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Télécopieur : (514)343-6779
Courriel : themis@droit.umontreal.ca

Ethics in Business: The New OECD Convention on Bribery

Juliette D'HOLLANDER*

Résumé

L'Organisation pour la coopération et le développement économique (OCDE) a adopté, en décembre dernier, la Convention sur la lutte contre la corruption d'agents publics étrangers dans les transactions internationales. Cette convention vise à mettre fin à une pratique courante selon laquelle les opérateurs du commerce international recourent à la corruption d'officiers publics dans un pays tiers afin d'obtenir un marché.

Les États-Unis qui avaient déjà adopté, dans les années 1970, une loi visant à lutter contre la corruption par les entreprises américaines, le Foreign Corrupt Practice Act***, avaient activement promu l'adoption d'un tel régime au niveau international.***

Ce texte examine, dans un premier temps, le régime mis en place

Abstract

The ministers of member countries of the Organization for Economic Co-operation and Development (OECD) have signed the Convention on Combating Bribery of Foreign Officials in International Business Transactions. This convention aims at putting an end to the current practice by international companies of bribing officials in a third country in order to obtain business in this country.

The United States, which has already adopted, since the 1970s a law, the Foreign Corrupt Practices Act ***(FCPA), aimed at fighting bribery committed by US companies abroad, had actively promoted the adoption of such a regime at a global international level.***

This article examines, in the first part, the regime put in place by the FCPA and, in a second part, focuses

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par la loi américaine avant de se pencher, dans un deuxième temps, sur le contenu de la nouvelle convention de l'OCDE.

on the content of the new OECD convention.

Table of Contents

On the 17 of December 1997, Canada signed the new anti-bribery convention, which was negotiated under the auspices of the Organization for Economic Co-operation and Development (OECD)[1]. This convention will make it a crime for Canadian companies and individuals that do business abroad to bribe public officials in foreign countries. As it stands, Canada, like many countries, does not have legislation that specifically punishes foreign corrupt practices and illicit payments made to foreign officials[2].

The International Bar Association carried out a study analyzing approaches different countries have taken towards bribery[3].

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1 ***Convention on Combating Bribery of Foreign Public Officials in International Business Transactions,*** adopted on Nov. 21, 1997 and in force on Feb. 15, 1999 (thereafter the "OECD Convention" or the "Convention") (see OECD Press Release on Agreement Criminalizing Bribery and also ***The Globe and Mail***, Dec. 17, 1997, A24).

2 However, Canada's ***Criminal Code*** includes provisions dealing with corruption of an official or conspiration in Canada to commit an offense outside of Canada.

A whole set of provisions in the ***Criminal Code*** addresses bribery of Canadian officials. In particular, s. 121 of the ***Criminal Code*** makes it a crime for any person to, directly or indirectly, bribe an official in order for the official to exercise his influence, to act or to omit to act in connection with government business. Everyone committing such offense is liable to imprisonment up to five years. S. 120 of the ***Criminal Code*** makes it an offense for a justice, police commissioner, peace officer, officer of juvenile court, or employee in the administration of criminal law, to accept or attempt to obtain a bribe, with the intent of facilitating the commission of an offense.

It follows from these provisions that, while the Canadian ***Criminal Code*** contains some provisions covering the corrupt practices of persons doing business with the government of Canada and with provincial governments, the Code does not cover the issue of foreign corrupt practices.

The ***Criminal Code*** nevertheless contains one provision that could be used to combat corruption of foreign officials. S. 465(3) of the ***Criminal Code*** provides that every one who, while in Canada, conspires with any one to commit an offence in a place outside Canada that is also an offence under the laws of such place shall be deemed to have conspired to do that thing in Canada. The courts have applied this provision for offences committed outside of Canada: ***Bolduc*** v. ***Quebec (P.G.)***, [1982] 1 S.C.R. 573, (1982) 28 C.R. (3d) 193; ***Libman*** v. ***The Queen***, [1985] 2 S.C.R. 178; ***Criminal Code***, R.S.C. (1985), c. C-46, mod. by R.S.C. (1985), c. 2 (1st supp.). See also James KLOTZ, "Bribery of Foreign Officials – A Call for Change in the Law of Canada", (1994) 73 ***Can. Bar Rev***. 467, 475ff.

3 STANDING COMMITTEE ON INTERNATIONAL LEGAL PRACTICE, SECTION ON BUSINESS LAW OF THE INTERNATIONAL BAR ASSOCIATION, ***Comparative survey of the law applicable to the bribery of public foreign***

The study explored criminal sanctions for the bribery of foreign officials as well as the tax deductibility of bribes. According to their research, only five jurisdictions (England, USA, Sweden, Australia (New South Wales) and the Netherlands) have laws explicitly prohibiting the bribing of foreign officials. Among those five jurisdictions, only three (Sweden, the United states and the Netherlands) prohibit international bribery if the offense is committed outside their respective territories, while the other two prohibit such actions only if the country having territorial jurisdiction over the matter criminalized the bribery of its own officials[4]. However, since the adoption of the OECD 1994 Recommendation[5], several countries have taken steps to combat international corruption. For instance, Belgium, the Netherlands and Norway have drafted legislation to criminalize bribery of foreign officials[6].

With respect to tax deductibility, different jurisdictions pursue radically different policies. Some jurisdictions go as far as to allow bribes to be tax deductible as business expenses[7]. The deduction is often disallowed though, for lack of proof that it was a necessary expense for the realisation of taxable income[8]. Whereas some countries disqualify bribes as a form of taxable business expense[9], in other jurisdictions, it is the illicit nature of the bribe that disqualifies them[10]. Most jurisdictions do not impose general accounting reporting requirements apart from disclosure for tax purposes[11].

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officials, 1996, cited by Sietze HEPKEMA and Willem BOOYSEN, "Bribery of Public Officials: an IBA Survey", 1997 ***I.B.L.*** 416.

4 ***Id***., 422.

5 "Review of the 1994 Recommendation on Bribery in International Business Transactions, Including Proposals to Facilitate the Criminalization of Bribery of Foreign Public Officials", Report by the OECD Committee on International Investment and Multinational Enterprise (CIME) to the OECD Council at Ministerial Level, May 26-27, 1997 [thereafter the "Report"].

6 ***Id***.

7 Australia, Austria, Belgium, France, Germany, Ireland, Luxembourg, the Netherlands, New Zealand, Portugal and Switzerland; ***id***.

8 Report, ***op. cit.***, note 5.

9 Finland, Greece, Hungary, Turkey, Italy, Korea, Mexico and Spain; ***id.***

10 Canada, Czech Republic, Norway and the United States; Report, ***op. cit.***, note 5.

11 See S. HEPKEMA and W. BOOYSEN, ***loc. cit.,*** note 3.

The enforcement of the OECD ***Convention on Combating Bribery of Foreign Public Officials in International Business Transactions***[12] will bring about a significant change in the domestic criminal laws of the signatory countries.

The United States, whose Foreign Corrupt Practices Act (FCPA) has been enacted since the 70s, has long been urging the OECD to take measures against international bribery. The OECD Convention seems to be inspired by the United States' FCPA regime, as there are elements common to both anti-corruption instruments.

This paper will first examine the American FCPA regime (I) and then will review the regime instated by the OECD Convention (II).

I. The *Foreign Corrupt Practice Act* (FCPA)

Investigations conducted by the Securities and Exchange Commission (SEC) in the 70s revealed that over 400 US companies had made questionable payments to foreign officials in excess of 300 million US dollars. These scandals had a negative impact on US foreign policy and economic relations[13] which prompted Congress to take measures to ban the bribing of foreign officials by US companies[14]. Consequently, the FCPA was enacted in 1977[15]. The US Congress, through the implementation of the FCPA, imposed rules of ethical business practice upon US companies abroad. The FCPA is a domestic criminal law prohibiting the bribery of foreign government officials in foreign coun-

12 The Convention was signed in Paris on Dec. 17, 1997 where ministers of 34 countries were present.

13 The biggest scandal was the Lockheed corporation $1.4 million bribe to the Japanese Prime Minister. Following discovery of the bribery by the Japanese, the Prime Minister was convicted and sent to jail. The Japanese government, which had good relations with the US at the time, fell. On the other hand, none of the executive from Lockheed were fined or jailed in relation to this bribery. The bribe even turned out to be a profitable investment. This was qualified "as a shocking, shameful development that sullied the reputation of our country" by Senator Proxmire, one of the drafters of the FCPA (***Lockheed Bribery : Hearing before the Senate Committee on Banking, Housing and Urban Affairs***, 94th Cong., 1st sess., 1975); see J. KLOTZ, ***loc. cit.,*** note 2, 469.

14 Don ZARIN, ***Doing Business under the Foreign Corrupt Practices Act***, New York, Practising Law Institute, 1995.

15 15 U.S.C.A. §§ 78dd (b), 78dd-1, 78dd-2.

tries; it applies extraterritorially to US citizens and US companies. The enactment of extraterritorial laws is not unusual in the US as various acts such as the ***Helms Burton Act*** and ***the Sherman Anti-trust Act*** demonstrate. The US had also been pressing for other countries to pass similar legislation as American companies doing business abroad were complaining that it was unfair competition – the OECD Convention addresses their concerns.

The FCPA was amended in 1988[16] in an attempt to clarify some of its notions[17]. The Act had been the object of criticism by US companies which alleged that complying strictly with the FCPA led them to loose business opportunities[18]. Although the 1988 amendments did clarify some vagueness and lifted a few prohibitions[19] in the Act, some aspects of the Act still remain confusing.

The FCPA addresses anti-bribery and recordkeeping. Under the anti-bribery provisions, issuers of U.S. securities and domestic concern are prohibited from making corrupt payments to a foreign official for the purpose of obtaining or retaining business.

The FCPA applies to issuers who have a class of securities registered under Section 12 of the Exchange Act or who are required to file periodic reports under Section 15(d) of the Exchange Act[20]. The FCPA also applies to domestic concerns[21]. This includes US citizens, national and residents. It is important to note that the issuers of US securities include foreign companies, such

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16 The 1988 amendments are contained in the ***Omnibus Trade and Competitiveness Act*** of 1988, 15 U.S.C.A. §§ 78dd-1 and 78dd-2.

17 ***Id***.

18 See Katheleen LITTLE and David JOHNSON, ***The Foreign Corrupt Practices Act",*** New York, American Conference Institute, March 7, 1996, pp. 4-8; ***id***., p. 5.

19 One of the most important changes brought by the 1988 amendment dealt with the "Knowledge standard". The 1977 FCPA had a very broad knowledge standard according to which liability was imposed if a payment was made to a person "while knowing or having reason to know" that it would be used as a bribe by a third party (art. 2 FCPA). The 1988 amendments removed the "reason to know" standard but the knowledge standard remains.

With the 1988 amendments, Congress also added an exception for "routine governmental functions" as well as explicit "affirmative defenses" to an alleged violation.

20 15 U.S.C. § 78dd-1.

21 15 U.S.C. § 78dd-2.

as Canadian companies registered on the US stock exchange. Moreover, officers, directors, employees and agents of such issuers are also required to comply with the FCPA anti-bribery provisions[22].

The FCPA contains provisions requiring issuers to comply with specified bookkeeping and accounting requirements. This obligation is designed to enable authorities to discover improper payments, since corporate bribery is usually concealed through the falsification of corporate books and corporate records. The FCPA's accounting provisions are two-fold: first they require issuers to keep books and records which, in reasonable detail, "reflect the transactions and dispositions of the assets of the issuer"[23], and second to "devise and maintain a system of internal accounting controls"[24]. The FCPA also imposes criminal liability on any person who "knowingly circumvents or knowingly fails" to implement such a system or "knowingly falsifies any book, record, or account"[25].

The scope of the FCPA accounting provisions is far broader than the anti-bribery provisions. The recordkeeping requirement applies not only to parent companies that are US issuers, but also to their controlled subsidiaries, which could be foreign companies. This allows the SEC to bring an action against foreign companies where all the alleged misconduct occurred outside the US. A good example is the recent enforcement action the SEC filed against Montedison, an Italian company, for fraud and failure to comply with the FCPA's record keeping provisions[26]. The SEC claimed jurisdiction over the Italian company because Montedison had American Depository Receipts listed on the New York Stock exchange[27].

The FCPA anti-bribery provisions render illegal any payment made "corruptly" to foreign officials, foreign political parties or party officials, or candidates for foreign political office. Payments

22 15 U.S.C. § 78dd-1(a).

23 15 U.S.C. § 78m(b)(2)(A).

24 15 U.S.C. § 78m(b)(2)(B).

25 15 U.S.C. § 78m(b)(5).

26 See ***SEC*** v. ***Montedison, S.p.A.***, Litigation Release No. 15164 (Nov. 21, 1996) [thereafter ***Montedison***].

27 ***Id.***

are corrupt if the intent is to induce the foreign official to misuse his or her official position in order to conduct business with the foreign company. Payments are prohibited whether they are made directly or through an intermediary. For example, a payment made to a member of the family of the official or through a representative or a sales agent would be considered as corrupt under the FCPA.

The prohibition of corrupt payments only applies where a means or instrumentality of interstate commerce is used in order to make the prohibited payment. The interstate commerce requirement is broadly interpreted and includes a phone call in the US or a landing in a US airport[28]. The FCPA bookkeeping provisions have even a broader application: there is no requirement of interstate commerce. For example, in ***Montedison***, the alleged corrupt payments did not involve the American mails or any instrumentality of interstate commerce as they were made in Italy. The SEC could not invoke the FCPA bribery provisions. It prosecuted, nonetheless, the Italian company based on the FCPA bookkeeping provisions[29].

Not only are corrupt payments themselves illegal under the FCPA, but any offer, promise or attempt to make such a payment is also illegal. It is of no importance whether the payment succeeds in its purpose. Valuable gifts or any kind of advantage provided directly or indirectly to a foreign official, a foreign political party or party official, or any candidate for foreign political office are equally prohibited. Offering an employment contract to the wife of an official, for example, would violate the provisions of the FCPA.

In order for a violation of the FCPA to be committed, "knowledge" that the payment is made for improper purposes must be demonstrated. The "knowledge" standard was much broader before the 1988 amendments. Liability was triggered if a payment was made to a person "while knowing or having reasons to know" that it would be used as a bribe. This standard has been

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28 William PENDERGAST, ***Foreign Corrupt Practices Act: An Overview of Almost Twenty Years of Foreign Bribery Prosecutions***, New York, American Conference Institute, March 7, 1996, p. 5, 11ff.

29 ***SEC*** v. ***Montedison, S.p.A.***, ***supra***, note 26; for a description of the case, see John F.X. PELOSO, "SEC Rejuvenates Foreign Corrupt Practices Act" (May 21, 1997) ***New York Law Journal*** 3.

restricted in 1988 to the simple "knowledge", which is considered to be more difficult for prosecutors to meet. It still encompasses situations where the payment is made through intermediaries while the principal knew of its illegal purpose. A conscious disregard of a suspicious situation, a deliberate ignorance or wilful blindness of circumstances that should reasonably have alerted the person to the high probability of violations under the Act falls under the scope of "knowing" for FCPA purposes[30]. Red flags point to those situations that indicate a "high probability" of improper payments, such as that where the agent requires unusually high commissions or has personal ties with governmental officials[31].

A good example of the knowledge requirement is the case of Triton Energy. This American company's activity was to explore and produce crude oil and natural gas through its subsidiaries. Triton Energy had a wholly owned Indonesian subsidiary, which had allegedly made improper payments. The SEC claimed that the executives of the Indonesian company knew that some payments had been made for illegitimate business expenses and knowingly participated in recording false entries in the company's books and records. The executives of the parent company, though they did not directly take part in authorising the questionable payments or in the recording of false entries, should have been alerted of the situation when they received the auditors' reports. Instead of investigating further, they purportedly told the internal auditor to collect all the copies of the report and to destroy them. The conduct of the executives of Triton Energy indicates that they

30 The FCPA defines a person's state of mind as "knowing" "with respect to conduct, a circumstance or a result if-

(i) such person is aware that such person is engaging in such conduct, that such circumstance exists, or that such result is substantially certain to occur; or

(ii) such person has a firm belief that such circumstance exists or that such result is substantially certain to occur.

(B) When knowledge of the existence of a particular circumstance is required for an offense, such knowledge is established if a person is aware of a high probability of the existence of such circumstance, unless the person actually believes that such circumstance does not exist."(15 U.S.C. § 78dd-1(f)(2)).

31 ***International Lawyers' Newsletter***, vol. XIV, No. 4, 1992.

were aware of a high probability of the existence of improper payments[32].

The FCPA provides for an exception allowing, in certain cases, payments to foreign officials. The exception relates to facilitating payments or "grease" payments, "the purpose of which is to expedite or to secure the performance of a routine governmental action by a foreign political official, political party, or party official"[33]. These payments are to be restricted to circumstances where it is sought to obtain permits, licences, or other official documents, visas, police protection or mail delivery, phone service, power and water supply, or actions of similar nature[34]. This exception is narrowly interpreted. Furthermore, the FCPA specifies that the decision by a foreign official to award a new business or to continue business with a particular party or any decision of the sort does not qualify as an exception[35].

In addition to the exception for "grease" payments, two affirmative defences also exist in the FCPA[36]. The first affirmative defence is for reasonable and ***bona fide*** promotional expenditures. This refers to the payment of travel and lodging expenses for a foreign official directly related to a product demonstration or to the execution or performance of a contract. However, it is difficult to distinguish when travel, lodging and dining are reasonable and ***bona fide*** expenditures from when they are corrupt payments under the FCPA. Moreover, even if the payment may qualify as an affirmative defence, the FCPA accounting provisions may still be violated if the payment is falsely documented and recorded[37]. The other affirmative defence enters into play when the payment,

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32 ***SEC*** v. ***Triton Energy Corp.***, Litigation Release No. 15266 (Feb. 27, 1997); see "The SEC Breathes New Life into the Foreign Corrupt Practices Act" (Summer 1997) ***Securities Law Roundup***, Morgan, Lewis and Bockius LLP, p. 15; J. PELOSO, ***loc. cit.,*** note 29, 5.

33 30A(b) ***Federal Securities Law Reports*** 26,625.

34 15 U.S.C. § 78dd-1(f) (3) (A) and 78dd-2(h) (4) (A) (1988).

35 15 U.S.C. § 78dd-1(f) (3) (B) and 78dd-2(h) (4) (B) (1988).

36 15 U.S.C. § 78dd-1(c) and 78dd-2(c).

37 This is what happened in the Triton Indonesia case where some of the payments were actually expedite payments of monthly crude oil invoices. These payments were therefore not improper under the FCPA anti-bribery provisions as payments expediting routine governmental actions, but because they were falsely documented and recorded, they allegedly violated the FCPA accounting provisions. See J. PELOSO, ***loc. cit.,*** note 29, 5.

which would otherwise be considered unlawful, was made lawfully under the written laws of the foreign country. Yet, one hardly expects legally sanctioned bribery. A State Department survey conducted in 1988 confirms that no country has enacted laws permitting bribery of it own officials[38]. The result is that this defence is non-existent.

The Department of Justice and the SEC are responsible for enforcing the FCPA. The Department of Justice pursues criminal actions and civil matters when a domestic concern is involved. The SEC enforces civil actions for anti-bribery provisions of issuers of securities[39]. Both the Department of Justice and the SEC have investigated a limited number of allegations of payment of bribes to foreign officials. Although few actions have followed, the penalties imposed so far, as a result of a violation of the act, are highly dissuasive. The FCPA stipulates very high penalties. Fines for companies may go up to $2 million (US). Specific fines, which the Act specifies that they are not to be paid by the company, are directed at officers, directors, employees, agents or shareholders. They may be held liable up to $100,000 (US). Civil penalties up to $10,000 (US) may also be enforced against the company and individuals. In addition, the Sentencing Guidelines, followed by federal courts in the sentencing of those convicted of federal offenses in the US, are applicable to the FCPA defendants. They establish a complex set of rules to calculate the amount of the fine to be paid by a convicted FCPA defendant[40]. Corporate fines, in the past, have ranged from $10,000 to a record fine paid by Lockheed of $21.8 million in 1995. Lockheed was also the first case in which an executive received an incarceration sentence. The indictment alleged that Lockheed had agreed to pay a consultant, who was also a member of the Egyptian parliament, a commission of $600,000 for each aircraft sold. Lockheed was awarded a $79 million contract and it maintained to the US authorities that there were no commissions on these sales. Lockheed, however, later transferred $1 million to a Bank account in Switzerland as a termination fee to its Egyptian consultant. The

38 See D. ZARIN, ***op. cit.,*** note 14, pp. 5-9, referring to a statement made by Peter Clark, Deputy Chief of the Fraud Section, Criminal Division, Department of Justice, at a conference on the FCPA in Washington D.C. (April 20, 1995).

39 See K. LITTLE and D. JOHNSON, ***op. cit.,*** note 18, p. 8.

40 18 U.S.C.A., para. 3551 et seq., s. 2B 4.1

wire transfers were the means and instruments of interstate commerce. Lockheed was charged with conspiracy to violate the FCPA bribery provisions and to falsify books and records; the company pled guilty in 1995[41].

The violation of the FCPA can also lead to liability under other laws. For example, the federal antifraud provisions might also be violated. A company may be debarred or suspended from contracting with the US government on the basis of an FCPA indictment[42].

A complaint by the SEC may ruin the reputation of a company even if it is not found guilty of violation of the FCPA. This is the type of consideration that encouraged Triton Energy to consent to the final judgement that permanently enjoined it from violating the accounting provisions of the FCPA and ordered it to pay $300,000[43].

The Department of Justice has established an Opinion Procedure by which a party may make a specific enquiry with regard to the enforcement of the FCPA[44]. Under this procedure, companies may obtain guidance as to whether the Department of Justice would take enforcement action with respect to a proposed transaction. The Department of Justice is required to deliver an answer within thirty days. If the Department of Justice gives clearance, the company may presume that the Department of Justice will take no enforcement action when it carries out its transaction as set forth in the submission[45]. This procedure has been used numerous times.

It is highly recommended that companies subject to the FCPA, whether they are domestic concerns or foreign issuers, adopt compliance programmes. These programmes may take various

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41 ***U.S.*** v. ***Lockheed Corporation***, No. 1: 94.CR.226 01 (Ga. Atlanta Div., Jan. 27, 1995).

42 ***Federal Acquisitions Regulation***, Title 48 of the ***Code of Federal Regulations***; K. LITTLE and D. JOHNSON, ***loc. cit.,*** note 18, p. 22.

43 J. PELOSO, ***loc. cit.,*** note 29, 5.

44 It is to be noted that the result of the procedure is an "opinion" and not a "statement of enforcement intention" as it used to be before the 1988 amendments.

45 Release No. 34-17099 ***Federal Securities Law Reports*** 26,628; DEPARTMENT OF JUSTICE, Guidelines, FCPA Anti-Bribery Provisions, Feb. 1992.

forms: the drafting of anti-corruption guidelines, the inclusion of specific FCPA clauses in contracts between the companies and their agents, sale representatives or partners, the implementation of training sessions for their employees and the appointment of compliance officers. They should even, in some cases, make efforts to have their affiliates adopt similar programs[46].

II. The OECD Convention

The OECD Convention requires Member countries to adopt, within their domestic jurisdictions, legislation to criminalize bribery in international business transactions[47]. Unlike the FCPA, the Convention does not set out a uniform set of rules, but instead establishes standards to be fulfilled through domestic legislation, In this way, the Convention remains respectful of the different legal regimes of the Parties[48].

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46 The question whether a company subject to the FCPA is liable for the violation of the Act by its subsidiaries is a difficult one. With respect to the anti-bribery provisions, the parent company would only be held liable to the extent that it corruptly took any actions in furtherance of a corrupt payment made by the foreign affiliate. That would happen if any of those persons would participate in making, ordering or assisting a proscribed payment. The parent company would also be liable if it knew that some or all the payments would be used for improper purposes. This "knowledge" condition also extends to cases where there is "conscious disregard" or "wilful ignorance".

With respect to the accounting requirements, the liability of the parent company depends on the control it exercises over the operations of the subsidiaries. Three situations must be distinguished. Where the parent company holds more than 50% of the voting securities of the subsidiary, the SEC has taken the position that the subsidiary must comply with the FCPA recordkeeping requirements. Where the parent company holds 50% or less of the voting power, the SEC will look at the issuer's good faith efforts to insure the compliance of the foreign affiliate with the accounting and bookkeeping requirements. Where the issuer holds 20% or less, the burden lies on the SEC to prove that the parent company had some kind of control on the foreign affiliate (***Security Exchange Act***, 1934, s. 13(b)(6)).

47 It must be noted that the Convention only deals with "active corruption" or "active bribery" which refers to the offence committed by the person who makes the bribe and does not include the offence of the person receiving the bribe (***Commentaries on the Convention on Combating Bribery of Officials in International Business Transactions***, adopted by the OECD Negociating Conference on Nov. 21, 1997 [thereafter the "Commentaries", General Part]. On the opposite, the Canadian ***Criminal Code*** provides criminal sanctions where a bribe is offered to public officials and applies to both the person who accepts the bribe and to the person who offers the bribe. See ***supra,*** note 2.

48 ***The Commentaries on the Convention on Combating Bribery of Officials in International Business Transactions*** state that "this Convention seeks to

The United States, being one of the only states to have international anti-bribery laws, had for some time been urging the international community to adopt such a convention[49]. The OECD Convention, though, imposes more stringent obligations on the Member countries than the FCPA in that it has a broader scope of application. Like the FCPA, the offence of bribery is constituted when the aim of the bribe is to "obtain or retain business"[50]. Unlike the FCPA, the charge of bribery can be laid when the purpose is to obtain "other improper advantage in the conduct of international business"[51] – this means something to which the company was not clearly entitled[52]. The issue of tax deductibility of bribes to foreign officials and the problem of public procurement are not dealt with in the FCPA. Although not included in the Convention itself, they were important issues in the preparatory work[53]. The 1996 Recommendation advanced that Member countries should disallow the deductibility of bribes to foreign public officials. The Recommendation was not generally followed; only Norway passed a law prohibiting the deductibility of bribes[54].

Canada, as a signatory to the OECD convention, will have to amend its domestic laws with respect to bribery of foreign officials. The Canadian Economic Law Section will ask permission from the Federal Cabinet to start consultations for new draft legislation in 1998.

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assure a functional equivalence among the measures taken by the Parties to sanction bribery of foreign public officials, without requiring uniformity or changes in fundamental principles of a Party's legal system" (Commentaries, General Part); see also the revised ***Recommendation of the Council on Combating Bribery in International Business Transactions*** adopted by the OECD Council on May 23, 1997 [thereafter the "Recommendation"], that recommends that each Member country examines the corruption of foreign officials "in conformity with its jurisdictional and other basic legal principles" (General (II)).

49 See Secretary of State Madeleine K. ALBRIGHT, "Statement at the Organization for Economic Cooperation and Development Signing Ceremony of the Anti-Bribery and Corruption Convention", Paris, France, Dec. 17, 1997.

50 Convention, ***op. cit.***, note 1, art. 1 (1).

51 ***Id***.

52 ***Commentaries***, ***op. cit.***, note 48, art. 1.

53 See Report, ***op. cit.,*** note 5, and Recommendation, ***op. cit.,*** note 48.

54 The Norwegian law was passed in Dec. 1996; see Report, ***op. cit.***, note 5, Pt. II.

The Convention requires each Party to enact criminal provisions against bribery of foreign officials. Article 1 provides as follows:

> ***Each party shall take such measures as may be necessary to establish that it is a criminal offence under its law for any person intentionally to offer, promise or give any undue pecuniary or other advantage whether directly or through intermediaries, to a foreign public official, for that official or for a third party, in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business.***[55]

This provision shares several communalities with the FCPA. The OECD Convention requires the knowledge of the person making the bribe. The bribe does not have to succeed for the offence to be committed; to "promise" or "offer" a bribe is sufficient. The illicit advantage may be provided directly or through intermediaries and the criminal offence is also constituted by complicity, incitement, aiding and abetting or authorisation of an act of bribery.

Contrary to the FCPA, the Convention does not provide expressly for the affirmative defence of the authorisation by the local law or the excuse of facilitating payments. However, the Commentaries suggested that such a defence should be available. They also proposed that small facilitating payments should not be considered as bribes under the Convention[56].

The Commentaries also point out the irrelevance of the fact that the company bribing was the best qualified bidder or a company which could have been properly awarded the business.

As a framework convention, the OECD Convention does not lay out sanctions. The Convention leaves it up to the Parties to determine the criminal sanctions but indicates that these must be "effective, proportionate and dissuasive criminal penalties"[57] comparable to those applicable to the crime of bribery of the Party's own public official. The sanctions for natural persons shall also include "deprivation of liberty sufficient to enable effective

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55 Convention, ***op. cit.,*** note 1, art. 1 (1).

56 Commentaries, ***op. cit.,*** note 48, art.1.

57 Convention, ***op. cit.***, note 1, art. 3 (1).

mutual legal assistance and extradition"[58]. The bribe and the proceeds of the bribe shall be subject to seizure and confiscation or equivalent monetary sanctions.[59] Additional civil or administrative sanctions shall also be considered by the Parties.

The Convention recognises that some Parties' legal systems do not provide for the liability of legal persons. If such liability does exist in the legal system, measures are to be taken in order that legal persons shall be held liable for the bribery of foreign officials.[60] If, under the legal system of a Party, criminal liability is not applicable to legal persons, that Party shall ensure that effective non-criminal sanctions are provided.[61]

As in the FCPA, the Convention requires each Party to implement measures according to which companies must maintain adequate books and records, as well as disclose their financial statements. These measures seek to prevent off-the-books transactions or the keeping of off-the-books accounts. The Parties should implement adequate penalties for the omissions and falsifications of the books and records[62]. It is interesting to note that the implementation of this Convention has the effect of making OECD accounting standards directly applicable to the companies of such Parties. These accounting provisions also have an impact on the professional liability of auditors. The problem of extraterritorial application is less likely to be raised here as the accounting offence will generally occur in the company's home country.[63]

The Convention raises the issue of extraterritoriality. It does not require all Member countries to adopt extraterritorial legislation in order to be able to prosecute their nationals who have committed bribery abroad. It leaves it up to the Party's legal system to deal with the issue of extraterritoriality. Naturally, all Parties shall have jurisdiction to prosecute their nationals for offences committed on their territory. If a Party possesses jurisdiction with respect to offences committed abroad by its nationals, it shall take necessary measures to ensure that bribery cons-

58 ***Id.,*** art. 3 (1).

59 ***Id.***, art. 3 (3).

60 ***Id.***, art. 2.

61 ***Id.,*** art. 3 (2).

62 ***Id.,*** art. 8.

63 Commentaries ***op. cit.,*** note 48, art. 8; Recommendation, ***op. cit.,*** note 48, s. V.

titutes a criminal offence. Parties, which do not prosecute on the basis of the nationality principle, should provide for the extradition of their nationals. The Convention stipulates that bribery of a foreign official should be deemed to be an extraditable offence.[64] Where an extradition treaty does not exist, the Parties may consider the Convention as a legal basis for extradition with regard to the offence of bribery.[65] Moreover, a broad interpretation shall be given to the territorial basis for jurisdiction so that an extensive physical connection to the bribery act is not required.

In addition to extradition, mutual legal assistance is a significant means of enforcing the objectives laid out in the Convention. Effective assistance is needed to investigate and to obtain evidence in order to prosecute cases of bribery of foreign officials. For example, Parties should be ready to take measures directed at temporarily transferring persons in custody to a Party requesting it.[66]

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The Convention is an important step forward in the fight to combat bribery in international transactions. However, it remains to be seen how the Convention is going to be implemented and enforced. Some concept of tribute continues and remains accepted practice by those conducting international transactions. It remains even integral to some administrations in which long traditions of bribing persist. The Convention, then, is faced with the additional task of transforming complex cultural attitudes towards notions of gratitude and tribute. Since cultural attitudes and their practices are the foundation of custom and law, such a transformation is a monumental task in itself.

Furthermore, the scope of applying the Convention against foreign officials committing bribery remains limited and it does

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64 Convention, ***op. cit.***, note 1, art. 10 (4); art. 4 of the ***Agreed Common Elements of Criminal Legislation and Related Action***, annexed to the Recommendation, ***op. cit.***, note 48.

65 Convention, ***op. cit.***, note 1, art. 10 (2).

66 ***Id.***, art. 9; Commentaries under art. 9, ***op. cit.,*** note 48.

not extend to prohibiting bribery on a more global scale. Bribery does not only exist in the relation with foreign officials but also with other private parties. Specific mechanisms ought to be integrated in the Convention in order to discourage such practices.

Finally, the convention has overlooked several delicate issues such as the tax deductibility of bribes and public procurement. Although these issues were addressed during the OECD Convention preparatory work, the drafters of the Convention chose not adopt them. These meaningful issues will undoubtedly soon challenge OECD members in its mission to eliminate bribery from international transactions.