



Business and Industry Advisory Committee to the **OECD**

Comité Consultatif Economique et Industriel Auprès de l' **OCDE**

BIAC Statement

OECD's Role in Fighting Solicitation of Bribes

Meeting of the OECD Council at Ministerial Level

– Consultations with BIAC and TUAC –

- Paris, 13 May 2004 -

I. Background

Up to now, governments have been reluctant to fully address the problem of bribe solicitation in international trade and investment. In fact, testimony and available evidence indicate that explicit or implicit requests for bribes by public officials are often the “initiating act” for bribes. In this sense, companies become victims of corrupt administrations.

Thus, BIAC has continuously asked OECD governments to publicly recognise the problem of solicitation of bribes and engage themselves to act against it by assisting companies in specific situations and co-operating internationally.¹

On the occasion of the OECD's Corporate Responsibility Roundtable last June, BIAC started an initiative on using the Guidelines for Multinational Enterprises to assist companies confronted with bribe solicitation and extortion.² The business community sees a strong need for establishing an institutional setting or using existing ones to deposit relevant bribe solicitation information on a confidential basis. Until now such information is lost.

II. The challenge

For business the key challenges of bribe solicitation have not changed since the implementation of the OECD Anti-Bribery Convention and are unlikely to change with the new UN Convention against corruption:

- Despite legislative anti-bribery measures, businesses are frequently confronted with explicit or indirect solicitation of bribes in OECD and non-OECD countries.
- The BIAC Programme for Combating Solicitation of Bribes calls on OECD governments to focus on: public recognition of the problem and assistance in cases of solicitation.
- When confronted with demands for bribes, companies need a point of reference, independent from the prosecution authorities, to which they can report such instances. Until now, information about bribe solicitors is lost.
- BIAC continues to believe that governments have a role to play in assisting companies in situations of bribe solicitation instead of relying solely on ex-post prosecution.

¹ See BIAC Submission “Assistance against solicitation of bribes, a possible answer to the problem of extortion in international business transactions”, October 1998, see <http://www.biac.org/Framepos.htm>.

² BIAC letter to Mr. Sikkel, Chair of the OECD Investment Committee, 7 July 2003, see Annex 1, DAF/IME(2003)18/REV1.

III. BIAC request

Given this continuing situation, business is requesting a clear signal from the OECD and its Committees showing the commitment to combat bribe solicitation in whatever form. This expression of governmental will is crucial to establish the necessary confidence of the business community for a comprehensive fight against corruption. We therefore ask the Investment Committee of the OECD and its Working Group on Bribery in International Business Transactions to consider and further explore possible options aimed at helping companies.

In addition, BIAC will ask this year's OECD Ministerial to concretely address the issue of bribe solicitation at high-level and to establish a public-private OECD working group to elaborate concrete steps. Such should include the following:

- **A revised Recommendation of the Council on Combating Bribery in International Business Transaction (last version 23 May 1997) including language on governmental measures against bribe solicitation;**
- **To elaborate the role of the NCPs in the context of the OECD MNE Guidelines (data collection function and joint external action);**
- **The establishment of governmental help lines in national administrations;**
- **The establishment of non-governmental help lines and contact points for businesses.**

For business the exchange of information amongst all these institutions and mechanisms involved is of crucial importance. **This could be ensured by establishing a respective forum/public-private network under the auspices of the OECD.** BIAC asks the OECD to establish such a network as a first step.

At the same time, as the discussion evolves the need for differentiating situations of bribe solicitation becomes more obvious. The following general lines should be taken into account:

- There could be a need to focus in a first step on the business situations where no bribe has been paid yet. This could be a way of excluding many problems stemming from the duty of government officials in OECD countries to report any knowledge they might gather to prosecutors.
- The situation of companies in bidding processes must be addressed differently from the situation of endemic wide-spread corruption affecting all sectors of an administration of a particular country. For tackling bribe solicitation in bidding processes, a more sector specific approach can be more adequate. At the same time data collection and diplomatic pressure can be more relevant responses in situations of endemic wide-spread corruption.

a) Statement/OECD Council Recommendation by OECD Governments

BIAC continues to expect from OECD governments to issue a high-level statement condemning bribe solicitation including a follow-up process. This should take the form of a revised Council Recommendation to the OECD Anti-bribery Convention including measures to be taken by governments on solicitation of bribes.³ A possible mechanism has been proposed by BIAC already in the context of the negotiation of the OECD Convention⁴ and merits still to be examined:

“Solicitation and extortion

1. The Parties shall combat the solicitation or bribes by foreign public officials. For this purpose each Party shall designate an office or agency of its government to which any natural or legal person may report any attempt by any foreign public official to solicit a bribe or to extort or procure any undue advantage.

2. The Party or Parties to which such a report is made shall promptly and thoroughly investigate such report using all sources of information at their disposal and, if the report shall appear to such Party or Parties to be substantiated, then the Party of which the person making the report is a national shall immediately extend comprehensive and effective diplomatic protection and support to such person with the objective of securing all the rights to which such person is entitled in respect of the matter reported and of preserving, forwarding and protecting the commercial position of such person in the market or territory concerned; all other Parties shall co-operate in the discharge of such obligation.

3. No person shall be under any obligation to make any report as is herein provided for and each Party shall hold any information which is disclosed by any person in making the report, or in consequence thereof, confidential and shall not use the same save for the purpose of extending protection and support as aforesaid.”

Such an addition to the OECD Convention would strengthen the support of the Convention in the business community, since it would be a clear signal to companies that governments take their practical problems on the ground seriously and help to resolve them. Another advantage of including such a paragraph into the Council Recommendation would be that the follow-up monitoring process established by the Convention could be extended to include the implementation of bribe solicitation facilities.

³ Last revised Council Recommendation on Combating Bribery in International Business Transaction, 23 May 1997, see http://www.oecd.org/document/32/0,2340,en_2649_34859_2048160_1_1_1_1,00.html.

⁴ See Fn 1.

b) Role of the OECD MNE Guidelines

BIAC still believes that the OECD MNE Guidelines must play a role in helping companies in instances of bribe solicitation:

- Since the Guidelines include text on bribe solicitation the issue must be promoted by governments and National Contact Points (NCPs) as part of their overall obligation to promote the Guidelines.
- The same applies to the outreach work the OECD is conducting with a wide range of non-member countries. Again, the fight against bribe solicitation must be an integral part of the OECD's anti-corruption and regulatory reform activities with non-member countries.
- Furthermore, the OECD Guidelines clearly attribute to National Contact Points (NCPs) the task of helping companies in situations of bribe solicitation. BIAC sees an obligation of NCPs deriving from the MNE Guidelines to assist companies in instances of bribe solicitation.

The OECD Guidelines for Multinational Enterprises

Chapter VI. Combating Bribery:

"Enterprises should not, directly or indirectly, offer, promise, give, or demand a bribe or other undue advantage to obtain or retain business or other improper advantage. Nor should enterprises be solicited or expected to render a bribe or other undue advantage."

Commentary on Combating Bribery:

45. "To address the demand side of bribery, good governance practices are important elements to prevent companies from being asked to pay bribes. In addition, governments should assist companies confronted with solicitation of bribes."

Procedural Guidance

"I. National Contact Points

The role of National Contact Points (NCP) is to further the effectiveness of the Guidelines."

"I C. The NCP will offer a forum for discussion and assist the business community, [...] to deal with the issues raised in an efficient and timely manner...."

Already now, a company could bring such a specific instance under the Guidelines to the attention of the National Contact Point of its jurisdiction. Thus, NCPs would have already now an obligation to deal with such instances. That could involve communicating instances of bribe solicitation with other agencies of their own government or directly with counterparts in the respective host countries. Apart from that, NCPs should start taking on a data collection function for any instances arising on the bribery chapter of the Guidelines and support anti-bribery policies in the countries and administrations where corruption is abundant.

c) Non-Governmental Anti-Bribery Helpline

In addition to that, another possible way of helping companies dealing with situations of bribe solicitations would be to establish an Anti-Bribery Helpline in the form of an independent non-governmental body.

Out of many suggestions, an independent, international helpline could be established as a non-governmental organisation operating under the protection of legal professional privileges in co-operation with the client seeking assistance. There could be advantages of such an approach. Companies might be more likely to turn to an independent non-governmental institution avoiding the risk of prosecution.

The following aspects might be also considered:

- What would be the “standing” of such a private institution vis-à-vis governments/administrations involved in solicitation of bribes? It seems to be an important difference whether an institution like the World Bank asks a host country government to implement its anti-corruption standards as part of their lending conditions or whether a non-governmental organisation tries to influence public administrations in OECD or non-OECD countries. Some attachment of such a non-governmental helpline to a public international organisation might be required.
- On a more general level, what would be the source of legitimacy of such an institution, not formally representing the business community, but intervening on behalf of it?
- The crucial challenge of such a facility will be to build up trust with all partners, companies as well as public institutions.

d) Governmental Helpline

Furthermore and as proposed under a), business would strongly recommend to envisage the establishment of governmental helplines in national administrations. A governmental helpline to which companies can turn in instances of bribe solicitation should act as a co-ordinating institution and inject the information gathered into “the whole of government”, including – *inter alia* - official development financing, export/investment promotion facilities/guarantee schemes, government procurement and diplomatic pressure.

The performance of such a governmental helpline should be monitored by an international organisation and constantly reviewed as to its effectiveness. This is why it would make sense to include the request of establishing such a helpline into the system established by the OECD Convention.

IV. Conclusion

BIAC feels that the best solution would be to have a strong link of any kind of institutional setting to an international organisation with credibility on anti-bribery work and respective standing in the international community.

The OECD would be best suited, representing the large majority of world investment and trade activity and having worked on the issues for a long time, be it through the OECD Anti-Bribery Convention, its Convention-related outreach activities with non-members countries or its work on public governance and regulatory reform.