

The BIAC Program for Combating Solicitation of Bribes

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(*Background note*)

The large majority of the member companies affiliated to *economiesuisse* – the Swiss Business Federation are **S**mall and **M**edium Sized **E**nterprises competitively active on world markets. My experiences in this fields are based on my occupation with the subject since the start of the discussions within OECD, the updating of the guidelines of the ICC, where I continue to be a member of the Standing Committee on extortion and corruption, and especially on various contacts with businessmen from all fields, for example when discussing with them the new legislation at training seminars or at field visits, e.g. in African countries.

1 Introduction

Business has good reasons to be opposed to any kind of corruption. Corruption causes competitive disadvantages for honest business, unpredictability for investments (especially in new markets), and added costs. Already in 1976, the OECD addressed this concern by developing guidelines for multinational enterprises, clearly rejecting the paying and asking of bribes in all transactions. These Guidelines, in 1976 and since, were endorsed by business associations and numerous multinational companies all over the world. Until the 90ties, this did not improve the situation substantially, as business feared competitive disadvantages by taking a lead in changing anti-bribery initiatives. During past years, international efforts to combat corruption and bribery have strengthened substantially and worked out in a more coordinated way. A significant progress is the penal prosecution of bribing foreign public officials. The most important landmark in this fight against corruption is the adoption of the OECD convention against corruption and bribery in international business transactions in December 1998. National legislations in industrial countries have been amended and the monitoring procedures have been started.

Business has actively supported such efforts. International business organisations such as the ICC have taken own steps to fight corruption in business transactions. ICC participated in the initiatives of international organisations such as OECD and cooperated with interested NGOs such as Transparency International (TI). Further, many companies – more and more outside the US as well - have issued new or strengthened existing internal regulations. Training programs have been engaged to raise awareness of employees – not only for multinational companies but for SMEs as well.

However, this can be only the first step. Putting regulations into practice brings concrete problems in daily operations. Corruption continues to happen in all regions of the world. Companies are faced with distortion of competition as competitors - being local or international - continues to pay bribes. Furthermore, companies may run difficulties as representatives from local government still do expect bribe payments. In fact, I know no company letting its executives to travel in search of opportunities to bribe but I do know a lot situations where they are confronted with ultimate requests to make payments in order to get a business, a permit or another official act. Another specific difficulty when introducing the new legislation is the handling of contracts concluded before entry into force of the new legislation.

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Business has always stated that, as corruption being a complex phenomena, co-ordinated efforts have to be taken on the supply side (offering of bribes) as well as on the demand side (soliciting of bribes). While the US – the country with the longest experience of criminalizing the bribing of foreign public officials – has established a notification mechanism in cases of solicitation and other countries (e.g. Bulgaria, Hungary) provide that extortion constitutes a defence, most of current governmental actions regrettably are focused on the offering of bribes only.

The OECD-Convention is perceived to exclusively aim at criminalizing the “supply” of bribes. As neither an explicit nor an implicit provision was included to address so called “passive” bribery, solicitation is identified as clearly falling outside the scope of application of the Convention. It was feared, that companies accused of bribing will use any such provision as a defence in penal prosecution. However, this does not adequately reflect the frequent situation of companies being confronted with explicit direct or indirect solicitation of bribes. Nevertheless, the OECD Recommendation and action program – the larger framework for OECD in the fight against corruption – provides for a broad approach. Therefore, governments should assist companies in such situations as efficiently as they attempt to fight against the paying sides. This is not yet sufficiently recognised. Curbing the demand side of corruption is an important issue of Good Governance as well. Only when efforts are combined, a real and lasting improvement of the situation may be achieved.

2 Situation seen from companies point of view

The following list of cases is the result of reports made by companies on a confidential bases and may illustrate the dilemma for companies:

1. A government official asked bribes to grant permits to open or adapt a business operation. Payment have been made in cash or by purchasing paintings at a excessive price. In addition, the government official offered his services to identify potential business partners against a fee.
2. In a public procurement process, bidders had to pay a (reasonable) fee to get copies of the necessary documentation. Later they were asked to pay a substantial amount to be put on the short list and a high bribe to win the bid.
3. A manager of a supplier asked a bribe in cash or the rendering of services to provide raw material or semi-finished goods urgently needed.
4. Employees organised a network to channel kickbacks asked for from their business partners (suppliers). The purchase prices were increased accordingly.
5. A multinational employed a contractor – who subsequently became an employee - in its operations to appoint suppliers and procure equipment in developing a new area of business – developing retail sites. The employee was found guilty of:
 - Extorting directors of a supplier firm to pay money into his personal bank account.
 - Requesting that supplier to pay for flights for himself and his family.
 - Requesting the directors of that firm to form another company with an international focus with himself a major shareholder.
 - Not informing his superiors that he had received thousands of shares in another company that was a major supplier of the company he was employed by.
6. A company needed a formal authorisation to get the necessary export credit insurance for a project that was close to realisation. As this authorisation was not dealt with – without

any reason - a middlemen offered his services "to solve the problem" against a fee of US \$ 1 Mio. payable to a offshore bank account.

7. A company was suggested that the grant of a unsecured loan to a member of the family at power at favourable terms, would ensure the unhindered acquisition of a substantial part in a infrastructure company.
8. A company wanted to re-export a part of the capital invested in a subsidiary 30 years earlier. Ordinary proofs of the bank transfers made initially were no longer available and the laws were rather ambiguous on how the calculations of exchange rates should be made (a number of devaluation had taken place). The lawyer in charge suggested to use a special consultant against a fee to discuss with the responsible authorities.
9. A company was requested to pay a percentage of the purchase price to a bank account in a third country. The account was to the benefit of the responsible sales person, a affiliated person or a third company in which the responsible persons have a direct or indirect interest.

Companies are in a very difficult situation when bribes are solicited. They find themselves confronted with different dilemmas:

- Even if a solicitation/corruption case is discovered and criminal prosecution of the foreign public official happen, the money paid cannot be recovered.
- Convicted persons risk severe penalties (sometimes capital punishment) even in countries where corruption is widespread.
- Solicitation is often hard to identify when it is part of an on-going business relationship. A company may be in business relationship for some time and not be aware that certain payments made in exchange for services rendered may be to the benefit of a public official and constitute a bribe.
- Large investments already made for a project make it difficult for companies to resist solicitation of bribes made in a late stage of a project.
- Solicitation is often made indirectly and implicit, often using middlemen. Companies are told or strongly led to believe that without payment of bribes the envisaged business transaction could not be realised or an official procedure (e.g. in the tax sector) may last very long and be cumbersome. In such cases, no sufficient proofs would be available to follow up the situation of solicitation. Companies may be reluctant to report incidences of solicitation in such cases for fear of facing complaints of slander.
- When requests for bribes are made in a early stage of business transactions, companies wants and have to safeguard their business interests. Therefore, any governmental intervention against the solicitor of bribes must duly take account of the need of ensuring business secrets.
- Often, competing companies from different countries are confronted with similar requests. A co-ordination at international level must be possible. Only though co-ordinated reactions, the necessary results may be expected without discrimination of any single competitor. However, business secrets must be safeguarded amongst companies concerned and between different countries.
- Cases of "high level" corruption are particularly difficult for companies to deal with without some explicit back-up support from governments.
- Invoices from agents working on behalf of a company may include items for "commissions" or "fees" which may be legitimate payments for services rendered or may, in some instances, be disguised bribe payments. Accounting provisions aimed at greater transparency do not capture solicitation since a payment will be entered on the books only if it has actually been paid. Once paid, it would be entered as a "commission" or "fee". Further, companies may not always know whether fees requested are legitimate government requirements (for example fees to obtain documentation during a bidding

process) or payments demanded by officials to improperly influence the outcome of a decision (for example fees in exchange for being shortlisted or selected in a bidding process).

- As practices differ widely over the world, it may not always be obvious that a specific payment or behaviour of a company violates anti-corruption laws. Such uncertainty affects international commerce seriously and may distort competition. Companies must get quick and reliable information on the legitimacy of certain business transactions. Such clearance must be provided by official sources not engaged with penal prosecution to protect substantive rights of the company in a eventual penal prosecution relating to the same transaction.

Reporting on the situation of corruption shall not be limited to the enforcement of penal sanctions and other measures against paying bribes. Both sides of the coins have to be addressed by any follow-up mechanism even this may lead to naming specific countries or situations at an early stage and without formal and comprehensive proofs in judicial terms.

Many instances of solicitation occur in areas of economic activity which are subject to complex, overlapping and non-transparent regulations. It is certain that deregulation/economic liberalisation reduces rent seeking opportunities. Appeal mechanisms in bidding processes further reduce the risk of decisions influenced by bribe payments.

In general, large companies having a dominant market position and companies known for a strict no-bribe policy are less confronted with cases of solicitation or even extortion. Most hurt are small and medium sized companies entering new markets. Confronted with the situations described above and under the threat of criminal sanctions in their home countries, companies may be forced to withdraw from specific markets or not to enter such markets. This is to the detriment of economies concerned.

Business can be supported in its no-bribe policy by a clear message to trading and investment partners that the OECD Convention – and eventually other similar instruments - represent the expressive will of adhering countries that bribery is a crime and that it would therefore be illegal for companies to submit for demand for bribes. In addition, National Governments and International Organisations could address the problem in their cooperation respecting the principles of Good Governance.

3 Program against solicitation of bribes

BIAC has developed and presented to the OECD a program of actions against the solicitation of bribes. This initiative was discussed at working group level. While getting some understanding and marginal references in public statements, it was not fully put into practices neither at national nor at international level. Nevertheless, we feel this program as valid as at its initial presentation two years ago and should be taken into account notably in discussions on other instruments, e.g. in the context of an eventual UN convention.

3.1 Public addressing the problem of solicitation

When discussing the issue of corruption, the supply side and the demand side should be addressed publicly to make it clear that neither paying nor requesting bribes will be tolerated under the changed rules. This would enhance stricter no bribe policies

Further, governments should publicly recognise and address the problem of solicitation of bribes and preventive measures, assist companies in such situations and to co-operate internationally.

Respective declarations by the OECD Ministerial Conference as well as declarations of National Governments could be adequate instruments in this respect.

The actual conference would represent a good opportunity to make it clear that governments take the issue of solicitation truly serious.

3.2 *Integration in follow-up programs*

As the current international instruments do not properly address the problem of the demand side of bribes, monitoring programs do not yet include the problem of solicitation nor the situation in "receiving" countries - in all parts of the world. This gives a unbalanced picture. Necessary data for actively take measures against the distorting effects of requests for paying bribes are not collected.

The follow-up mechanisms should include the situation of explicit or implicit requests for bribes. Such enquiries can only be done in a close co-operation with business. Collecting such data may be difficult as formal proof will seldom be available and business secrets must be safeguarded. Therefore, it will be necessary to establish reporting bodies as "filters" that can provide the necessary information in a anonymous and aggregated form. Such reporting bodies must be separated from any body having judicial or penal prosecution competence to avoid conflicts of interest.

3.3 *Assistance and protection*

When confronted with requests for bribes, companies need to have a point of reference to report such cases, find guidance and support on possible action. Confidentiality and discretion have to be ensured. Independence from prosecution authorities would enhance confidence of business in this system. Such contact points should also be established in embassies or consulates abroad. Diplomatic representations to host countries would be more effective if there were a mechanism for joint diplomatic action from all countries concerned.

To assist companies in determining whether a specific transaction might violate anti-bribery laws, it would be useful to obtain prior opinions from a competent body as to the legality of the transaction (creation of a "safe harbour") following the US mechanisms under the FCPA. The integration of such a mechanism in the legal systems of other countries would need further examination.

3.4 *Co-ordinated trade measures*

Governments shall engage themselves to co-ordinate their means in enforcing good governance and the fight against solicitation of bribes. Thereby, development aid and other assistance has to be taken into account as well. Requesting bribes not only distorts trade but violates obligations under the rules of Good Governance. Whereas large trading countries may act individually in such situations by limiting for example development assistance programs or imposing binding obligations to recipient countries, this is not the case for most OECD member countries. International co-operation is therefore needed.

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Such a program would not prevent SME's being confronted with difficult situation, especially in developing markets. However, it would ascertain companies not being left alone. The program would underline the will of governments to establish a level playing field and ensure that the problem is not tackled from one side only. If business is not generally put on the accused place, there will be more will to join the fight against corruption actively despite short term complications.