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**REPORT BY THE CIME: IMPLEMENTATION OF THE CONVENTION ON  
BRIBERY IN INTERNATIONAL BUSINESS TRANSACTIONS AND THE 1997  
REVISED RECOMMENDATION**

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## NOTE BY THE SECRETARY GENERAL

1. The OECD attaches the highest priority to the fight against bribery and corruption. Member countries have mounted an effective, concerted campaign to criminalise the bribery of foreign public officials in international business and to end tax deductibility for bribes paid to foreign public officials. This past year has brought major success in these endeavours.

2. The OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions entered into force on 15 February 1999. It represents a landmark in international co-operation to fight bribery and corruption. For the first time, the world's largest trading and investment partners will act in concert to halt the flow of bribes to foreign public officials in international business transactions. The standard set by the Convention will help level the playing field for international business by ensuring fair and open competition and access to international markets. The Convention can help strengthen national anti-corruption programmes aimed at raising standards of governance and increasing civil society participation. The Convention has been ratified by 12 of the 34 signatory countries<sup>1</sup>. To realise its goals, all signatory countries must rapidly take the necessary steps to ratify the Convention and to adopt legislation to implement it in national law.

3. In adopting the Convention, OECD Ministers recognised that it was necessary to pursue further analysis of other issues relating to corruption. They asked the CIME, through its Working Group on Bribery, to examine bribery acts in relation with foreign political parties, advantages promised or given to any person in anticipation of that person becoming a foreign public official, bribery of foreign public officials as a predicate offence for money laundering legislation, the role of foreign subsidiaries in bribery transactions, and the role of offshore centres in bribery transactions.

4. The Working Group's report on these analytical issues is found in Annex 2. It would appear that there is wide spread acceptance that the extent to which certain acts of bribery relating to all five issues are not covered by the Convention and implementing legislation, or by existing national laws, should be carefully monitored. However, experience is necessary with the application of the Convention in order to judge whether these are major problems that would require any further action. The Working Group recommends, therefore, that examination of these issues continue having regard to the knowledge generated by the process of self and mutual evaluation. In support of the overall objective of combating bribery in international business transactions, Ministers are invited to request the OECD to continue the examination of possible solutions to any major problems raised by these issues. As concerns offshore centres, Ministers are invited to reaffirm their determination to address the obstacles in international co-operation, together with other fora.

5. The Convention is the centrepiece of the OECD's efforts to combat bribery in international business transactions, but it is not the only instrument. Another major breakthrough was the adoption of the 1996 Recommendation aimed at eliminating tax deductibility of bribes throughout the OECD area. In

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<sup>1</sup> The 34 countries include 29 OECD countries and 5 non-OECD countries (Argentina, Brazil, Bulgaria, Chile, and the Slovak Republic). Annex 1 provides a full report on steps taken by countries to ratify and implement the Convention.

some countries, adoption of the Convention has allowed them to introduce the necessary legislative amendments to ensure non-deductibility. Substantial progress has been made on achieving compliance with this Recommendation and further progress is expected this year<sup>2</sup>. Signatories of the Convention are also committed to implementing the 1997 Revised Recommendation on Combating Bribery in International Business Transactions which deals with accounting and auditing requirements, public procurement, and international co-operation, among other matters.

6. The Convention and the related recommendations are part of a broad interdisciplinary effort in OECD to address all aspects of corruption. While these instruments address the “supply” side of bribes, the OECD Public Management Service (PUMA) assists Member countries to develop and maintain an effective framework for promoting integrity and high standards of conduct on the part of public officials. Members of the Development Assistance Committee (DAC) share a common concern with the negative effects of corruption on good governance and the development co-operation effort. The 1996 Recommendation concerning Anti-corruption Proposals for Bilateral Aid Procurement was incorporated in the 1997 Revised Recommendation. Almost all OECD donor countries, members of the DAC, now have introduced or strengthened explicit anti-corruption clauses in their aid procurement contracts. The OECD’s Export Credits and Credit Guarantees Working Party surveys Members’ existing legislation and official support schemes.

7. The chief problem with all forms of corruption is that it thrives on secrecy and silence. Transparency therefore becomes a key concept in this fight, in particular in the public domain. The private sector and civil society were instrumental in the developments of the OECD Convention and their continuing support is necessary to ensure that it is effectively implemented. BIAC, TUAC, ICC, and Transparency International are actively engaged in talks with officials from participating countries on matters of particular concern to them, including the “demand” side, or the solicitation of bribes, and bribery transactions between private individuals or entities.

8. A key element in an effective anti-corruption campaign is the sharing of information and experience on national, regional and international development and initiatives taken by countries, international organisations, and civil society. The OECD manages an Anti-Corruption Network for Transition Economies and pursues regional co-operation with Asian and Latin American countries. The Working Group on Bribery has made a special effort to disseminate information about the Convention and the related recommendations through contacts with the media and via an OECD comprehensive web site on anti-corruption activities.

9. Conferences and regional events have been held under the auspices of the OECD to appeal to government officials of non-signatory countries and other relevant segments of society – business leaders, journalists, non-governmental organisations, and professional bodies – to associate themselves with the Convention and take effective measures to fight bribery and corruption. The Group will continue to broaden the discussion of the OECD Convention and related instruments and develop partnerships with major stakeholders on national, regional and international initiatives against bribery and corruption.

10. The measures that governments will take as members of the Convention will complement the actions to fight corruption taken by other institutions such as the Council of Europe, the European Union, and the OAS. They will reinforce anti-corruption activities of institutions such as the World Bank, the IMF, the World Trade Organisation, and the UN. Co-operation with these organisations is crucial to building partnerships that strengthen consensus and ensure the full involvement of major stakeholders.

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<sup>2</sup> See Annex 3 for more information on the status of tax deductibility in OECD countries.

11. The significance of the OECD Convention on Combating Bribery has been directly alluded to at high political levels. Its credibility, however, depends in large part on effective implementation. Particularly prominent is the expectation that the Convention can serve as a model for global co-operation on corruption, provided that "...we move forward with implementation through the Convention's important mutual evaluation process which will examine the written laws and regulations of ratifying countries to determine whether they are in compliance with the Convention."<sup>3</sup> The OECD has begun its first round of evaluation that will be crucial in establishing confidence in the commitments undertaken by participating governments.

12. Entry into force of the Convention positions the OECD at the forefront of the international fight against bribery. If the Convention is to be more than a noteworthy political achievement, the Organisation must be endowed with the necessary resources to meet the high expectations generated by the Convention. The intensive work programme to implement the Convention and the recommendations that includes monitoring, analytical work, co-operation with non-signatory countries and other international organisations, and co-operation with business and civil society, calls for an allocation of sufficient budgetary resources.

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<sup>3</sup> Statement of Ambassador Stuart Eizenstat at Global Forum on Fighting Corruption, Washington, D.C., 24 February 1999.

**IMPLEMENTATION OF THE CONVENTION ON COMBATING BRIBERY OF FOREIGN  
PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS  
AND THE 1997 RECOMMENDATION**

**REPORT BY THE COMMITTEE ON INTERNATIONAL  
INVESTMENT AND MULTINATIONAL ENTERPRISES**

**I. Introduction**

1. Article 12 of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions provides that:

“The Parties shall co-operate in carrying out a programme of systematic follow-up to monitor and promote the full implementation of this Convention. Unless otherwise decided by consensus of the Parties, this shall be done in the framework of the OECD Working Group on Bribery in International Business Transactions and according to its terms of reference.....”.

2. Section VIII of the 1997 Revised Recommendation on Combating Bribery in International Business Transactions states that:

“[The Council] INSTRUCTS the Committee on International Investment and Multinational Enterprises, through its Working Group on Bribery in International Business Transactions, to carry out a programme of systematic follow-up to monitor and promote the full implementation of this Recommendation, in co-operation with the Committee for Fiscal Affairs, the Development Assistance Committee and other OECD bodies, as appropriate...”

3. The Negotiating Conference on a Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, noted that further work was needed on a number of related corruption issues. In December, 1997, the OECD Council decided [C(97)240/FINAL] that the Committee on International Investment and Multinational Enterprises, through its Working Group on Bribery in International Business Transactions, should examine on a priority basis the following five issues with a view to reporting conclusions to the 1999 OECD Council at Ministerial level:

- bribery acts in relation with foreign political parties;
- advantages promised or given to any person in anticipation of that person becoming a foreign public official;
- bribery of foreign public officials as a predicate offence for money laundering legislation;
- the role of foreign subsidiaries in bribery transactions;
- the role of offshore centres in bribery transactions.

## II. OECD Convention and Progress in Implementation

### (i) Status of Ratification

4. The OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions entered into force on 15 February 1999. The Convention has been signed by all 29 OECD Member countries and by 5 non-Members (Argentina, Brazil, Bulgaria, Chile, and the Slovak Republic). Article 15 provides that the Convention would enter into force on the sixtieth day following the date upon which five of the 10 countries with the largest shares of OECD exports, representing at least 60% of the combined total exports of those 10 countries, have deposited their instruments of acceptance, approval, or ratification. Countries that have already deposited their instruments include: Iceland (17 August 1998), Japan (13 October 1998) Germany (10 November 1998), Hungary (4 December 1998), United States (8 December 1998), Finland (10 December 1998), United Kingdom (14 December 1998), Canada (17 December 1998), Norway (18 December 1998), Bulgaria (22 December 1998), Korea (4 January 1999), Greece (5 February).

5. The Working Group on Bribery regularly monitors the progress of countries in ratifying and implementing the Convention. The most recent review in April 1999 indicated that ratification is imminent in a few countries. Some other countries have finalised the drafting of legislation and are close to completing the ratification process. In the remaining countries, approval by Parliament is not expected before the end of the year.

6. *Annex I* provides a brief description of the steps which participating countries have taken and the schedule of future actions to ratify and implement the Convention.

### (ii) Monitoring of member countries' commitments

7. The Working Group on Bribery agreed to a two-phase procedure to carry out a programme of systematic follow-up to monitor and promote the full implementation of the Convention [DAFFE/IME/BR(98)8/REV1]. Phase 1 began in April 1999 with the examination of three countries that have ratified the Convention: the United States, Germany, and Norway. Its purpose is to evaluate whether the legal texts through which participants implement the Convention meet the standard set by the Convention. The Working Group will evaluate all participating countries by Spring 2000 in order to be able to report results to the Council at that time.

8. In phase 2, the Working Group would assess each country's structures to enforce the laws implementing the Convention and its application of the laws and rules in practice. It will also monitor more fully implementation of the non-criminal aspects of the 1997 Revised Recommendation. This phase will involve visits by the Secretariat and lead examiners in order to prepare a thorough review of the country concerned. In principle, phase 2 should begin in the second half of 2000, in order to finish a cycle of examinations of all participants by 2005 at the latest.

## III. Further Issues Relating to Corruption

9. In accordance with the Council mandate (see paragraph 3, above) the Working Group on Bribery has been examining bribery acts in relation with foreign political parties; advantages promised or given to any person in anticipation of that person becoming a foreign public official; bribery of foreign public officials as a predicate offence for money laundering legislation; the role of foreign subsidiaries in bribery transactions; and the role of offshore centres in bribery transactions.

10. The Secretariat proposed a questionnaire on the first four issues [DAFFE/IME/BR(98)9/REV1] covering a number of examples of undue payments. France submitted a note on approaches to the role of offshore centres in bribery transactions, issued as DAF/IME/BR(98)11/ADD1, and the United States contributed a note on bribery of foreign political parties, party officers and candidates for political office in international business transactions DAF/IME/BR(98)12. Italy chaired an informal meeting of experts in Milan on 5-6 October 1998.

11. The Working Group's methodology was to examine, for each issue, to what extent it might already be covered by the Convention and by legislation adopted to implement the Convention, or by existing national laws. The Secretariat analysed replies to a questionnaire covering the first four issues in order to assess the adequacy of overall coverage. Concerning the role of offshore financial centres in bribery transactions, the Working Group convened a special meeting with prosecutors from several OECD countries, (under the chairmanship of France), to identify the practices that act as obstacles to effective investigation and prosecution of cases relating to international corruption. *Annex 2* to this report contains a brief description of each of the five issues, the Working Group's assessment of the adequacy of coverage, and recommendations concerning future work.

12. There was wide spread acceptance that the extent to which certain acts of bribery relating to all five issues are not covered by the Convention and implementing legislation, or by existing national laws, should be carefully monitored. However, experience is necessary with the application of the Convention in order to judge whether these are major problems that would require any further action. The Working Group recommends, therefore, that examination of these issues continue having regard to the knowledge generated by the process of self and mutual evaluation. In support of the overall objective of combating bribery in international business transactions, Ministers are invited to request the OECD to continue the examination of possible solutions to any major problems raised by these issues. As concerns offshore centres, Ministers are invited to reaffirm their determination to address the obstacles in international co-operation, together with other fora.

#### **IV. Tax Deductibility**

13. Section IV of the 1997 Revised Recommendation is drawn from the 1996 Recommendation on the Tax Deductibility of Bribes to Foreign Officials, C(96)27/FINAL; it reads as follows:

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

14. The Committee on Fiscal Affairs (CFA) regularly monitors countries' progress in implementing the 1996 Recommendation on the Tax Deductibility of Bribes of Foreign Officials. The results of its most recent review [DAFFE/CFA/WP8(99)6], including information provided to the Working Group on Bribery, is reproduced in *Annex 3*.

15. Concerning other work relating to bribery, the CFA is currently developing best practices audit guidelines for tax examiners in administering the non-tax deductibility of bribes to foreign public officials in the domestic context. It is also drafting OECD tax audit guidelines for the detection of bribes to foreign public officials. Guidelines to improve international tax co-operation to counteract bribery of foreign public officials by increasing exchange of information on bribes and suspicious payments is also under review by the CFA. A draft Council Recommendation for an OECD Model Memorandum of Understanding on automatic exchange of information [DAFFE/CFA(98)41] has been approved by the CFA



in January 1999 and addresses in particular the exchange of information on commissions and similar payments. Working Party n°8 of the CFA is also examining the tax implications of the five issues relating to bribery currently under study by the Working Group on Bribery and in particular the tax treatment of bribes paid through foreign subsidiaries.

**V. Other actions to implement the 1997 Revised Recommendation on Combating Bribery in International Business Transactions.**

**(i) Activities of the Export Credits and Credit Guarantees Working Party**

16. Section II of the Revised Recommendation reconfirms the engagement set forth in the 1994 Recommendation, “that each Member country examine the following areas and, in conformity with its jurisdictional and other basic legal principles, take concrete and meaningful steps to meet this goal:

- v) public subsidies, licences, government procurement contracts or other public advantages, so that advantages could be denied as a sanction for bribery in appropriate cases, and in accordance with section VI for procurement contracts and aid procurement:”

17. Last year, the Working Party on Export Credits and Credit Guarantees (ECG) surveyed Members’ existing provisions and practices under national legislation to deter bribery in the award of contracts with official export credit support. Following this survey, at their meeting on 16 April 1999, ECG Members re-affirmed that the ECG was the appropriate forum for discussion of bribery and export credits and that the issue was important against the background of the OECD Convention. Whilst there were differing views on the approach to be taken, the United States’ specific proposal to combat bribery in official export credits through supplier certificates for individual transactions, as well as other possible approaches are scheduled for further discussion at the ECG’s meeting in October 1999, in light of Member countries’ different legal systems.

**(ii) The DAC Recommendation on Anti-Corruption Proposals for Aid-Funded Procurement - Report on Follow-up Actions by Members**

18. In 1996, the DAC adopted the Recommendation on Anti-Corruption Proposals for Aid-Funded Procurement [DCD/DAC(96)11/FINAL] which was integrated into the 1997 Revised Recommendation on Combating Bribery. In the year following the Recommendation, DAC reported that all donors have fully complied with it by introducing or strengthening explicit anti-corruption clauses in their procurement documentation. The DAC will return to this matter next year to assess Members’ experience with the Recommendation, its impact and possible next steps. The DAC is also assisting several developing countries to develop or improve national level co-ordination in efforts to tackle corruption.

**VI. Activities of the OECD Working Group on Bribery to Implement the 1997 Revised Recommendation and the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions**

19. Both the Convention and the 1997 Revised Recommendation provide for co-operation with non-Member countries. On the occasion of the signing of the Convention, Ministers of participating states declared their intention to seek to secure the accession of non-OECD countries to the Convention. The Convention is open to any non-member that becomes a full participant in the Working Group and that adheres to the 1996 and 1997 Recommendations. The Commentaries to the Convention make clear that full participation by non-Members is to be encouraged and arranged under simple procedures. Section XII of the Revised Recommendation instructs the CIME, through its Working Group on Bribery, to provide a

forum for consultations with countries that have not yet adhered, in order to promote wider participation in the Recommendation and its follow-up.

20. Conferences and regional events were held under the auspices of the OECD to appeal to government officials of non-signatory countries and other relevant segments of society – business leaders, journalists, non-governmental organisations, and professional bodies – to associate themselves with the Convention and Recommendation and take effective measures to fight bribery and corruption. These events included a conference sponsored jointly with the Organisation of American States in Argentina on 7-8 September, and a joint USAID/OECD workshop in Turkey on 7-9 October. The DAF Secretariat also co-operated with the Development Centre in the organisation of a symposium on the role of the private sector in fighting contribution in developing and emerging economies, held in February 1999, in Washington DC. The Group will continue to broaden the discussion of the OECD Convention and related instruments and develop partnerships with major stakeholders on national, regional and international initiatives against bribery and corruption. A regional workshop for Asian economies is scheduled for September 1999 with joint sponsorship by the Asian Development Bank and partner associations such as USAID and UNDP.

21. A key element in an effective campaign to fight bribery and corruption is the sharing of information and experience on national, regional and international developments and initiatives taken by countries, international organisations, and civil society. The DAF Secretariat manages an Anti-Corruption Network for Transition Economies and pursues regional co-operation with Asian and Latin American countries. The Group has made a special effort to disseminate information about the Convention and the related recommendations through contacts with the media and via an OECD comprehensive web site on anti-corruption activities. The Working Group holds regular consultations with business organisations and representatives of the private sector, civil society, and international organisations such the Council of Europe, International Monetary Fund, Organisation of American States, World Bank and the World Trade Organisation, to build partnerships and ensure the full involvement of major stakeholders.

22. Over the coming year, the Working Group on Bribery will continue to closely follow ratification and implementation of the Convention. Completion of a first round of self and mutual evaluation of implementation of the Convention and the 1997 Recommendation will be the Group's main priority. As provided for in paragraph 12 above, the Group will continue to pursue work on the five issues relating to corruption. It will also consider how to address other issues that involve private to private bribery (bribery of commercial agents), the solicitation of bribes, and civil law remedies for both bribery of public officials and private to private bribery. The Working Group will continue to review developments in anti-corruption activities related to tax deductibility, export credits and aid-funded procurement.

## ANNEX 1:

**STEPS TAKEN AND PLANNED FUTURE ACTIONS BY EACH PARTICIPATING COUNTRY  
TO RATIFY AND IMPLEMENT THE CONVENTION ON COMBATING BRIBERY OF  
FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS**

**(information as of 19 April 1999)**

- Argentina**            The text of the Convention in Spanish has been finalised. Ministerial consultations are underway on the amendments to the Penal Code. The draft bills to ratify and implement the Convention are expected to be presented to Parliament by the second quarter of 1999.
- Australia**            An exposure draft of legislation to criminalise bribery of foreign public officials in international business transactions was tabled in the Australian Federal Parliament on 3 March 1998. The legislation and the Convention were referred to the Joint Standing Committee on Treaties for examination in accordance with the practice followed in this country for the Parliamentary scrutiny of all treaties prior to signature. The Committee tabled its Report on 2 July 1998. The Committee recommended Australia sign the Convention and, subject to some changes to the draft legislation, also recommends enactment of implementing legislation. The fact that a Federal Election was called affected the timing for signature of the Convention and its implementation. Australia signed the Convention on 7 December 1998.
- The Criminal Code Amendment (Bribery of Foreign Public Officials) Bill 1999 was introduced in the Australian Senate on 10 March 1999. This Bill implements the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. The Australian Federal Government's response to the Federal Parliament's Treaties Committee report on the OECD Convention and draft implementing legislation was tabled in Federal Parliament on 11 March 1999.
- Austria**              The legislation implementing the Convention is in force in Austria since 1 October 1998. The ratification process is under way. The First Chamber of Parliament passed the bill for ratification on 24 March 1999. The competent committee of the Second Chamber decided not to veto the bill on 13 April. After adoption by the Second Chamber, the legislative procedure will be finalised in the near future.

- Belgium** Ratification and implementation of the Convention involve two different steps. Concerning ratification, the Government has almost finished the preparatory work: the Council of Ministers sent the draft bill to the State Council for advice; the State Council has given its advice and the draft bill will be submitted to Parliament as soon as possible. It is expected that the draft bill will be passed by Parliament before the parliamentary elections in June 1999. With respect to revision of penal law to comply with the obligations under the Convention, the legislative proposal was passed by Parliament at the beginning of February 1999, was published on 23 March and entered into force on 3 April.
- Brazil** A draft text has been sent to the Brazilian Congress by the executive branch of Government and is under examination by the Chamber of Deputies. The ratification process should be completed this year. Internally, bribery falls under a law on crimes related to money laundering and use of financial system for illicit purpose which was passed by Congress in March 1998. The law establishes, inter alia, the Council on Financial Activities Control.
- Bulgaria** Bulgaria ratified the Convention on 3 June 1998 and deposited its instrument of ratification on 22 December 1998. A Law on Amendment to the Penal Code was passed by Parliament on 15 January 1999 and came into force on 29 January 1999. An explanation of the term of "foreign public official", in line with the terms of the Convention, has been incorporated into Art. 93 of the Penal Code and a new paragraph 2 to Article 304 of the Code has been inserted.
- Canada** The new legislation was adopted by the Senate on 3 December 1998 and by the House on 7 December 1999 and received Royal Assent on 10 December 1998. The Convention was ratified on 17 December 1998. The law came into force at the same time as the Convention on 14 February 1999.
- Chile** The draft law for ratification and implementation of the Convention was presented to the Chamber of Deputies on 5 January 1999 in order to inform the commission for external relations. It is expected that the bill will be approved by Parliament by November 1999, before the Presidential elections.
- Czech Republic** The draft amendment to the Criminal Code was approved by the new Parliament formed after the June 1998 legislative elections during its first reading. The draft bill has been submitted to the Chamber of Deputies and the third reading will soon be on the agenda. The ratification and implementation process should be likely completed before the summer recess in July 1999.
- Denmark** Denmark has prepared draft legislation on both ratification and implementation of the Convention. The Government is expected to submit this to Parliament in April 1999. The parliamentary process may take between 3 and 7 months before the bill is adopted and comes into force. The draft legislation is now publicly available.

- Finland** The legislation for ratification and implementing legislation were approved by Parliament on 9 October 1998 and Finland deposited its instrument of ratification on 10 December 1998. The amended Penal Code entered into force on 1 January 1999. The Convention entered into force internally on 15 February 1999.
- France** The Council of Ministers (Conseil des Ministres) has approved the drafts on ratification and implementing legislation, after consideration by the State Council (Conseil d'Etat), and submitted them to Parliament. It is expected that both texts will be approved by Parliament during the current session which ends in June 1999.
- Germany** Germany ratified the Convention on 10 November 1998. The implementing legislation contained in the Act on Combating International Bribery of 10 September 1998 entered into force together with the Convention on 15 February 1999.
- Greece** The Convention was ratified by Parliament on 5 November 1998. The implementing legislation was passed by Parliament the same day. Greece deposited its instrument of ratification on 5 February 1999.
- Hungary** The texts of ratification of the Convention and implementing legislation (the Amendment of the Criminal Code) were submitted to Parliament in May 1998. The texts for ratification was approved on 4 December 1998 and Hungary deposited its instrument of ratification on 4 December 1998. The Amendment of the Criminal Code was passed in December 1998 and came into force on 4 March 1999.
- Iceland** The Icelandic government deposited its instrument of ratification on 17 August 1998 and the implementing legislation was passed by Parliament on 22 December 1998.
- Ireland** The Government has approved the drafting of legislation to enable ratification of the OECD Convention on Bribery. The law, in large measure, meets the requirements of the Convention. However there are one or two areas where additional legislation has been considered necessary and these issues are being addressed in the legislative proposals. It is anticipated that the Bill will be published in mid-1999.
- Italy** The Italian Chamber of Deputies has approved on 24 March 1999 the bill for the ratification and enforcement of the OECD Convention, together with various EU instruments against fraud and corruption. The bill is now pending for approval before the Senate which is expected to pass it in the next weeks. The Chamber has amended the bill reinforcing the framework for imposing non-criminal sanctions against legal persons under Art. 3.2 of the Convention, a new feature in the Italian legal system. The Government has been delegated to introduce these sanctions - including fines up to Euro 1.5 million - within six months from the final approval of the bill.

- Japan** On 10 April 1998, the Government of Japan formally submitted the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, along with its implementing legislation (amendments to the Unfair Competition Prevention Law) to the National Diet. The National Diet approved the conclusion of the Convention on 22 May 1998. The implementing legislation was adopted on 18 September 1998. The instrument of acceptance was deposited on 13 October 1998.
- Korea** The Korean Government formally submitted the bill to ratify the Convention along with its implementing legislation to the National Assembly in October 1998. Both bills were approved by the National Assembly on 17 December 1998. Korea deposited its instrument of ratification on 4 January 1999. Korea's implementing legislation –the Act on Preventing Bribery of Foreign Public Officials in International Business Transactions-- went into effect on 15 February 1999, at the time of the entry into force of the OECD Convention.
- Luxembourg** The draft bill to ratify and implement the Convention is under review by the Conseil d'Etat. It is expected that the legislative procedure will be completed by Fall 1999.
- Mexico** A Spanish language version of the Convention was submitted to the Senate for ratification as a treaty on 5 November 1998. The draft implementing legislation was introduced in the Senate, as part of a comprehensive package of reforms to the criminal code in Mexico, on 17 November 1998. The Senate is in the process of finalising the analysis of the bills. Both Chambers of Congress are expected to deal with these issues before the closing of the current regular session on 30 April 1999.
- Netherlands** Bills to ratify and implement the Convention have been sent to parliament in April 1999. At the same time three EU treaties have been submitted. The Convention needs to be ratified by the Kingdom of the Netherlands which includes the Netherlands Antilles and Aruba. Both chambers of parliament will have to approve the bills.
- New Zealand** The New Zealand Government has approved the policy to amend New Zealand law to enable it to ratify the Convention. Drafting instructions for the necessary legislative amendments have been issued and passage of the requisite implementing legislation and ratification is expected by the end of 1999.
- Norway** After consultation with the relevant private and public authorities, at the end of May 1998, the Government submitted to Parliament the bills to ratify and implement the Convention. The amendments to the Penal Code were passed on 27 October 1998 and came into force on 1 January 1999. The instrument of ratification was deposited on 18 December 1998.

- Poland** The Ministry of Justice has finalised a draft implementing law. Inter-ministerial consultations have been held since 15 February 1999. It is expected that the draft bill will be submitted to the Council of Ministers by the end of June 1999. The whole procedure for ratification and implementation is estimated to be finalised before the end of this year.
- Portugal** The ratification procedure has nearly been completed, having the Convention been submitted to Parliament and being currently there under review by the specialised committees. The Portuguese competent authorities within the Ministry of Justice are finalising the draft legislation needed to alter the criminal legislation currently in force in order to implement the OECD Convention. A copy of the draft legislation will be provided to OECD Secretariat and the Bribery Working Group as soon as it is made publicly available.
- Slovak Republic** Slovak Parliament has approved the ratification of the Convention on February 11, 1999.
- The implementing legislation (Criminal Code amendment and Act on Banks amendment implementing Article 9 of the Convention) is under discussion by Parliament. The draft of the Criminal Code amendment also includes provisions implementing the Criminal Law Convention of the Council of Europe. It is expected that both amendments will be approved by Parliament in May 1999 at the latest and the deposit of the instrument of ratification will take place at about the same time.
- Spain** The draft legislation for ratification, as approved by the Council of Ministers, was submitted to Parliament in the fall 1998. Since then, the Parliament has given permission to the Government to ratify the Convention. As to implementing legislation, a draft text has been approved by the Council of Ministers after being reviewed by the General Law Council on 29 January 1999. The text of the implementing legislation has been sent to Parliament and the adoption of the bill is expected during the current session of the Parliament which ends in July.
- Sweden** The bill embracing the necessary amendments of Swedish legislation in order to be able to ratify and implement the Convention was passed by Parliament on 25 March 1999. The instrument of ratification is to be deposited with the OECD by the beginning of May 1999. The implementing legislation will enter into force on 1 July 1999.
- Switzerland** The draft law, based on the results of consultations among cantons and other interested parties, has been signed by the Minister of Justice and was submitted to Parliament on 19 April 1999. Parliament should take up debates on the draft in Summer 1999. The Convention will be ratified as soon as the bill enters into force.
- Turkey** The draft bill to ratify the Convention has been submitted to Parliament. The inter-ministerial consultations on the text to implement the Convention has been completed. A bill is now being drafted.

**United Kingdom** The United Kingdom deposited its instrument of ratification on 14 December 1998. Although internal consultations have confirmed that the scope of existing laws allows the United Kingdom to meet the requirements of the Convention, the UK is currently considering the formulation of a new public statute on corruption. It is hoped that a public discussion document on proposals for new legislation on corruption will be published before the UK parliamentary summer recess.

Steps are being taken to bring the Channel Isles and the Isle of Man within the scope of the Convention. Whilst these territories have indicated their willingness to do this, they need to enact new legislation to ensure their domestic laws match the provisions of the Convention.

Also, the process to bring UK's Overseas Territories under the scope of the Convention is beginning. This will involve a bilateral consultative process with each Territory. The intention is for these Territories to adhere to the Convention via the UK's own ratification. The Territories will not adhere individually.

In relation to the Overseas Territories, a White Paper entitled 'Partnership for Progress' was published on 17 March 1999. One element of this refers to the requirement for the Overseas Territories to match the best international standards in financial regulations and stipulates that, by the end of 1999, they will be required to meet, in full, international standards on money laundering, transparency and co-operation with law enforcement authorities and independent financial regulations.

**United States** On 31 July 1998 the Senate approved both the Convention and the implementing legislation. Congress completed action on implementing legislation in October 1998 and on 10 November 1998 both the ratification instrument and implementing legislation were signed by the President. The US deposited its instrument of ratification with the OECD on 8 December 1998. The legislation is available on the Internet at [www.ita.doc.gov/legal](http://www.ita.doc.gov/legal).



**ANNEX 2:**  
**FIVE ISSUES RELATING TO CORRUPTION**

**Introduction**

1. The Negotiating Conference on a Convention on Combating Bribery of Foreign Public Officials in International Business Transactions noted that further work was needed on a number of related corruption issues. In December, 1997, the OECD Council decided (C(97)240/FINAL) that the Committee on International Investment and Multinational Enterprises, through its Working Group on Bribery in International Business Transactions, should examine on a priority basis the following five issues with a view to reporting conclusions to the 1999 OECD Council at Ministerial level:

- bribery acts in relation with foreign political parties;
- advantages promised or given to any person in anticipation of that person becoming a foreign public official;
- bribery of foreign public officials as a predicate offence for money laundering legislation;
- the role of foreign subsidiaries in bribery transactions;
- the role of offshore centres in bribery transactions.

2. The Secretariat proposed a questionnaire on the first four issues [DAFFE/IME/BR(98)9/REV1] covering a number of examples of undue payments that concern the Group<sup>4</sup>. France submitted a note on approaches to the role of offshore centres in bribery transactions, issued as DAFFE/IME/BR(98)11/ADD1 and the United States contributed a note on bribery of foreign political parties, party officers and candidates for political office in international business transactions DAFFE/IME/BR(98)12. Italy chaired an informal meeting of experts in Milan on 5-6 October 1998.

3. The Working Group's methodology was to examine, for each issue, to what extent it might already be covered by the Convention and by legislation adopted to implement the Convention, or by existing national laws. The Group then assessed the adequacy of overall coverage. This note presents a brief description of the issue and the Group's assessment of the adequacy of coverage. It also sets out recommendations concerning possible future work on these issues.

***Bribery acts in relation with foreign political parties***

Description of issue

4. Some delegates are concerned that certain important cases of undue offers or payments to foreign political parties or party officers might fall outside the coverage of the Convention. The offers or payments involved would be those that are part of a quid pro quo transaction to obtain the award of a specific business contract or improper business advantage from a foreign public official acting in relation

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<sup>4</sup> The replies of the 26 countries that responded to the questionnaire can be found in DAFFE/IME/BR/WD(98)4/REV1, DAFFE/IME/BR/WD(98)4/REV1/ADD1, and ADD2.

to the performance of official duties. This issue would not include illegal party or campaign financing to develop a favourable relationship with party officers as such.

5. In examining this issue, the Working Group noted that it would be difficult to find a homogeneous definition of a political party and political party officers. Some countries would find it impossible to equate a party officer to a public official.

#### Assessment of coverage

6. Countries were asked to assess the situation where a company officer approaches a political party or political party officer and offers to pay, or pays, a substantial sum to the party if the political party or party official promises that a public official will award a specific business contract or improper advantage to the company. Looking at the Convention and implementing legislation, the Group concluded that several cases would be covered:

- when the party officer is a public official or exercises a public function (Article 1.4),
- in the case of a one-party state (Commentaries, Article 1.16),
- when the transaction is between the briber and the public official and the political party is the beneficiary of the bribe transaction (Article 1.1),
- when the party officer is acting as an intermediary between the company officer and the public official (Article 1.1), and
- where the party officer and the public official are “co-authors”, i.e., acting in collusion (Article 1.2).

7. The more difficult cases are those where the public official is not involved in the transaction, or is unaware, has been tricked, or is possibly acting under duress-- but may unwittingly provide the illegal quo. The concepts of intermediary/accomplice, co-authorship or third party beneficiary would not apply. However, some national laws might be able to cover the cases under different approaches:

- i) directly criminalising the act under a general statute, or by equating the party officer to a public official,
- ii) covering the offer, or payment to the party officer, under laws on trading in influence,
- iii) applying laws on the misuse of company funds,
- iv) applying laws on national party financing, although there is a question whether these laws can be applied extraterritorially.

#### Recommendations

8. The Working Group on Bribery examined several instances of bribery acts in relation with foreign political parties involving a quid pro quo transaction to obtain the award of a specific business contract or improper business advantage. The issue of illegal party or campaign financing as such was not addressed.

9. The assessment of the Working Group was that certain cases of bribery acts in relation with foreign political parties can be covered -- either under the Convention and laws implementing the Convention, as well as under different existing national law approaches which might go further than the

Convention. The problem is that there is no homogeneous coverage. For those cases that might not be covered, there was no consensus on how significant the problem might be.

10. There was wide spread acceptance that the extent to which certain acts of bribery relating to foreign political parties are not covered should be carefully monitored. However, experience is necessary with the application of the Convention in order to judge whether these are major problems that would require any further action. The Working Group recommends, therefore, that examination of this issue continue having regard to the knowledge generated by the process of self and mutual evaluation.

***Advantages promised or given to any person in anticipation of that person becoming a foreign public official (candidates for public office)***

Description of issue

11. The case of offers or payments to a candidate for public office might be treated like the one involving company officers, political party officers and public officials. In this case, the political party officer and the public official are the same person but their status changes in time when the party officer later becomes a public official. There are two variations of this case:

- 1) the offer/promise is made before the election, payment (or part thereof) is made when the candidate is a public official and the pro quo occurs when the candidate is a public official,
- 2) the offer/promise is made before the election, payment is made before the election; the pro quo occurs later when the candidate is a public official.

12. The Working Group noted a definitional problem relating to candidates for public office. In the analysis of the issues presented, it is not clear whether only candidates that are running for elected office are covered or whether “candidate” could cover persons that are nominated for a public office (where there is no election but rather a “confirmation” period).

Assessment of coverage

13. Countries considered the case where a company officer offers a candidate for public office a substantial payment immediately, and another substantial payment after election, in return for the promise that the candidate will award the company a contract if the candidate wins the election and becomes a public official.

14. In the case where the candidate is elected to public office, the Convention will apply provided the payment is made after the candidate is a public official and the quo is delivered once the candidate is an official. It is more difficult to cover the case where the payment is only promised, but not actually made to the official. Here, there may be alternative ways to get the company officer that has offered the bribe, perhaps misuse of company assets, campaign financing laws, or conspiracy. However, if there is only a company officer and a candidate for a foreign public office, this might not be enough to trigger conspiracy statutes. Applying laws regarding misuse of company funds might also be problematical if the behaviour to bribe a candidate is not also illegal in the country where it occurs. When the payment is not made because the candidate does not become a public official, the case might be considered an “attempt”.

15. The second case involves the company officer who agrees with a candidate for public office to make a payment in return for the promise that the candidate will award a contract or improper advantage to the company.

16. This case remains very difficult for most countries to cover irrespective of whether the payment has actually been made to the candidate. Quite a few countries cannot apply national penal, or anti-corruption laws, etc. unless the candidate is also a public official. Some countries are considering in their legislation to implement the Convention, a provision that would equate both national and foreign candidates to public officials; but for others, this would not be feasible.

17. Where candidates are not equated to public officials, the offer or promise to a candidate might be treated as a preparatory act, an attempt, or a conspiracy to bribe. However, in many countries where candidates are not considered as public officials, even the concept of “attempt” is problematical because the person is not invested with any qualification to deliver the quo. In these countries, there cannot be an attempt to corrupt since corruption itself is a preparatory act (to distort an official decision). Countries indicated however that there may be indirect ways of reaching the company official through other laws such as financing rules for election campaigns, misuse of company assets, trafficking in influence, or breach of trust.

#### Recommendations

18. The Working Group considered the payment by company officers to political candidates in anticipation of their becoming public officials a relevant problem. They noted that the Convention would cover the case where a promise is made to a candidate before election, the candidate is then elected, and payment is made thereafter (payment is in effect made to a public official).

19. The Convention is unlikely to cover cases where no payment has been made after a candidate has been elected, or where the candidate loses the election, or where the illegal quo is delivered after the candidate becomes a public official but the payment has been made before. Countries might use other approaches but this creates again a problem of non-homogenous coverage.

20. There was wide spread acceptance that the extent to which certain payments to candidates for public office are not covered should be carefully monitored. However, experience is necessary with the application of the Convention in order to judge whether these are major problems that would require any further action. The Working Group recommends, therefore, that examination of this issue continue having regard to the knowledge generated by the process of self and mutual evaluation. The Working Group noted that the problem of how to define candidates for public office is not resolved and needs further consideration.

#### ***Bribery of foreign public officials as a predicate offence for money laundering legislation***

##### Description of issue

21. Article 7 of the Convention requires that countries which have made bribery of domestic public officials a predicate offence for the purpose of money laundering legislation should do the same for the bribery of a foreign public official. The commentaries to this article clarify that when a Party has made only passive bribery of its own public officials a predicate offence for money laundering, that Party is required to make the laundering of the bribe payment subject to money laundering legislation. The 1996 FATF Recommendation asks countries to broaden the scope of predicate offences for money laundering to all serious crime. It provides that each country would determine which serious crimes would be designated as money laundering predicate offences.

22. A number of countries expressed concern that the treatment of money laundering in the Convention may result in uneven application between countries that make bribery of domestic public officials a predicate offence for money laundering and those that do not.

#### Assessment of coverage

23. One means to assess eventual coverage of the Convention is to determine whether participating countries make bribery of a domestic public official a predicate offence for money laundering legislation. Additionally, countries were asked whether there was an obligation on the part of a bank officer to report that a deposit is a bribe payment to a public official, and whether there would be a basis for acting against the officer for failure to report.

24. Article 3.3 of the Convention makes the bribe and the proceeds of the bribery of a foreign official subject to confiscation and seizure. This may increase the incentives to hide proceeds in the financial system. A case would be where a company deposits or transfers the proceeds of a contract that was obtained by virtue of a bribe. The Group considered whether under money laundering legislation, a bank officer, who has reason to believe that the funds are the proceeds of contract obtained by bribery of a public official, would be obliged to report the deposit to the appropriate authorities and whether prosecutors would have a basis for acting against the bank officer for failure to report.

25. In many cases, countries make bribery a predicate offence for money laundering legislation. A few make only passive, not active, bribery a predicate offence. These countries provide for reporting obligations on the part of the bank officer who has reason to believe that the deposit is a bribe payment to a domestic public official. Where this applies to bribe payments to domestic officials, the countries apply the legislation also with regard to bribe payments to foreign public officials.

26. The treatment of the proceeds of a contract obtained by bribery is less clear. Some countries do provide for an obligation on the part of bank officers to report transactions that they have reason to believe are proceeds of a contract obtained by bribery and they apply this obligation where the bribe was to a domestic or foreign public official. Other countries said that it was difficult to identify what funds were part of the proceeds of a contract obtained by bribery and what funds were part of legal transactions and so make no provision for reporting obligations.

#### Recommendations

27. The Working Group recognised that the Convention requires only that if domestic bribery is a predicate offence for money laundering, this same result should apply to bribery of foreign public officials. The issue raised by the Council mandate is whether this requirement is sufficient. The Group agreed that money laundering is an essential element in bribery because large-scale bribery requires facilitation by money managers, offshore centres, etc. Since the Convention also requires confiscation of proceeds, this will further increase the propensity to hide proceeds through the financial system.

28. The Group noted that the Commentaries to the Convention (Article 7, paragraph 28) provide that when a Party has made only passive bribery of its own public officials a predicate offence for money laundering purposes, the Convention requires that the laundering of the bribe payment be subject to money laundering legislation. The Group also noted that the concepts in the Convention already imply that it is focused on serious, or grand corruption. In implementing the Convention, many countries have taken care to use the breach of duty concept so as not to include types of grease payments; others exclude these facilitation payments directly. Group members also noted the growing tendency among countries to expand the list of predicate offences for money laundering to include bribery.

29. While there is a link between bribery and money laundering, the Group felt that other international organisations were more appropriately mandated to address money laundering issues. The priority of the Working Group remains implementation of the Convention and the related Recommendations. However, in the context of monitoring observance of the Convention, the Group should be particularly attentive to this issue to determine its significance.

30. Ministers' attention is called to the conclusion of the Working Group that it considers bribery, as defined in the Convention, a serious offence also for the purposes of money laundering legislation. This conclusion would not imply that it is necessary to go beyond the requirements of Article 7 of the Convention. Ministers are invited to forward this conclusion, in an appropriate manner, to all relevant organisations that work on money laundering issues.

### *The role of foreign subsidiaries in bribery transactions*

#### Description of issue

31. The question of the role of foreign subsidiaries is essentially whether authorities in the country of the headquarters of the corporation can take action against officers of the company headquarters, or the company, if its foreign subsidiary bribes a foreign public official.

32. Members of the Working Group shared the view of the crucial importance of this subject for the effective implementation of the Convention. They were of the opinion that the issue of how to deal with foreign subsidiaries is linked to how countries deal with notions of corporate responsibility in their national company laws. There was concern that the different approaches in jurisdiction may hamper effective implementation and lead to uneven application of the Convention.

#### Assessment of coverage

33. Countries were asked to consider whether their authorities could take action, criminal or non-criminal, against officers of the corporation headquarters, the corporation headquarters itself, or the foreign subsidiary when:

- a) company headquarters authorised the bribe
- b) company headquarters "should have known" about the bribe, and
- c) company headquarters "knows" about the bribe
- d) company headquarters has no knowledge of the bribery transaction

34. Where company headquarters had authorised the bribe (a) most countries said they could take action against the officers or corporate headquarters since the act of authorising the bribe would be a sufficient territorial link to take jurisdiction. Action could be either civil or criminal. In some cases, authorisation of the bribe would allow prosecution for complicity, active bribery, or conspiracy.

35. Concerning cases (b) and (c), the answers were not substantially different. What was determinate was whether in the relevant national corporate law, there was a concept of corporate responsibility. Under this concept, officers or the company headquarters, could be liable if the circumstances could show that there was breach of duty, or gross negligence, or reckless disregard of legal provisions concerning corporate organisations and control of parent companies over their subsidiaries. Even where there is criminal corporate liability, unless there is "knowledge" as in case (c) that could be considered either complicity or conspiracy, it would be difficult to take action against the officers or the corporate headquarters. Some countries however indicated that they could not take either civil or criminal

proceedings in these circumstances because of the lack of a territorial link to the act of bribery, or because no national was involved.

36. The most difficult case was case (d). Most countries indicated that under their national laws they cannot take action against officers, or corporate headquarters, in the case where there is no knowledge of the bribery transaction.

37. Concerning action against the foreign subsidiary itself, most countries thought that where the bribery transaction occurred entirely abroad and where no nationals of the corporate headquarters home country were involved, it would be extremely difficult to exercise jurisdiction in this case. However, if nationals were involved, then under the extended nationality principle, some countries would be able to take action against the foreign subsidiary provided they recognise criminal liability of companies. The Group noted that, in any event, there is no intention to expand jurisdiction beyond Article 4 of the Convention.

#### Recommendations

38. The assessment by the Working Group showed that the Convention and national implementing laws would cover the case where company headquarters had authorised the bribe. Using the nationality basis of jurisdiction would also allow application of the Convention to cases where nationals of the company headquarters were involved in the bribery transaction. For other cases, where the company “knows” or “should have known” about the bribe, application of the civil concepts of corporate responsibility would most likely capture those instances.

39. The Working Group considered recommending that countries introduce the concept of corporate responsibility of the parent in the supervision of the activities of the foreign subsidiary especially with a view to ensuring that bribery is not committed through foreign subsidiaries. The Working Group considered that the attachment of civil sanctions arising from the lack of effective supervision of foreign subsidiaries was a possible avenue for controlling the behaviour of companies and their subsidiaries that merited further examination. Other means to enforce some control would be to encourage corporate governance schemes in headquarters and in subsidiaries. Indeed, standards relating to corporate governance, business ethics, and international accounting standards, are considered an effective way of promoting self-regulation<sup>5</sup>.

40. The Group noted that experience with the implementation of the Convention might clarify to what extent this problem would require further action. The Convention’s review and monitoring mechanism might be particularly helpful in surveying this issue. In the meantime, it would be important for Member countries to find ways to improve their ability to control the actions of their corporations and to encourage companies to take more responsibility for self-policing. The Group also noted that Working Party 8 of the Committee on Fiscal Affairs is looking at the tax treatment of bribes paid by foreign subsidiaries and particularly foreign subsidiaries located in a territory with a lower level of taxation. Conclusions drawn from that study would be relevant to any future work on this matter.

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<sup>5</sup> The Working Group noted the relevance of the Organisation’s work concerning the development of corporate governance guidelines and the review of the OECD Guidelines for Multilateral Enterprises.

### *The role of offshore financial centres*

#### Description of issue

41. As part of the issues relating to corruption, the OECD Council mandated the Working Group to examine the role of offshore financial centres in bribery transactions. On the basis of a note by the French delegation DAF/IME/BR/(98)11/ADD1, the Working Group decided to explore to what extent certain practices particularly associated with offshore financial centres might constitute obstacles to successful anti-corruption investigations.

42. The Group agreed that this area was particularly sensitive and convened a special meeting with prosecutors from some Member countries, to develop further information and to identify the methodologies related to corruption. The meeting was held on 11 February 1999 under the chairmanship of France.

#### *-- Summary of discussion*

43. The prosecutors identified various practices that inhibit successful investigation and prosecution of international corruption. For the most part, these practices relate to the lack of adequate regulation of financial centres, inadequate company law requirements that hide the identification of the true owners, and de facto or de jure obstacles to the smooth progress of investigations and administrative or judicial international co-operation, especially when bank secrecy is used to decline to render legal assistance.

44. Prosecutors described how offshore centres are used to transfer funds to pay for bribes. In order to move money through the international financial system, slush funds are constituted by using methods of over- or under-invoicing. Offshore centres that serve as bank havens, tax havens, or corporate havens facilitate the creation of these slush funds. Once capital has passed through a tax haven or offshore centre, it is impossible to distinguish between legitimate and "dirty" money.

45. The circuits used to recycle money are the same for drug money, Mafia money, terrorism, corruption, etc. These circuits use highly advanced technologies which permit the transfer of huge amounts of money in very little time. On the other hand, efforts to trace money trails are hampered by the slowness engendered in the system of international co-operation, sometimes up to two years or more.

46. Other obstacles relating to the use of offshores include practices that shield the identity of true owners, the invocation of professional secrecy to deny requests for information, as well as immunity for accounts for heads of state and denying requests for co-operation on the basis of "national security". Prosecutors noted that existing instruments for international co-operation are inadequate and discussed the utility of the strict requirement of dual criminality, at least in the closely integrated area of Europe. Prosecutors also noted that the extensive use of appeals were causing considerable delays.

47. Prosecutors stressed that these problems can only be resolved on an international level and provided there is sufficient political will to increase transparency and co-operation. One proposal was to create an international charter on transparency rules with enforcement and sanctions. Sanctions could include non-recognition of legal persons (non-recognition of shell companies for example). As to mutual legal assistance procedures, prosecutors urged that investigations be freed of excessive recourse to secrecy. In these cases, particularly, there is a need to reform international rules. Direct communication of information among prosecutors should be permitted and time limits for responding to requests should be reduced. Also, requirements of dual criminality should not be used as a barrier to international co-operation. As concerns company law, prosecutors thought that practices that hide the true owners should



be curtailed. Reforms should focus on company registration or other measures sufficient to require identification of the true beneficial owner and elimination of falsified accounts.

#### Assessment

48. The Group concluded that there were substantive, procedural, and institutional aspects that needed to be considered separately. There was a general overall concern that the central problem was one of a lack of financial and commercial transparency. This problem needs to be thoroughly discussed in the context of minimum standards of transparency. These standards should address three areas: financial rules and regulations, company law, and mutual legal assistance.

49. Concerning the financial sector, proposals were made that the Group should work to ensure that the preventive measures developed for the financial sector in the FATF Forty Recommendations (e.g. customer identification, recordkeeping requirements, reporting of suspicious transactions, etc.) are equally applied to preventing corruption.

50. Another area of concern relates to inadequate company laws which prevent obtaining information about the true identity of the real, or economic, owners or beneficiaries. The Group would need to study further what this means and what could be done in the OECD or in other fora.

51. The obstacles and deficiencies in providing mutual legal assistance were considered to be the most important impediments to law enforcement and the area where very substantial problems exist. There is a need to build more effective international structures but, as for the other issues mentioned, it is first necessary to identify who should address this question, when, and in what fora. Furthermore, there is the role of the OECD that needs to be defined. The OECD Bribery Convention already addresses some mutual legal assistance issues but this has been a cautious approach, not going beyond accepted standards. The comments by prosecutors clearly indicated that they saw major problems in mutual legal assistance, not only as concerns unnecessary delays but also the actual state of development of the laws governing mutual legal assistance.

#### Recommendations

52. The Group reaffirmed the importance of the issues relating to offshore financial centres, particularly as they relate to cases of international bribery and corruption. These issues fall into three main categories: financial rules and regulations, company law requirements, and mutual legal assistance. These issues are not exclusive to offshore centres nor are they restricted to the fight against corruption. Member countries should be encouraged to enhance their efforts in the fight against money laundering, to increase transparency, and to improve efforts to provide effective mutual legal assistance.

53. The Group recognises that important work to address these issues is underway in other fora. It notes, in particular, the work of the FATF and its relevance to the effective functioning of the OECD Convention especially the concerns raised during the meeting with prosecutors, i.e., offshore financial transactions (banking secrecy) or corporate havens (problems of non-transparency). FATF also deals with other matters of concern to the Convention such as the role of subsidiaries and money laundering. In monitoring implementation of the Convention, these issues will probably give rise to further reflection. There might also be scope for the Working Group to pursue work in this area, for instance whether FATF standards might be expanded beyond money laundering, or as suggested by a delegation, the issue of professional secrecy as an obstacle to mutual legal assistance

54. Delegations also noted that there is work going on in relation to mutual legal assistance which aims to take up many points raised here including negotiations on an European Union Convention on

mutual legal assistance. Additionally, the G8, the Council of Europe and the United Nations are addressing these matters. Duplication of work needs to be avoided but it is important to ensure the issues are addressed in a comprehensive, global manner.

55. The Working Group is of the view that the practices identified during these discussions, particularly those that hinder transparency in financial and commercial activities and mutual legal assistance, are directly relevant to the implementation of the OECD Convention. High-level political determination is necessary to effectively tackle the obstacles to international co-operation created by these practices that are carried out, for the most part, in jurisdictions which do not participate in arrangements for international co-operation. The Group recommends to continue efforts in the OECD to find solutions, in co-operation with non-signatories and other international fora.

**ANNEX 3:**  
**STATUS ON TAX NON-DEDUCTIBILITY**

Tax Treatment of Bribes in OECD Member countries

(as of 19 April 1999<sup>6</sup>)

**Argentina** Tax deductibility of bribes paid to foreign public officials is not allowed.

**Australia** The general election of 3 October 1998 has resulted in a delay in the passage of the legislation relating to the non deductibility of bribery payments made to foreign public officials. The Parliament has as priority the discussion of the business tax reform. **The draft legislation would deny deductions (other than minor facilitation payments) for bribery payments made to foreign public officials but also cover those non government enterprises associated with foreign governments. The adoption of this legislation is expected by July.**

**Austria** Legislation was passed by Parliament in late October 1998. Section 20 paragraph 1 subparagraph 5 of the Income Tax Act which already provided for non-deductibility of payments subject to criminal prosecution under certain conditions was amended by deleting those former conditions. According to this new legislation any cash or in kind remuneration whose granting or receipt is subject to criminal punishment is not deductible from taxable income. Already in August 1998 the Criminal Code had been amended in a way which extended criminal prosecution also to bribes granted to foreign officials. Since this Act entered into force on 1st October 1998, bribes paid to foreign officials became generally no longer deductible for income tax purposes as soon as the new income tax legislation entered into force.

**Belgium** A bill aiming at the criminalisation of bribes to foreign public officials and at denying the deductibility of so called "secret commissions" paid in order to obtain or maintain public contracts or administrative authorisations has been adopted by the Senate on 9 July 1998 and by the House of Representatives on 4 February 1999. It was published in the Official Journal on 23 March 1999 and entered into force on 3 April 1999. Other types of commissions, paid to foreign officials, will remain deductible provided that such commissions do not exceed reasonable limits, that they are necessary to fight against foreign competition, and that they are recognised as a normal customary practice in the relevant country or sector (i.e., necessary usual and normal in the given economic sector). The taxpayer must present a request and disclose to the tax administration the amount and the purpose of the commissions for the tax administration to appreciate whether the commission is deductible or not. In any case, a tax equal to at least 20,6 percent of the commission must be paid. If these conditions are not simultaneously fulfilled, the deductibility of the commissions is denied and they are added back to the taxable income of the payer. If the payer is a company, it is liable to a special tax equal to 309 percent of the amount of the bribe. For the period 1988-1992, 109 applications for authorisation were made to the Belgian Ministry of Finance.

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<sup>6</sup> recent developments are highlighted

**Brazil** Does not allow tax deductibility of bribes to foreign public officials.

**Bulgaria** Bulgarian tax legislation does not allow the deductibility of bribes to foreign public officials.

**Canada** No deduction can be made in respect of an outlay made or expense incurred for the purpose of bribing a foreign public official or conspiring to do so.

**Chile** Chilean tax legislation does not contain provisions or rules concerning bribes paid to foreign public officials.

**Czech Republic** Czech taxation law and regulations do not allow deductions of bribes paid to foreign public officials. Deductibility is not possible even in cases where the bribe could be treated as a gift. Gifts are deductible only in exceptional cases under two specific conditions. The gift must be made for one of the following specific purposes: science, education, culture, fire protection and some other social, charitable or humanitarian purposes; and the gift must not be over a strictly determined percentage of the tax-basis. Only if both conditions are fulfilled, can the gift be treated as deductible for tax purposes.

**Denmark** The Danish Parliament has adopted a bill from government denying the deductibility of bribes to foreign public officials. The new legislation entered into force on 1 January 1998. Up to 1997 Denmark did not allow deductions for bribes paid to foreign officials, except where bribes were recognised as a customary business practice in the country of the recipient. The burden was on the taxpayer to establish that bribes are a customary business practice in a foreign state. The acceptance of the bribe by a foreign public official was not enough to establish a customary practice. In practice Danish enterprises requested the deduction of bribes in only a small number of cases. The Danish tax authorities were also reluctant to grant deductions because of the difficulty of certifying the deduction.

**Finland** Does not have statutory rules concerning bribes paid to foreign officials. Corresponding payments to domestic public officials are non-deductible on the basis of case law and practice of the tax authorities. The same rule is expected to apply to bribes paid to foreign public officials in case law and the same rule is applied already in the practice of the tax authorities.

**France** The French Parliament passed legislation denying the tax deductibility of bribes to foreign public officials on 29 December 1997 as part of the Corrective Finance Bill for 1997. For contracts concluded during tax years opened as of the entry into force of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (i.e. 15 February 1999), amounts paid or advantages granted, directly or through intermediaries, to public officials within the meaning of article 1 § 4 of the convention or to a third party in order that this official act or refrain from acting in the performance of his official duties, in order to obtain or retain a contract or other improper advantage in international business transactions, are not admitted as a deduction of taxable profits".

**Germany** Under previous German tax law, deductions for bribes were not allowed if either the briber or the recipient had been subject to criminal penalties or criminal proceedings which were discontinued on the basis of a discretionary decision by the prosecution. **New legislation adopted on 24 March 1999 deleted these procedural conditions and denied the tax deductibility of bribes.**

**Greece** Does not allow the deductibility of bribes to foreign public officials.

**Hungary** Does not allow the deductibility of bribes to foreign public officials since only expenses covered in the tax laws are deductible and the tax laws do not include a specific reference to bribes.

**Iceland** Does not allow the deductibility of bribes to foreign as well as domestic public officials and officials of international organisations on the basis of law from June 1998. Previously, bribes to foreign officials were not deductible except if they were considered as a customary business in the country of the recipient.

**Ireland** It is the view of the Revenue Commissioners, on the basis of legal advice received, that bribes paid to foreign public officials are not deductible in principle. It is also doubtful that the conditions for deductibility could ever be met in practice in Ireland. Accordingly, it has not been considered necessary to introduce specific legislation to deny a deduction.

**Italy** Does not allow deductions for bribes paid to foreign officials. Legislation enacted in 1994 made moreover gains from illicit sources taxable. The non-deductibility of bribes remained unaffected.

**Japan** Does not allow deductions for bribes paid to foreign officials. Bribes are treated as an "entertainment expense" under Japanese law, which expenses are not deductible. In practice Japan treats bribes of foreign public officials in the same way as bribes of domestic public officials and therefore as non-deductible.

**Korea** Does not allow deductions for bribes paid to foreign government officials since they are not considered to be business related expenses.

**Luxembourg** The Minister of Justice and Budget has prepared draft legislation that would criminalise bribes to foreign public officials as well as deny their tax deductibility. Presently Luxembourg allows deductions for bribes paid to foreign public officials as any business expense. The tax administration is starting to pay greater attention to the control of such payments to discourage them. To be deductible the recipient must be clearly identified. Payments to companies domiciled in tax havens and to persons which are not clearly identified are not deductible. The general issue of bribery is under review in a broader context than taxation.

**Mexico** Does not allow the deductibility of bribes to foreign public officials since they would not meet the general requirements to qualify as deductible expenses which have to be strictly essential for the purposes of the taxpayers activities and formally documented. Considering that bribes are treated as illicit activities, such payments cannot meet the requirements set forth in the Mexican Commerce Code. Therefore the payment of a bribe is not a business activity and is not a deductible item.

**Netherlands** A new law entered into force as of 1st January 1997 which denies the deductibility of expenses in connection with illicit activities if a criminal court has ruled that a criminal offence has been committed (Dutch criminal law will be amended in the near future to ensure that bribery of foreign public officials is a criminal offence).

**New Zealand** Legislation is being prepared to disallow deductions for bribery. Presently deductions are allowed for bribes paid to foreign officials, provided the recipient is identified.

**Norway** Does not allow deductions for bribes paid to foreign private persons or public officials, on the basis of a new law passed by the Norwegian Parliament on 10 December 1996. Before this law was passed the deduction was disallowed except where bribes were recognised as a customary business practice in the country of the recipient of the bribe.

**Poland** Does not allow the deductibility of bribes to foreign public officials. According to Polish law, bribery is illegal and an offence for both the briber and the recipient of the bribe and both are punishable. The provisions of the Corporate Tax Act and Personal Income Tax Act are not applicable to illegal

activities. Therefore gains and expenses connected with the offence of bribery cannot be taken into account by the tax authorities. As a result, the taxpayer is not allowed to deduct from his income expenses concerning bribes to foreign officials.

**Portugal** Does not allow the deductibility of bribes to foreign public officials. The Parliament has adopted on 20 December 1997 new legislation effective 1st January 1998 to disallow any deduction referring to illegal payments such as bribes to foreign public officials. Previously deductions for bribes paid to foreign officials were allowed if they were documented and the bribe was shown to have contributed directly to the realisation of income (a standard not frequently met). If the bribe was entered as an undocumented expense, it was not deductible and taxed at a rate of 25 percent.

**Slovak Republic** does not allow deductions of bribes to foreign public officials nor private persons. Bribes are not considered as business-related expenses. Recipients of bribes are liable to criminal prosecution. Expenses related with any bribes are not deductible for taxation purposes.

**Spain** Does not allow deductions for bribes paid to foreign public officials.

**Sweden** A bill explicitly denying the deductibility of bribes and other illicit payments was presented to the Swedish Parliament on December 17 1998. The bill was adopted by the Parliament on 25 March 1999. The new law on tax non-deductibility will enter into force of the new legislation, Sweden is dealing with the issue on a case by case basis. Bribes may resemble fees or entertainment expenses. If they are assimilated to a fee, the deductibility is determined as for any other business expense. The burden of proving that it was a necessary expense is on the taxpayer and the fact that bribes are recognised as a normal customary practice in the relevant country is likely to have some impact on the deductibility. If the bribe resembles entertainment expenses, it is deductible provided it does not exceed reasonable limits.

**Switzerland** A draft bill on denial of deductibility of bribes was submitted in Spring 1998 to cantons and other interested parties for consultation (matters of direct taxation are mostly within the competence of the cantons). This process has been terminated and the revised draft is almost finished. The draft bill should soon be submitted to Parliament.

**Turkey** Does not allow deductions for bribes paid to foreign officials because there is no explicit rule allowing the deductibility of bribes.

**United Kingdom** Does not allow deductions for any bribe paid to foreign officials, if that bribe is a criminal offence, contrary to the Prevention of Corruption Acts. If any part of the offence is committed in the United Kingdom, for example the offer, agreement to pay, the soliciting, the acceptance, or the payment itself, it would be caught by the corruption laws and would then not qualify for tax relief. The UK Finance Act of 1993 disallows tax deductions for all payments -- the making of which constitutes a criminal offence. In addition, UK tax laws also deny relief for all gifts and hospitality given, whether or not corrupt.

**United States** Does not allow deductions for bribes paid to foreign government officials if that bribe is a criminal offence. Both before and after the United States criminalised bribery of foreign government officials, it denied tax deductions for such payments. Before the enactment of the Foreign Corrupt Practices Act of 1977, tax deductions were disallowed for payments that were made to an official or employee of a foreign government and that were either unlawful under US law or would be unlawful if US laws were applicable to such official or employee. The denial of the tax deduction did not depend on a conviction in a criminal bribery case. After the United States criminalised bribery of foreign government officials, US tax laws were changed to disallow tax deductions for payments if made to foreign government officials or employees and if unlawful under the Foreign Corrupt Practices Act of 1977 (FCPA). With respect to US tax provisions for Controlled Foreign Corporations, any payment of a bribe by a foreign subsidiary is treated as taxable income to the US parent. Also, to the extent relevant for US tax purposes, bribes of foreign officials are not permitted to reduce a foreign corporation's earnings and profits. US denial of tax deductibility or reduction of earnings and profits does not depend on whether the person making the payment has been convicted of a criminal offence. Treasury has the burden of proving by clear and convincing evidence that a payment is unlawful under the FCPA. In particular, it will propose the use of the nationality principle of jurisdiction for this offence. The changes affect both criminal and civil law.