;
2. authorities of UNCAC States Parties be proactive in preventing and detecting foreign bribery offenses, and ensure that credible allegations of bribery of foreign public officials, including allegations of solicitation, are referred in a timely fashion to law enforcement authorities responsible

⁵ Even though the WGB limits its recommendations to the Working Group’s mandate and scope of work, its members reiterate its commitment to fighting corruption in all of its forms and would therefore ask parties to the UNCAC Convention to consider these recommendations in a broad manner.

for investigating and prosecuting such crimes; and law enforcement authorities be proactive in effectively investigating and prosecuting credible allegations of bribery of foreign public officials;

3. in cases of multiple States Parties having jurisdiction over the same alleged acts of international bribery, the relevant jurisdictions consider consultations and coordination during the investigation, prosecution and sanctioning phases of the case, in conformity with their legal systems;
4. UNCAC States Parties utilise the opportunity of UNGASS 2021 to explore innovative ways to overcome challenges pertaining to data protection regulations and obtaining evidence from abroad, while recognizing the importance of privacy rights;
5. UNCAC States Parties consider increased and better cooperation at all levels, and take into consideration different legal systems, while recognizing the difficulties faced when seeking cooperation between administrative, civil and criminal authorities;
6. UNCAC States Parties ensure that the anti-bribery activities of their law enforcement and judicial authorities align with the requirements of applicable international and national anti-corruption instruments, including the requirements as set out in Article 5 of the AB Convention⁶, recognising that investigations and prosecutions are not subject to improper influence by concerns of a political nature⁷; and
7. international monitoring bodies invest maximum efforts to evaluate the enforcement of States Parties' domestic legal frameworks implementing international obligations of their States Parties with a view to fighting impunity and to ensure effective, rigorous, impartial investigations, prosecutions and adjudication of bribery cases.

⁶ Article 5 of the AB Convention mandates that the “investigation and prosecution of the bribery of a foreign public official shall be subject to the applicable rules and principles of each Party”, and that “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”.

⁷ See Commentary 27 to the AB Convention, http://www.oecd.org/daf/anti-bribery/ConvCombatBribery_ENG.pdf.