Enforcement of Foreign Bribery Offences

G20 ACWG Note prepared by the OECD

Following the G20 Leaders commitment "to enact and proactively implement, and enforce legislation criminalizing foreign bribery by end 2012" taken in Cannes, the G20 Anti-Corruption Working Group (G20 ACWG) asked the OECD to prepare a note underlying current trends and cross-cutting challenges to enforcing the foreign bribery offence. A first draft of this note was discussed at the G20 ACWG meeting in Puerto Vallarta, in April 2012. The OECD was then asked to build on this discussion, revise the note and prepare draft guiding principles on enforcement. This note and the draft principles were submitted at the G20 ACWG meeting in October, where, due to lack of time, no discussion was held on this topic. In the new 2013-2014 Anticorruption Action Plan, G20 countries committed to "promoting effective enforcement of legislation against domestic and foreign bribery".

Following the Moscow meeting of the G20 AWG in February 2013, comments to the paper were received by several countries of the Group. This note has been revised accordingly and is provided as background to support the consideration of a set of draft principles at the Ottawa June meeting, which is provided as a separate document.

I. Note on Criminalising Foreign Bribery: Trends and Challenges in Enforcing the Foreign Bribery Offence

Background

1. G20 countries committed in action point 2 of the G20 Seoul Anti-Corruption Action Plan "*to adopt and enforce laws and other measures against international bribery, such as the criminalization of bribery of foreign public officials, and begin by 2012 the necessary discussions to lead to, on a voluntary basis, more active engagement within the OECD Working Group on Bribery with regard to the standards of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions or to the ratification of the Convention. G20 countries will as well promote the effective implementation of Article 16 on bribery of foreign public officials and public international organizations of the UNCAC*."

2. In the 2011 Monitoring Report endorsed in Cannes, G20 countries stressed the importance of this central issue by committing "*to enact and proactively implement, and enforce legislation criminalizing foreign bribery by end 2012*."

3. Following up on these commitments, the G20 Anti-Corruption Working Group asked the OECD to present at their April meeting in Puerto Vallarta a note underlining current trends and cross-cutting challenges to enforcing the foreign bribery offence. It provides updated information regarding the enforcement tools used by Parties to the OECD Anti-Bribery Convention.

Progress in Enforcement

4. From 1999 through December 2011, the latest date for which published enforcement data is available, 210 individuals and 90 companies have been sanctioned under criminal proceedings for foreign bribery in 14 State Parties to the Anti-Bribery Convention. At least 66 of the sanctioned individuals were sentenced to prison for foreign bribery. Approximately 300 investigations are reported as ongoing in 26 States Parties. Criminal charges are pending against 158 individuals and 13 entities in 13 State Parties.

General Framework for Fighting Foreign Bribery

5. The following cross-cutting issues can be identified as key elements to effective enforcement:

Political will and commitment

- High levels of enforcement are a reflection of strong political will and commitment to the fight against foreign bribery. Consistent and continued engagement from the highest levels of government impacts all aspects of enforcement be it in enactment of legislation, allocation of resources to law enforcement authorities, or initiatives to raise awareness in the public and private sector. Law enforcement authorities must be sufficiently independent from political pressures, and investigations and prosecutions must not be influenced by considerations of national economic interest, the potential effect upon diplomatic relations, or the identity of the natural or legal persons involved.

A robust legislative framework

- Effective enforcement against perpetrators of transnational bribery can only be carried out pursuant to clear and explicit foreign bribery legislation. Where legislation does not cover certain key elements of the foreign bribery offence, such as bribery through intermediaries, or bribes paid to third party beneficiaries, it will be difficult for law enforcement authorities to seek enforcement of the foreign bribery offence. Indeed, intermediaries are almost systematically involved in foreign bribery cases, as exemplified in recent cases.

- Another important element of the foreign bribery offence is the definition of a "foreign public official". This definition should be "autonomous", i.e. providing its own elements that are not dependent upon the law of the particular official's country. Where there are doubts as to the autonomy of that definition, countries may need to rely on other offences, where they exist. Indeed, there is a trend amongst some countries to use offences other than foreign bribery offences to prosecute the bribery of foreign public officials in international business transactions. For instance, in Germany, of 30 convictions for cases involving foreign bribery, only 10 were convicted under the foreign bribery offence, and the rest were convicted for offences such as breach of trust.

- Foreign bribery cases, by their nature, involve multiple jurisdictions. Therefore, extraterritorial application of the offence to nationals of the prescribing State, or "nationality jurisdiction", is also an extremely useful tool in enforcing foreign bribery laws. Nationality jurisdiction allows law enforcement authorities to rely simply on the nationality

of the natural or legal person as ground for exercising their jurisdiction in a suspected foreign bribery case, without the heavier burden of proving a strong territorial link to the prosecuting country. The absence of nationality jurisdiction can be considered a serious challenge to a country's ability to effectively prosecute foreign bribery cases, and it may also cause significant confusion within the private sector as to the scope of the foreign bribery legislation.

- A robust legislative framework should also include the liability of legal persons for acts of foreign bribery, including for bribery acts committed on their behalf by related legal persons such as subsidiaries. (See also below for further discussions on the liability of legal persons.)

Awareness of the public and private sector

- Lack of awareness that bribery of foreign public officials constitutes a criminal offence is often synonymous with low levels of detection, and, consequently, low enforcement, notably given that the criminalisation of foreign bribery is fairly recent in most legal systems. The low level of awareness of foreign bribery laws can be viewed as a major impediment to their effective enforcement. Important target groups in terms of awareness-raising include, in addition to law enforcement authorities, officials in overseas missions, in trade promotion, public procurement, export and official development agencies, in the tax administration, and any other public service regularly involved with the private sector. Engagement with the private sector is also key to preventing and detecting foreign bribery, including by encouraging companies to put in place internal controls, ethics and compliance programmes or measures. Outreach to small- and medium-sized enterprises is a particularly difficult challenge. (See also below on the liability of legal persons.)

<u>Detecting foreign bribery</u>

6. Analysis of country reviews as well as regular consultations with law enforcement authorities shows that detecting bribe payments is one of the first challenges to effective enforcement. Analysis of actual foreign bribery cases has allowed the identification of some good practices that enhance the capacity to detect transnational bribery.

Inter-agency reporting and cooperation

- The foreign bribery offence often entails other types of economic and financial crime. Thus inter-agency communication and cooperation has often been key to effective enforcement. For instance, several foreign bribery cases in Germany and Japan have come about as a result of reports from tax officials and auditors. Countries should facilitate the exchange of information between tax administrations and law enforcement authorities in charge of enforcing the foreign bribery offence, and, conversely, consider removing any provision which prohibits such exchange of information. Similarly, and not surprisingly, cooperation between a country's financial intelligence unit and the authorities in charge of enforcing the foreign bribery offence has led to more effective detection and enforcement, as has cooperation with securities regulators in some countries. More generally, countries' efforts

to encourage and facilitate reporting by public officials to law enforcement authorities of suspected acts of foreign bribery should be commended. In Canada, for instance, several reports have been made by public officials pursuant to these mechanisms. Certain administrations are particularly well positioned for reporting foreign bribery; these include for instance overseas missions, as well as public procurement, official development aid, and export credit agencies. Governments should provide education and training on the foreign bribery offence to these administrations, including instructions on how to provide further information on foreign bribery laws to companies, as well as on how and where to report foreign bribery allegations.

Protection of whistleblowers

- Providing reporting channels for whistleblowing and appropriate whistleblower protections, for both public and private sector employees, is one of the most important areas to have emerged as both a good practice and a challenge to foreign bribery enforcement.[1] There is generally a correlation between high levels of enforcement and the existence and effectiveness of whistleblower legislation. For example, in the United States whistleblower reports are considered as an important source of allegations.

Voluntary disclosures

- In certain countries, a large number of cases have come about as a result of companies voluntarily self-reporting. Such voluntary disclosures can occur in countries where negotiated settlements are possible, and/or where such disclosure may impact the level and type of sanction imposed on the company. In some countries, such settlements are subject to judicial approval. However, reluctance by certain courts to endorse settlement agreements between the prosecution and the defendant, or uncertainty as to the benefits of self-reporting may cause corporations to question the value of voluntary disclosures. (See also the issue of negotiated settlements in section D below.)

Investigating and prosecuting foreign bribery allegations

7. Of central importance to strong enforcement of the foreign bribery offence are effective investigations and prosecutions. Based on an analysis of enforcement actions to date, it is possible to identify some practices that have been very effective for certain countries in dealing with foreign bribery investigations and prosecutions, as well as some obstacles, which can majorly impede effective enforcement.

Specialisation and training in foreign bribery investigations and prosecutions

- An increasing number of specialised units have been created in several countries to deal with foreign bribery investigations and prosecutions. The significant increase in foreign bribery cases may be attributed to a significant extent to this development. For instance, Canada has set up a specific Royal Canadian Mounted Police (RCMP) unit to investigate

[1] The G20 Anti-Corruption Action Plan has also highlighted the importance of whistleblower protections, an issue which was further elaborated upon by the OECD in the G20 Whistleblower Protection Frameworks, Compendium of Best Practices, and Guiding Principles For Legislation (http://www.oecd.org/dataoecd/42/43/48972967.pdf)

transnational bribery cases. In Germany, the Länder have either set up special anti-corruption units or dedicated public prosecution offices that specialise in investigating economic crimes, with similarly specialised directorates in the police forces of the Länder. Korea established a new information and intelligence-gathering capacity to support the investigation of international crimes, including foreign bribery, involving several ministries and the prosecuting authority. The United States also has longstanding units to deal with foreign bribery investigations in the Federal Bureau of Investigation (FBI), the Department of Justice, and the Securities and Exchange Commission (SEC). However, the establishment of specialised units within the police or prosecution services is not sufficient in and of itself, unless such units are adequately trained, staffed and resourced to cope with a potentially substantial and complex body of cases. Similarly, adequate training on the specificities of foreign bribery offences in international business transactions should be provided to magistrates.

Multijurisdictional and parallel investigations

- Given that foreign bribery cases often cross multiple borders, countries often need to consult with each other when more than one Party has jurisdiction over an alleged foreign bribery case. Analysis of foreign bribery cases shows a growing trend in the use of multi-jurisdictional and parallel investigations. For instance, the United States has worked, in separate cases, with Germany, the United Kingdom, and another non-G20 country, to conduct parallel prosecutions of the same criminal behaviour involving bribery of a foreign public official in an international business transaction. In the case involving the United States and Germany, the two prosecuting governments even coordinated simultaneous announcements of sentences and sanctions. Because international business transactions are increasingly being conducted via joint ventures and consortiums, there is the expectation that this practice will continue.

Adequacy of investigative techniques

- The availability of adequate investigative means is essential to the gathering of evidence and to seek convictions for a foreign bribery offence. Information obtained from banks and other financial institutions, as well as interceptions of telecommunications, have often been instrumental in allowing law enforcement authorities to establish the commitment of a foreign bribery offence and secure sanctions against the perpetrators. Thus, it is crucial that adequate investigative powers be granted to law enforcement authorities to allow for effective investigations of foreign bribery allegations, and, beyond this, that use is effectively made of such techniques.

Statute of limitations

- An inadequate statute of limitations can be a barrier to effective enforcement of the foreign bribery offence, especially given the inherently complex and international dimensions of this offence. This has sometimes been identified as a major hurdle in certain countries. An inadequate statute of limitations can pose challenges when the foreign bribery schemes are complex, well concealed, and involve multiple jurisdictions. In the worst cases, the significant efforts by the law enforcement authorities are, in effect, cancelled out by the expiration of the statute of limitations during court processes. Thus,

the overall limitation period applicable to the foreign bribery offence must be sufficient to allow adequate investigation and prosecution.

Mutual legal assistance

- Obtaining mutual legal assistance (MLA) is perhaps one of the most significant obstacles faced by countries in investigating and prosecuting foreign bribery cases. As a result, facilitation of mutual legal assistance and informal cooperation can prove invaluable. Effective responses by countries to requests for MLA constitute a significant contribution to enforcement in other countries, and should be encouraged to the maximum extent possible. The OECD Working Group on Bribery has produced a typology on mutual legal assistance in foreign bribery cases that discusses many of the challenges of MLA in multijurisdictional investigations and identifies some options to address them.[2]

Effective liability of legal persons

- Effective enforcement of the offence of bribing a foreign public official in an international business transaction should include liability of and enforcement against legal persons. The obligation to establish a system for the responsibility of legal persons is perhaps one of the most significant changes brought about by the OECD Anti-Bribery Convention, since, at the time of the entry into force of the Convention in 1999, many Parties did not have such systems in place. The Working Group on Bribery further developed its standards on what constitutes effective liability of legal persons in Annex I to the 2009 Anti-Bribery Recommendation. To date, nearly all Parties to the OECD Anti-Bribery Convention have put in place either administrative or criminal liability of legal persons for acts of foreign bribery. Effective enforcement against corporations can only occur where the corporate liability regime does not make conviction of a company contingent on the prosecution or conviction of a natural person, and where the threshold is not too high for triggering the liability of the legal person, based on the level of authority of the natural person(s) who committed the bribery.

- In addition, the establishment and enforcement of the liability of legal persons has a major impact on the development of robust anti-corruption compliance programmes by companies. Companies often state that the most important incentive for them to have established robust compliance programs is prosecutions taking place in their own jurisdiction (and sometimes abroad). The first purpose of a compliance programme is therefore to avoid infringement of foreign bribery legislation. Furthermore, certain countries have an explicitly delineated defence in their foreign bribery offence that can be used, under certain circumstances, for companies that have implemented adequate anti-bribery compliance systems. For instance, Australia provides for the liability of companies where "the body corporate failed to create and maintain a corporate culture that required compliance with the relevant [foreign bribery] provision". Similarly, the Italian corporate liability regime provides for a defence of "organisational model", where the company makes reasonable efforts to prevent the commission of a foreign bribery offence. Korea provides a defence for companies that have "paid due attention or exercised proper supervision to prevent" the bribery of foreign public officials. The United Kingdom even

[2] The "Typology on Mutual Legal Assistance in Foreign Bribery Cases", based on a large number of case studies, was published on 7 December 2012 and is available from the OECD website.

goes so far as to impose liability on commercial organisations for failure to prevent bribery, thus placing the onus on the company to prove on a balance of probabilities that it had adequate procedures to prevent persons associated with it from committing bribery. Even where such a defence is not explicitly defined in the law, some countries may consider that the existence of adequate internal company controls can be a factor for exonerating the legal person from liability or mitigating the penalty imposed. This is, for instance, the case in the US Federal Sentencing Guidelines, and it is also an important factor for qualifying for a deferred prosecution or non-prosecution agreement in the United States, a practice which has been growing dramatically in recent years.

Sanctioning instances of foreign bribery

8. Foreign bribery should be punishable by effective, proportionate, and dissuasive criminal, civil and/or administrative penalties, including financial sanctions for both natural and legal persons and imprisonment. Enforcement is only effective if sanctions are actually imposed on perpetrators. Sanctions for foreign bribery can be imposed in a variety of ways, including through the course of a court trial, or by agreements between the prosecution authorities and the defendants.

An effective, proportionate and dissuasive sanctions system

- Enforcement actions are only likely to have a deterrent effect on the commission of transnational bribery if the sanctions imposed on natural and legal persons are sufficiently effective, proportionate, and dissuasive, not only under the law but also in practice, both in terms of monetary fines, and imprisonment sanctions.

- Emphasis should also be put on the importance of confiscation of the bribe and the proceeds of bribery as a sanction for foreign bribery. In this regard, the United States and Germany have impressive records on the confiscation or forfeiture and disgorgement of the proceeds in foreign bribery cases.[3] Six cases in Germany have led to significant amounts of illicit gains being confiscated, with, for instance, nearly EUR 600 million confiscated in one case. In the United States, since 2004, over USD 1 billion in foreign bribery proceeds have been recovered through the disgorgement of the proceeds of bribery. The confiscation of the proceeds of bribery, however, cannot stand alone, as the confiscation of ill-gotten gains would result in the legal person merely returning to the same financial position it held prior to the crime's commission. Confiscation of any benefit derived from the criminal conduct, in addition to punitive fines, is likely to dissuade more effectively a legal person from committing foreign bribery.

- Debarment from public procurement or other public advantages can also be an effective sanction for deterring companies from engaging in acts of foreign bribery. Many countries have introduced such laws to this effect, allowing the courts to pronounce such sanctions, or the prosecuting authorities to include them in settlement agreements. In one Japanese

[3] The joint OECD WGB / World Bank-UNODC Stolen Asset Recovery Initiative (StAR) analysis, *Identification and Quantification of the Proceeds of Bribery* (March 2012) defines confiscation as "the permanent deprivation of assets by order of a court or other competent authority. In some jurisdictions, it is called "forfeiture". Disgorgement is defined as "a civil remedy to require the repayment of ill-gotten gains. Unlike confiscation, this remedy is not derived from statute but from the courts' equitable power to correct unjust inequality. It is not meant to be punitive." (See pages 16-20.)

case, for instance, a company was delisted from official development assistance-funded contracting for two years. Certain countries have also provided their public procurement, official development assistance, and export credit agencies with the possibility of suspending from procurement eligibility or refusing public funding to companies sanctioned for foreign bribery. However, a recurrent obstacle to the effective enforcement of such measures is the absence of a central registry, which would allow these public agencies to access information on applicant companies.

Negotiated settlements

- Parties with the possibility in their law to use different types of agreements that do not necessitate a trial have been using them quite widely in foreign bribery cases. Such negotiated settlements have permitted the imposition of serious monetary sanctions, especially against companies. Canada obtained the conviction of a company, with a substantial fine of CAD 9.5 million imposed through a plea agreement. In Germany, over half of the individuals sanctioned for foreign bribery-related offences were sanctioned through negotiated settlements. In Italy, all the finalised foreign bribery cases that resulted in sanctions against individuals or corporations were obtained through “patteggiamento”. In the United States, although 28 companies have been criminally convicted since 1998 for acts of foreign bribery, 26 companies have been sanctioned without convictions under non-prosecution agreements and deferred prosecution agreements. Such mechanisms can be very effective for resolving foreign bribery enforcement actions. Ensuring that these agreements are appropriately transparent regarding the calculation of sanctions and the rationale for qualification for a particular type of negotiated agreement improves possibilities to assess the effectiveness of such processes, including whether sanctions are sufficiently effective, proportionate and dissuasive. Disclosure to the public of the factors considered in such case resolutions also contributes to raising awareness of enforcement actions.