



Twenty Years of the OECD's Anti-Corruption Campaign – Nicola Bonucci

[00:00:07] Welcome back to the podcast, Bribe, Swindle or Steal. I'm Alexandra Wrage, and we're recording today's interview in person in Beijing. My guest is the Director for Legal Affairs of the Organization for Economic Cooperation and Development, the OECD. He's also the coordinator for accession to the OECD, and since 1997, he has been intimately involved in the monitoring and follow up of the OECD Anti-Bribery Convention, which is what we'll be discussing today. Nicola Bonucci, thanks so much for joining me.

[00:00:35] Thank you, Alexandra.

[00:00:36] It says something about your travel schedule that we have to come to China to record this podcast. There will be people listening to the podcast, which is general about financial crime, who won't have a whole lot of background. Can you tell us how we came to have the OECD Anti-Corruption Convention?

[00:00:53] Actually, it all started in 1977, with this wonderful and very well known acronym of FCPA, the Foreign Corrupt Practices Act. What happened in 1977 is that bribery of a foreign public official became a crime in the U.S. The problem is that it became a crime only in the U.S. It was not a crime in France, in Germany, in the UK, in all the other OECD Countries. Not only that, but at the time, believe it or not, the bribe was considered a tax-deductible expense in countries like Germany and France. Clearly, this irritated the U.S. companies, and I would say rightly so. There was a push which led to the amendment of the FCPA in 1988-89. In this part of the amendment, there was also, in the call for the Congress, the fact that the executive should multi-lateralize the FCPA. This is how we started to have a discussion in the OECD. Why the OECD, you may ask? Because it's a good question. The OECD is not known for developing international conventions, and certainly not on criminal matters like the OECD Anti-Bribery Convention. But let me go back to what I said. Now, this was an economic issue. This was a competitive disadvantage in which the U.S. company failed to be, and they wanted competitors to be held by the same standard. It was actually logical to go into the OECD, and it spared, at the time, a lot of political discussion that you would have had in a setting like the United Nations. We started with the working group, even before I joined, which was led by at a time by the then-general counsel, my predecessor. This working group was then headed by this unknown professor of Switzerland, who now is very well known, Mark Pieth.

[00:02:58] Mark stayed there for 17 years?

[00:03:00] Even more. All in all, I think more than 20. Then this group, which was an informal expert group, became the working party of the OECD, adopted the first recommendation in 1994, and this is where things started to accelerate. In 1994, you remember, this is also the Wolfson years at the World Bank when the issue of anti-bribery becomes to be a subject on which people in the World Bank could talk about. There was a lot of moments in the Clinton administration about good governance. There was

a momentum generated, so things accelerated a lot, and between 1994 and 1997, the convention was there.

[00:03:44] How would you describe the initial response? You've talked about the U.S. FCPA, Wolfson, who, of course, was based at the World Bank in Washington, and the sense that American companies were frustrated with this. What was the response from some of the other OECD countries?

[00:04:06] The response was between those who didn't have much stake were ready to go along and those who had more at stake were fairly reluctant. I think it's fair to say that this was not always easy. I don't know how many people know that, but paradoxically, the reason why the convention exists is not because of the U.S. It's because of France and Germany, because when we adopted the recommendation in 1996, there were two lines. The U.S. wanted to reinforce recommendations, but France and Germany were of the view that if they had to do something, everybody had to do the same. They didn't trust all the other competitors — including the U.S., by the way — and they wanted everybody to be under the same legally binding treaty. So it was the French and the Germans who put on the table a joint proposal to transform this recommendation into a legally binding treaty.

[00:05:08] How would you describe the impact — we're now 20 years — the impact of the OECD Convention from an insider angle?

[00:05:19] If you look at it in terms of, "Have we eradicated transnational bribery?" No, we haven't eradicated transnational bribery. But there have been giant steps, honestly. This is not to say that there is not a lot of work ahead of us, but we have done giant steps. All the data, all the hard data, are there to show it. It took, I would say, probably at least 10 years for the convention to start really to build momentum. But again, it's very easy to criticize the countries and to also have a lot of ideas about the fact that the countries. You were introducing a major, completely new offense in a number of countries, which is not an easy one to investigate and prosecute, as we all know. In a number of countries, this was a double change: There was the introduction of the offense of foreign bribery, but there was also the introduction — let's not underestimate it — of the liability of legal persons, which, for a number of legal systems, was not as given as it is in the U.S.

[00:06:27] The idea that the corporation could commit a crime.

[00:06:30] Exactly. The continental European citizen, based on the Roman law, the mens rea — the company cannot have a mens rea, you know the issue. I think people underestimate what a cultural change it was, even for the prosecutor, to adapt to that. If we look at it now, I think we can certainly see an acceleration, an increase, both in terms of the number of countries which are investigating, prosecuting — I don't even have to talk about what's going on in Brazil, which is massive — but also the level of fines, the awareness on the issues. We're not there yet. I'm first one to recognize it. If there had been no Anti-Bribery Convention, there would have been no Siemens case. There would have been no PIA case. There would have been no Odebrecht case.

[00:07:19] You talk about the difference between common law and civil law, which, I understand, was probably amongst the biggest obstacles. I recall hearing the European Conference, somebody talking about voluntary disclosure, and this was a European lawyer. They said their client had asked whether they should voluntarily disclose, and he responded that he wasn't even sure who he would tell or where he would go. How big an obstacle do you see, the absence of a process for voluntary disclosure?

[00:07:46] I think one of the other values of the convention, which is not in the convention per se, but it's the fact that we've managed to have those countries around the table four times per year at the OECD for a full week, and prosecutors talk and exchange views and experiences. We have organized now prosecutors meetings, which take place on camera twice per year, and they talk, and they exchange experiences. The gap between the two systems, which existed in 1997, has been considerably shrunk. You have more and more countries, including continental law countries, which now have some sort of settlement system or plea-bargaining, whatever terminology want to use, including the French, who just introduced that in the last legislation in September. In terms of the voluntary disclosure, I think the companies are now getting used to it, even in the European context. It is certainly not as, let's say, articulated and sophisticated than in the U.S. legal system, but I know, by my own context, that voluntary disclosure happens in two continental European systems and that prosecutors are more and more looking at it in good faith and not as something which would completely be against their own values and ethics. I think the gap, which still exists, has really diminished with time.

[00:09:16] We hear a lot about the increase in international cooperation on some of these cases. Without naming any countries and getting into any trouble, are there instances where that's headed in the wrong direction, where there is less international cooperation now? Or is it all marching forward towards better cooperation, better understanding between the jurisdictions?

[00:09:37] Good question. There is nothing which comes immediately into my mind. I think the level of cooperation is uneven. There are clearly trilateral corporations which start to be more regular, also because the people know each other. It's all about people at the end of the day, Alexandra. A country which, let's say, deliberately are not cooperating or withdrawing from cooperation — I don't have any particular examples, no. I have to admit that, naturally, I'm not a prosecutor so I'm not always — I feel certain that advantage vis-a-vis maybe someone like you because I spend a lot of time with those people, but they don't tell me everything. But I think this trend is a real one. It doesn't mean that it is completely linear and that cooperation is booming in other countries in all sorts of situations, but the general trend is there.

[00:10:41] Over the last 20 years or so, are there tools that you wish you had had or that would have made this whole process easier? You were working within the framework of the OECD, and that was the right home for this, I think, but there are limitations to that. Were there either legal or political tools that would have accelerated the process moving towards greater cooperation and sharing of information and less corruption, more transparency — the overarching goal?

[00:11:13] Right. I think the OECD and the members — because at the end of the day, we always talk about OECD, but this now supposed the fact that the members, in one way or the other, were agreeing with that the course of action — created something which was honestly unthinkable. I am an international lawyer, pretty knowledgeable about peer reviews and peer pressure, and in particular in other areas like human rights. They often end up in mutual backscratching. We'll have some ideas in mind and some examples in mind. What was striking for me is that this has never been an issue in the working group on bribery. Very early on this circle of, "I was beaten up by the working group, so next time I will take my revenge" — no sense, which is a virtuous circle. I think we did, within the tools that we had, an incredible work, and credit should be given, as I said, to the members, the parties first but also to my colleagues who do the on-site examination. I may have two regrets, at least two. Surely, I can find many others, but at least I have two. No. 1, I think we had something which was potentially super interesting to which we have not been able to use. If I were to renegotiate the convention today, I will

draft it in a different manner, which is Article 43 of the convention. Article 43 of the convention is the article which provides that, if more than one country has jurisdiction, one of the countries that has jurisdiction can ask for a consultation and decide which country is best equipped to carry out the case. This article has never been triggered, and it has never been triggered because it can be triggered only by the countries. It cannot be triggered by the secretariat. Drafting change would have been, "Each of the country or the secretariat could ask to enter into the scandal," and this could have lead to very interesting discussions.

[00:13:25] So there are times when you would have intervened?

[00:13:27] Yes.

[00:13:27] And shifted the jurisdiction?

[00:13:29] At least provoked a discussion. At the end of the day, maybe not, this maybe would not have changed the course of action, but at least provoked a discussion.

[00:13:40] Are you going to tell us which cases?

[00:13:43] No, but nice try. This is an article at least which is still there but in which has potential which has been untapped so far. The second regret is not the legal regret, but it's political policy regret. In 1997, we were absolutely right to have the approach which was followed, in the sense that there was a legal vacuum, a huge legal vacuum, that had filled. I have to say, it was a right analysis, but a purely legal analysis. Maybe we should have had a bit of a broader perspective, and maybe, even though there was no legal vacuum, we should have incorporated at least the hook which would have allowed the working group on bribery to also tackle the demand side. I think this was a mistake. As I said, not a legal mistake, but more a policy and political mistake because clearly, if I have a regret, it's the fact that we don't have any particular provision on the demand side. Having said that — and I don't know if you are aware, but I'm going to spread the news — the working group on bribery has decided, for the first time, that it will also start to look at the demand side in terms of "stop taking just of the issue and deciding maybe what else could be done." So this is major.

[00:15:08] That's really big news.

[00:15:09] That's big news indeed, big news indeed.

[00:15:13] Do you think part of the reason that the demand side wasn't incorporated initially was political? You were trying to get all these countries onboard.

[00:15:22] I don't think so. I think it was more like we wanted to wrap up the negotiations very quickly. We came to the conclusion very early on that — which is true — most of the countries around the world criminalized receiving bribery by their own officials, but it was a purely legal analysis. We should have said, "OK, yes. This is what the law and books say. But what is really happening in practice?" I think it was more a question of insufficiency and also — remember what I said — the mandate was to multi-lateralize the FCPA. In a sense, we followed the same approach than the FDCPA.

[00:16:06] Right, because, of course, the FCPA doesn't cover the demands side either.

[00:16:08] Exactly.

[00:16:08] I want to ask you a little bit about accession to the convention but before we do that, you mentioned four one-week meetings per year. For people who have never had the opportunity to sit in on one of those meetings, what are you doing together in a room for four weeks a year?

[00:16:25] A lot of things. First, we have all the peer reviews of the countries which provides for three readings during the week, plus preparatory meetings.

[00:16:37] And these are the peer reviews of the — there's a cycle that they go through.

[00:16:42] Correct.

[00:16:43] The first round, the second round. At any time, how many of those are underway?

[00:16:47] It's variable, but usually we review around two countries per session.

[00:16:53] That's labor intensive.

[00:16:54] It is super labor intensive and sometimes so labor intensive that you have side negotiations until 2 o'clock in the morning because, even though — chapeau to my predecessors, we had two basic rules which we established, which I think makes us special, even vis-a-vis the UN system, which is first: All our reports are made publicly. It's mandatory. And secondly, they are all adopted by consensus minus one. The country which is evaluated cannot block that adoption of the report. But in spite of that, not only the idea is to also try to find a language which, at the end of the day, is acceptable. Sometimes, the negotiations are quite tedious, so this by itself takes a lot of time on the working group on bribery. Then there are all the parallel activities. One of the aspects that's maybe not very well-known is the fact that we have also two spinovers of the working group on bribery in terms of the outreach program. One is dealing with the eastern and central Europe, Central Asia. It's called the Anti-Corruption Network. The other one is a joint program that we have with the Asian Development Bank on the Asia Pacific. They report to that, and they are also given direction to do work. Actually, we have what we call the horizontal study of the typologies, so we are going to discuss and possibly adopt one in October on detection. Next year, we're going to work on settlements. Those are comparative studies in which we analyze the legal system of all the countries, make a recommendation and probably, maybe decide common action on that. I can tell you there is still a lot to do. In the beginning, it was five meetings per year because when we started the cycle, we wanted to review a number of countries very quickly just to establish the trend. I can assure that the taxpayer money is very well used, and people from the U.S. delegation or other countries which are attending those meetings do not have much time to enjoy Paris.

[00:19:10] I was going to say, they're still in Paris so it's not a hardship duty.

[00:19:13] In December, you know, it could be.

[00:19:16] The accession issue. There are a number of OECD member countries, of course. But then there are other countries that want to accede to the convention, and there is a bit of a political split on that issue — whether it's better to let everybody in and start these peer reviews or whether that becomes unmanageable.

[00:19:40] Yes, you're absolutely right. There is an ongoing discussion. Let's maybe put the parameters in place. Number one: The convention is not limited to OECD countries. It's open to any country which will become a member of the working group on bribery, so the discussion is then: Who can become a member of the working group on bribery? It's interesting because this split — again, this is the

advantage of having been around for too long, Alexandra — this split also was a split that even the U.S. administration had. In the first years, at the time, President Clinton started to go around and spread the gospel and invited other countries to join the Anti-Bribery Convention, until the time which the Department of State said, "This is not exactly what he meant." I understand the two logics, and it's not for me to take a position. There is one logic which says, "This is only the supply side. We should only look at our competitors." The original scheme of 1997. Why the OECD? Because the competitors are there. There is a second school of thought which is, "Yes, but this logic is the 1997 logic. The world of 2017 is completely different. Who is the supply side? Who is the demand side?" If you look, you can you can establish a company anywhere. If we create loopholes in our companies who do not want to stand by the rules, they will install their headquarters or their office will deal with these nasty operations in non-covered countries. By doing that, aren't we facilitating and creating a vacuum? As I said, both make sense. What is true, I think is fair to say, that we will never become a UN type of convention, because the peer review is so intensive, so rigorous, that we couldn't afford it. Then people will spend all the year in Paris. We will have permanent delegations, and also, honestly, because it wouldn't make sense. I think this idea that only the major economies should be in — yes, this was the original idea, but I think the notion of major market economies has really changed, and you have a lot of intermediate players who could be very interested in joining the anti-bribery convention. So we're not only talking about China and India, but even as we are in Beijing, let's talk about Asian countries, countries like Thailand, Malaysia, even Vietnam, who are starting to be subregional players, but also in Latin America and maybe some countries even in Africa, like Morocco or Ghana, who start to have operations outside of their own borders. I think there is a potential. There is a problem, which is, as I said, the problem of resources and time-consuming. I think this is a valid point that some delegations will raise.

[00:22:49] You've made the most of the expertise that's been developed by the group, by developing some tools and resources. You mentioned this in a meeting today, a document that compares the guidance from a number of different sources and things. Your website is a great resource for companies that are operating in countries outside this community to see, fairly conveniently, what best practices look like. What do you see as the next big step for the working group? Is it just more of the same? Because there's enough corruption to go around. I understand that. Is it more of the same, or is there — you talked about possibly looking more closely at demand-side bribery. Anything else on the horizon?

[00:23:33] Naturally, I'm not the representative for the parties of the working group on bribery, but I think this is an important caveat. It's not only rhetoric. What I'm going to give you is really my personal opinion, and I'm not sure it represents the opinion of the working group on bribery. I think there is a sort of — if I was a representative of the working group on bribery, this is what I would say to my colleagues. "I think we did an incredible work. I think we shall continue what we're doing, but I think there is one aspect that we should now revisit, which is private sector." Let me try to explain. 1997 was a purely intergovernmental approach. Control and command. Classic. Actually, for another conference, I was preparing a short presentation on compliance, and I looked, and our compliance was not in the convention nor actually in the commentaries. Companies were only mentioned, but as a recipient of bad points.

[00:24:38] As the target.

[00:24:41] Exactly. So this was 1997. There was an incredible shift and a very major shift in 2010 with guidance, which actually was pushed by the U.S. at the time, the U.S. Department of Justice, with the development of the internal control and compliance guidance, which remains the only

intergovernmental guidance for companies, by the way, on internal control and compliance. I think it's time now to go to third phrase, which is to work with companies on issues, which are issues for everybody. For example, settlements. This is not to say that we should mix or start to collude with companies.

[00:25:26] You're not going soft on crime.

[00:25:28] No, we're not. But I think there are specific issues which are a problem for companies, are a problem for government. I think there should be scope to start to deal with them. Let me give you another example, which is one of my obsessions. You know I have a few. I think one of the trends I can see — but I don't know exactly how we're talking about — is this question of offsets.

[00:26:01] That's an incredibly complicated issue.

[00:26:03] It's an incredibly complicated issue for a company. I think it's an incredibly complicated issue for government.

[00:26:09] For governments as well, absolutely.

[00:26:11] For me, this is the perfect subject in which governments and companies should sit together and say, "OK, let's try to pose. Let's try to see what is the issue and what we can do." Maybe, at the end of the day, maybe there will be no agreement, but it's time for me to engage in this kind of dialogue. As I said, I'm not a member of the working group on bribery.

[00:26:32] Right. So with that caveat — I think that's a fantastic idea. There's almost no transparency around this issue. I don't know any company that says, "We're all over this. We're on top from this we know what we're doing with offsets." There's a lot of—

[00:26:44] Anxiety.

[00:26:45] Anxiety, exactly right. There's a lot of anxiety around this, so I think that's a great point. Obviously, it's music to my ears if we can start pulling in the same direction on some of these issues. If you work on the assumption that the companies we're talking about are trying to get this right, then helping them get it right is—

[00:27:03] It's to the benefit of everybody.

[00:27:04] Right. It's in everybody's best interests, and the outliers that are not trying to get it right, we'll leave them behind. Is there anything else you want to add?

[00:27:12] No, just to say that I was really very happy to have this interview, and thank you very much.

[00:27:17] That's very kind of you, Nicola. I pulled you out of this meeting in Beijing, and I need to let you get back to it, so thank you for joining me.