



Business and Industry Advisory Committee to the OECD

Comité Consultatif Economique et Industriel Auprès de l'OCDE

## **Assistance against solicitation of bribes**

### **A possible answer to the problem of extortion in international business transactions**

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#### ***1 Background***

International efforts to combat corruption and bribery have strengthened substantially during past years. A significant sign of progress is the penal prosecution in cases 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.

Business has actively supported such efforts. International business organisations such as the ICC have taken own steps to fight corruption in business transactions. Further, many companies have issued new or strengthened existing internal regulations.

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). However, most of current governmental actions are focused on the offering of bribes. This does not adequately reflect the frequent situation where companies are confronted with explicit direct or indirect solicitation of bribes. Respecting the OECD Recommendation and action program, governments have to assist companies in such situations as efficiently as they attempt to fight against the paying sides. This is not yet sufficiently recognised.

#### ***2 Special problems for governmental interventions***

Requests for bribes are often made in an indirect manner in an early stage of business transactions. In such a situation companies want and have to safeguard their business interests. Therefore, any governmental intervention must duly take account of the need of ensuring business secrets. Further, there are often insufficient proofs to enter formal judicial proceedings. Governmental actions must still be possible.

Often, competing companies from different countries are confronted with similar requests. A co-ordination at international level must be possible. Only through co-ordinated reactions, the necessary results may be expected without discrimination, and without excluding any single competitor. However, business secrets must be safeguarded amongst companies concerned and between different countries.

As corruption occurs in various forms and usual 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 coin 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.

### **3      *Program against solicitation of bribes***

#### *3.1      Public recognition of the problem*

Until now, governments have been reluctant to recognise the problem of solicitation. It was feared, that companies accused of bribing will use any such provision as a defence in penal prosecution. This creates the incorrect impression that companies are the source of corruption while explicit or implicit requests for bribes are more often the real initiating act for bribes.

***Governments have to publicly recognise the problem of solicitation of bribes and engage themselves to act against it, to assist companies in such situations and to co-operate internationally. Declarations by the OECD Ministerial Conference as well as declarations by the respective Member Governments (e.g. in the context of parliamentary debates on implementing legislation) could be adequate instruments in this respect.***

#### *3.2      Integration in follow-up programs*

As the current international instruments do not properly address the problem of the demand side of bribes, such programs do not include the situation in "receiving" countries - in all parts of the world. This gives a unbalanced picture. Necessary data for active taking measured against the distorting effects of requests for paying bribes are not collected.

**The follow-up mechanisms - especially within OECD - have to include the situation of explicit or implicit requests for bribes. Such enquiries should, and can only, be done in 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      Clarification in individual cases*

As it may not always be obvious whether a specific transaction violates anti-bribery laws, companies must be able to obtain quick clearance on the legitimacy of specific transactions.

The United States provide such a facility in their FCPA. To safeguard basic rights of a defendant in a penal prosecution, such - binding - advice must be obtained by instances not related to the penal

proceeding. Alternately, the use of any information provided in the context of such a preliminary inquiry shall not be used in a penal procedure concerning the respective case of corruption (some exemptions will have to be established to avoid abuse). This is not the case according to the FCPA rules.

**Governments ratifying the OECD Convention shall establish a neutral information point to provide companies with clarity on the legitimacy of a specific transaction.**

### *3.4 Assistance in specific cases*

Quite often companies are confronted with requests for bribes, e.g. in the context of large public procurement contracts. Specific action is needed in such cases. Thereby, an international co-operation mechanism is needed. For example, a national contact point could alert their counterparts in other countries to inquire whether other companies have been confronted with similar requests.

A possible mechanism has been proposed in the context of the negotiation of the OECD Convention and merits still to be examined in the new context:

#### **Solicitation and extortion**

**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. 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.**

**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.**

### *3.5 Co-ordinated trade measures*

Requests for 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 development assistance programs or imposing binding obligations to recipient countries, this is not the case for most OECD member countries. International co-operation is needed.

Governments should engage themselves to co-ordinate their means in enforcing good governance and the fight against solicitation of bribes. Thus, development aid and other state assistance has to be taken into account as well.