

The OECD Convention on Bribery

A COMMENTARY

Edited by

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CAMBRIDGE

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*A Commentary on the Convention on Combating Bribery of
Foreign Public Officials in International Business Transactions of
21 November 1997*

Edited by

MARK PIETH, LUCINDA A. LOW AND PETER J. CULLEN



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THE OECD CONVENTION ON BRIBERY

The OECD Convention is the first major international treaty specifically to address 'supply-side bribery' by sanctioning the briber. The OECD Convention establishes an international standard for compliance with anti-corruption rules by 36 countries, including the 30 OECD members and six non-member countries, with the leading OECD exporting countries receiving particular attention. This book is an article-by-article commentary which gives particular attention to the results of the OECD monitoring process as applied to state implementation.

Companies in particular are at ever greater risk of legal and 'reputational' damage resulting from failure to comply with the anti-corruption standards, set inter alia, by the OECD Convention. This book provides them with comprehensive guidance on the OECD standards.

The commentary also constitutes a significant work of comparative criminal law. It is written and edited by persons who include experts involved in development of the Convention standards as well as academics and legal practitioners.

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PREFACE

In recent years there has finally been a global awakening to the need to fight corruption in order to promote development and preserve respect for public institutions.

I watched from side-stage when the problem of international corruption first broke in the mid-1970s. I was a practicing lawyer in Canada representing Lockheed Aircraft Corporation in what was then the largest military procurement in Canadian history. Suddenly Lockheed was caught up in scandals related to bribery of foreign public officials in several jurisdictions outside Canada. These scandals gave rise to the U.S. Foreign Corrupt Practices Act, a pioneering effort to curb international bribery and severely penalise the senior management of corporations who engaged in it. (As it turned out, Lockheed was the first to be exposed, but many more followed.)

I am proud that OECD and other countries joined this battle in 1997 with the negotiation of the Convention on Fighting Bribery of Foreign Public Officials in International Business Transactions. This binding treaty obliges signatories to take responsibility for corrupt practices of the companies operating from their territory — wherever in the world they may bribe.

What changed to enable the OECD to draft and conclude a convention against bribery in the late 1990s? The answer is globalisation. In the 1970s, countries still saw themselves as competing with each other, promoting the interests of their companies abroad. Globalisation changed the perception. It was clear that companies, not governments, were the competitors — and they needed a level playing field. During the same period several major bribery scandals in the OECD countries roused public indignation and led to the formation of non-governmental groups like Transparency International which pressed for cleaner government. Since it came into force in 1999, a hallmark of the Convention has been rigorous monitoring

of its implementation in law and its enforcement. This has been absolutely necessary since the stakes are so high. The monitoring has demonstrated that the Convention has indeed inspired many positive changes in the legal and law enforcement capacities of the Parties to the Convention. But the monitoring has also shown that many Parties still fall short of fully implementing the Convention and fulfilling their commitment to stop international bribery.

The battle against corruption will last many years. We must not diminish our efforts. I hope that the present book will increase public awareness of the Convention and of what should be expected of the countries that signed it.

MR. DONALD J. JOHNSON, P. C. Q. C.

Secretary General of the OECD (until Spring 2006)

ACKNOWLEDGEMENTS

It has been a great satisfaction after sixteen years as Chairman of the OECD Working Group on Bribery to see through this book on the core piece of our efforts, the OECD 1997 Convention on Corruption.

All contributors, including those such as Nicola Bonucci who have played a central role in the development of OECD anti-corruption standards are, however, intervening in a personal capacity.

These preliminary remarks give me a welcome opportunity to mention that this project would not have been possible without the generous funding of the Swiss National Fund (SNF) and the Freiwillige Akademische Gesellschaft (FAG) in Basel. Furthermore I would like to thank all who have made this critical analysis possible.

First, I would like to thank the authors of the chapters. I am confident that we have been able to strike a fair geographic balance by inviting contributions from the United States (Gregory Bruch, Akita Atkins, and Lucinda Low), the United Kingdom (Peter Cullen) and continental Europe (here again the French and Italian speakers Nicola Bonucci, Maurice Harari, and Anne Valérie Julien Berthod) and the German speakers (Ingeborg Zerbes and Mark Pieth). A further attempt to balance the contributions between academics (Ingeborg Zerbes, Peter Cullen, Mark Pieth) practitioners (Gregory Bruch/Akita Atkins, Maurice Harari/Anne Valérie Julien Berthod, Lucinda Low) and representatives of institutions (Nicola Bonucci) has proved rather successful.

Second, I would like to thank my co-editors for their support, especially Peter Cullen for donating a sabbatical year from the Academy of European Law (ERA) in Trier for an intensive year on this project. The Academy's Director, Wolfgang Heusel, kindly agreed to Peter's release for this period.

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Finally, I would like to thank the staff of Cambridge University Press for their professional support.

MARK PIETH
Co-ordinating Editor

OECD texts, national laws and cases have been included in this book up to 31 December 2005.

ABBREVIATIONS

General abbreviations

ADB	Asian Development Bank
AI	Amnesty International
ASEAN	Association of South-East Asian Nations
APG	Asia/Pacific Group on Money Laundering (OECD)
ASIL	American Society of International Law
BCBS	Basel Committee on Banking Supervision
BG	Bundesgericht (Federal Court, Switzerland)
BGE	Bundesgerichtsentscheid (Federal Court Decision, Switzerland)
BGH	Bundesgerichtshof (Federal High Court, Germany)
BIAC	Business Advisory Committee (OECD)
BIS	Bank for International Settlements
BVerfG	Bundesverfassungsgericht (Federal Constitutional Court, Germany)
BVerfGE	Bundesverfassungsgerichtsentscheid (Federal Constitutional Court Decision, Germany)
CATF	Caribbean Action Task Force
CBCA	Canada Business Corporations Act
CDU	Christlich Demokratische Union (Christian Democratic Union) (Germany)
CDD	Customer Due Diligence
CEO	Chief Executive Officer
CFA	Committee on Fiscal Affairs (OECD)
CFO	Chief Financial Officer

CIHEAM	Centre International de Hautes Études Agronomiques Méditerranéennes (International Centre for Advanced Mediterranean Agronomic Studies)
CIME	Committee on Investment and Multinational Enterprises (OECD)
COE	Council of Europe
COSO	Committee of Sponsoring Organizations of the Treadway Committee
CPS	Code for Crown Prosecutors (England and Wales) (see List of Selected Documentation)
DAC	Development Assistance Committee (OECD)
DAFFE	Directorate for Financial, Fiscal, and Enterprise Affairs (OECD)
EC	European Communities
ECGD	Export Credit Guarantee Department (UK)
ECG	Export Credits Group (OECD)
ECOSOC	Economic and Social Council (UN)
ERA	Europäische Rechtsakademie Trier (Academy of European Law Trier)
ESAAMLG	Eastern and Southern African Anti-Money Laundering Group
EU	European Union
FATF	Financial Action Task Force
FCPA	Foreign Corrupt Practices Act (USA)
FIFA	Fédération Internationale de Football Association
FINTRAC	Financial Transactions Reports Analysis Centre of Canada
FIU	Financial Intelligence Unit
FSF	Financial Stability Forum
GAFISUD	Grupo de Acción Financiera Internacional Sudamericano (South American Financial Action Task Force)
GATT	General Agreement on Tariffs and Trade (WTO)
GCA	Global Coalition for Africa
GRECO	Group of States Against Corruption
HRW	Human Rights Watch
IACC	International Anti-Corruption Conference
IBC	International Business Corporation
IAP	International Association of Prosecutors
IAPAC	International Auditing Practices Committee (International Federation of Accountants)
IAS	International Accounting Standards

IBT	International Business Transactions
ICC	International Chamber of Commerce
ICFTU	International Confederation of Free Trade Unions
ICRC	International Committee of the Red Cross
IDRC	International Development Research Centre
IGO	Intergovernmental Organisation
IIC-OFFP	Independent Inquiry Committee into the United Nations Oil-for-Food Programme
ILA	International Law Association
ILC	International Law Commission
IMAC	(Federal Act on) International Mutual Assistance in Criminal Matters (Switzerland)
IMF	International Monetary Fund
IOC	International Olympic Committee
IOSCO	International Organisation of Securities Commissions
IPU	Interparliamentary Union
ISO	International Organization for Standardization
MDB	Multilateral Development Banks
MDP	Ministry of Defence Police (UK)
MENAFATF	Middle East and North Africa Financial Action Task Force
MLA	Mutual Legal Assistance
MLLA	Mutual Legal Assistance Agreements
MLAT	Mutual Legal Assistance Treaties
MNE	Multinational Enterprise
NATO	North Atlantic Treaty Organization
NEPAD	New Partnership for Africa's Development
OAS	Organization of American States
OECD	Organization for Economic Co-operation and Development
OFC	Off-Shore Centre
OI	Oxfam International
OSCE	Organisation for Security and Cooperation in Europe
PACI	Partnering Against Corruption Initiative (WEF)
PEP	Politically Exposed Person
POCA	Proceeds of Crime Act (UK)
POLISARIO	Frente Popular de Liberación de Seguí el Hamra y Río de Oro (Polisario Front)
PUMA	Public Management Group (OECD)
Rn.	Randnummer (marginal number)
SEC	Securities and Exchange Commission (US)
SFO	Serious Fraud Office (UK)

SIDA	Swedish International Development Cooperation Committee
SIGMA	Support for Improvement in Governance and Management
SME	Small and Medium-Sized Enterprise
SPAI	Stability Pact for South-Eastern Europe
TI	Transparency International
TRACE	Transparent Agents and Contraction Entities
TRACFIN	Traitement du Renseignement et Action Contre les Circuits Financiers Clandestins (France)
TRNC	Turkish Republic of Northern Cyprus
TUAC	Trade Union Advisory Committee (OECD)
UN	United Nations
UNESCO	United Nations Educational, Scientific and Cultural Organization
UN ODCCP	United Nations Office for Drug Control and Crime Prevention
UNICORN	Global Unions Anti-Corruption Network
US GAAP	US Generally Accepted Accounting Principles
WCL	World Confederation of Labour
WEF	World Economic Forum
WGB	Working Group on Bribery (OECD)
WTO	World Trade Organisation

Country abbreviations¹

AR	Argentina
AU	Australia
AT	Austria
BE	Belgium
BG	Bulgaria
BR	Brazil
CA	Canada
CH	Switzerland
CL	Chile
CZ	Czech Republic
DE	Germany
DK	Denmark

¹ Based on the list of the International Organization for Standardization (ISO).

EE	Estonia
ES	Spain
FI	Finland
FR	France
GR	Greece
HU	Hungary
IE	Ireland
IS	Iceland
IT	Italy
JP	Japan
KR	Korea, Republic of
LU	Luxembourg
MX	Mexico
NL	Netherlands
NO	Norway
NZ	New Zealand
PL	Poland
PT	Portugal
SE	Sweden
SI	Slovenia
SK	Slovakia
TR	Turkey
UK	United Kingdom
US	United States