Witness and Whistleblower Protection: Some OECD observations

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TOPICS TO BE COVERED

- A. OECD Instruments
- B. Corporate reporting mechanisms
- C. Detection in the public administration
- D. Reporting by the public
- E. Whistleblower & Witness Protection
- F. Conclusion



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Bribery and Corruption are difficult to detect

- Participants in corrupt business transactions operate in a secretive manner. They :
  - disguise the act(s) as a legitimate transaction, and
  - conceal the matter from plain view.
- Effective detection depends on reliable reporting mechanisms that channel allegations to investigative authorities
- Whistleblowing is a critical source of information





A. OECD Instruments' provisions

- 1997 Recommendation on Combating Bribery in International Business Transactions (V.C.iv):

  "Member countries should encourage companies to provide channels for communication by, and protection for, persons not willing to violate professional standards or ethics under instructions or pressure from hierarchical superiors".

- Guidelines for Multinational Enterprises (II.9):

  Enterprises should … refrain from discrimination or disciplinary action against employees who make bona fide reports to management or competent public authorities on actions that contravene the law, the Guidelines or the enterprise's policies.

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Monitoring of the OECD Anti-Bribery Convention and Recommendation

- Monitoring experience of almost 10 years
- Review of legal provisions and their enforcement in 38 countries
- Focus: Active foreign bribery i.e. *the giving, offering, promising of a bribe to a foreign official*

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B. Corporate Reporting Mechanisms

- Whistleblowing and protection are not encouraged by all Parties (cultural reservations; privacy provisions etc). United States Sarbanes-Oxley Act significantly strengthens whistleblower proctecion in publicly listed companies

- Some companies introduce internal mechanisms to facilitate reporting:
  - Ethics committees
  - Internal audits
  - Internal bodies
  - Outside counsel

- Company reservations vis-a-vis external reporting/media

- Unions' concerns: confidentiality, risks of victimisation & absence of protection by law.

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Corporate governance policy

Corporate governance policy can provide a guarantee against retribution or retaliation for reports made in good faith.

Employees should be able to report anonymously via, for instance, hotlines for this purpose.

Disciplinary measures should be available and applied when retaliation or retribution occurs.





C. Detection in the Public Administration

- Potential reporting by officials from agencies that contract directly with individuals and companies involved in international business *i.e.* from
  - export credit support agencies;
  - official development assistance (ODA) agencies;
  - agencies that come into contact on a non-contractual basis, such as tax authorities, customs officials, and officials from foreign representations
- **Observation:** reporting of foreign bribery offences to law enforcement authorities is a general issue for many Parties.
- Need for clear reporting obligations for public officials in general (Mid-term study).

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D. Reporting by the public

- Reporting by the general public, civil society and the media constitute primary sources for detecting bribery.



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E. Comprehensive whistleblower & Witness protections

- Reluctance to report bribery suspicions in the absence of whistleblower protections.
- Few Parties provide for comprehensive whistleblower protections, including in the public administration.
- Effective whistleblower protections should:
  - ✓ provide a guarantee of confidentiality (*e.g.,* via a hotline);
  - ✓ apply where the whistleblowing concerns either an act by another public official or an act outside the public administration; and
  - ✓ apply where the whistleblowing follows internal procedures as well as where the whistleblower goes directly to the law enforcement authorities, particularly in certain situations (*e.g.,* internal whistle-blowing has not produced adequate results or internal reporting raises the risk of victimisation).

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F. Conclusion

Effective fighting against corruption remains a challenge; it requires implementation and enforcement of adequate anti-corruption rules.

To achieve the latter, it is notably important to:

- Identify & receive information on suspicion, and
- Make sure to be able to act upon allegation and identified evidence.

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