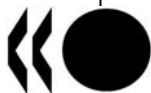


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Global Forum on Competition

COLLUSION AND CORRUPTION IN PUBLIC PROCUREMENT

Contribution from the Business and Industry Advisory Committee (BIAC)

-- Session V --

This contribution is submitted by the Business and Industry Advisory Committee (BIAC) under session V of the Global Forum on Competition to be held on 18 and 19 February 2010.

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COLLUSION AND CORRUPTION IN PUBLIC PROCUREMENT

-- Business and Industry Advisory Committee (BIAC) --

1. BIAC has always been concerned about corruption in international markets and especially public procurement, has strongly supported the development of the OECD Anti-Bribery Convention and has assisted in ensuring its implementation including through consultations in the context of OECD country reviews. We welcome this opportunity to present BIAC's views on this important and sensitive subject to the Global Forum on Competition.

2. The business community is fully conscious that corruption, the abuse of entrusted power for private gain, is a major obstacle to economic growth and social development in the world. Obviously, the principal victims are the consumers and taxpayers of the countries – often the poorest - where corruption is most rife. But corruption goes also directly against the interests of the business entities, which in most corruption cases are subjected to plain extortion.

3. Corruption goes against the long-term interests of the business community, because it affects overall economic growth¹. It undermines the acceptance of free trade, democracy and the rule of law, which OECD countries believe are the necessary conditions for sustained economic development. In particular, it distorts markets, both because the business itself is not rewarded on the normal basis of price, quality and innovation criteria, but also because companies operating from jurisdictions which do not have a strong legal framework for fighting corruption in foreign countries (or do not seriously enforce it) have an unfair competitive advantage over those based in countries which do.

4. Corruption is not confined to the public procurement area. As pointed out by Transparency International in its latest yearly global report focusing on Corruption in the Private Sector: “for business, [corruption] means more than the perceived need to bribe public officials [...] but it also includes, for example, the bribing of purchase officers to win business at other companies' expense (commercial bribery)².” Companies which engage in “active” bribery, and their shareholders, may also become victims of their own practices as these “foster a culture of moral ambivalence and reckless opportunism that undermines the overall commitment to integrity and opens the door for other corrupt acts” including to the detriment of the company itself; moreover, “the very strategies and mechanisms used to circumvent internal or external controls and cover up a specific corrupt activity can also provide the infrastructure for other corrupt acts”³, for example to conceal financial risks or manipulate earnings.

¹ According to a document entitled “Clean Business is Good Business” published by ICC, Transparency International, the United Nations Global Compact and the World Economic Forum in 2009, “estimates show that the cost of corruption equals more than 5% of global GDP (US \$2.6 trillion), with over US \$1 trillion paid in bribes each year; corruption adds up to 10% to the total cost of doing business globally, and up to 25% to the cost of procurement contracts in developing countries; moving business from a country with a low level of corruption to a country with medium or high levels of corruption is found to be equivalent to a 20% tax on foreign business”.

² Transparency International, Global Corruption Report 2009, p.7.

³ *Ibid.*, p.8.

5. However, public procurement is one of the sectors where the issues related to corruption are the most apparent, and perhaps the most harmful. First because of its sheer volume: as noted in the Chairman's call for country contributions, it is estimated to account for approximately 15% of the gross domestic product in OECD countries and more in non-OECD countries. It concerns sectors that play a key role in the economy, such as infrastructure, health and education. Ethically, corruption in public procurement is particularly reprehensible because it harms not only consumers but also citizens, because it benefits those who have been elected or selected to act for the common good.

6. Public procurement is generally subject to bidding procedures to ensure that the public entity obtains value for money. Bribery can affect these procedures in two ways. Either it simply disrupts the competitive process as the business is awarded to those who have made illegal payments. Or it is the price to pay for the bidders to enter into collusive practices. Indeed, corruption and collusion often go together. Bribes have to be paid for the competitors to "step back" i.e. to agree to align prices or refrain from tendering. Payments are made to the companies themselves (either in cash or in the form of other compensations such as sub-contracting arrangements) and sometimes to their executives. Payments may also be made to the purchaser entity's officers to close their eyes to these collusive practices; there are even cases where these officers play an active part in the organisation of the bid-rigging practice, and charge the corresponding "fee"⁴.

7. Generally, bid-rigging is considered by competition authorities as a hard-core infringement, for which they impose high penalties⁵. Although bid-rigging is not a specificity of the public sector in itself, it does regularly affect public procurement⁶. And although corruption is not a specificity of public procurement in itself, most of the high-profile corruption cases occur in the public sector. Competition authorities, both in their enforcement and their advocacy roles, must therefore play a key role in the fight against corruption in public procurement alongside anti-corruption and procurement agencies. As stated at a recent 2008 OECD Competition Committee Working Party meeting, BIAC supports the vigorous enforcement of antitrust laws aimed at preventing bid-rigging and punishing offenders⁷.

8. Thanks largely to the actions of the OECD, the legal background is now very clear for companies. It is not so long ago that in many countries illegal commission payments were tax deductible as ordinary business expenses provided they were discretely declared as such, and export financing support or international aid to development was granted without serious scrutiny to ensure that it would only be used in corruption-free conditions. The OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions of 1997 has now been ratified by 38 countries, and transposed into

⁴ For a recent, ominous example of a hospital's purchasing official pleading guilty to bid-rigging, see the U.S. Department of Justice's press release of 12 January, 2010.

⁵ For instance in the European Union, the practice of bid rigging will automatically infringe Article 101(1) TFEU. It was condemned by the European Commission in 1973 in the European Sugar Cartel case ([1973] OJ L140/17); when bid rigging was discovered in the Pre-Insulated Pipe Cartel ([1999] OJ L24/1), and later in the Lifts and Escalators case (IP/07/09), the European Commission imposed record fines. In Germany, bid-rigging is a specific criminal offence.

⁶ "Evidence suggests that bid-rigging, at least in some countries, may be rather widespread, in particular in government procurement cases" (A. Jones and B. Sufrin, *EC Competition Law*, Oxford University Press, 3rd ed., 2008, p. 894). It is generally considered that the conditions for bid-rigging to occur more frequently are related to the structure of the market (small number of sellers, lack of ready substitution with other products, repetitive purchases by large buyers, etc.). See Fiona Carlin and Joost Haans, "Bid-rigging Demystified", *Practical Law Company - PLC* (November 2005).

⁷ BIAC contribution to the OECD Competition Committee Working Party No. 3 roundtable on Bid-Rigging and Public Procurement, June 10, 2008, DAF/COMP/WP3/WD(2008)74.

domestic law making it a criminal offence to bribe foreign officials⁸. Through its “peer review” process, the OECD exercises pressure on countries parties to the Convention so that their internal legislation and enforcement are improved with a view to a more efficient application of the treaty⁹.

9. The OECD Convention has paved the way to several other international treaties or mutual commitments, worldwide or regional, achieving the same purposes¹⁰. It has been complemented by OECD recommendations to the member states, chiefly prohibiting any governmental permissiveness in exporting countries¹¹, and by agreements by other governmental bodies securing the co-operation of banks in the fight against corruption¹².

10. Avoiding criminal sanctions against themselves and their executives has therefore now become a very significant deterrent to company engagement in corrupt practices. However, it is not the only one. The cost of procedures and remedial actions can be very high, while the impact of management distraction and the harm to personnel motivation and corporate image are immeasurable. The damage resulting from an individual corruption case can also extend to the whole industry: the harm it inflicts on the reputation of the company who engages in it may spill over to those companies which refrain from illegal practices.

11. In many cases, the benefit derived from corrupt practices, even if successful and undetected, is questionable. Although corruption distorts competition, it is not even a reliable or guaranteed way to maintain or protect high prices: the pattern is often one where the company is approached by an intermediary who threatens "if you do not commit to bribe, you will not be allowed to compete", rather

⁸ For instance, the German Act of 10 September 1998, the Canadian Act of 10 December 1998, the Argentinean Act of 1st November 1999, the French Act of 30 June 2000, the Italian Act of 29 September 2000, or the U.S. Amendment of October 21, 1998 to the Foreign Corrupt Practices Act (“FCPA”).

⁹ This may concern for instance the enactment of criminal liability of legal persons (companies), or the conditions of exercise of the officials’ and private persons’ right/duty to report offences. In the UK, after an initial review of existing legislative and common law provisions it was considered that these were sufficient to implement the Convention and a wide reform is now in preparation: the Bribery Bill under which an act of bribery for or on behalf of a British company anywhere in the world will be a strict liability offence carrying an unlimited fine with the sole defence being that the company took all reasonable measures to prevent the act of bribery taking place, e.g. through active compliance programmes.

¹⁰ To name only a few: the United Nations Convention against Corruption of 2003, which addresses corruption both in the public and the private sectors (signed by 140 countries, ratified by 94), the Inter-American Convention against Corruption of 1996, the Council of Europe’s Criminal Law and Civil Conventions of 1998, the South African Development Protocol against Corruption of 2001, the African Union Convention on Preventing and Combating Bribery of 2003, the Asia-Pacific Economic Co-operation Organisation’s Santiago Commitment to Fight Corruption and Ensure Transparency.

¹¹ See in particular the OECD Recommendation on Tax Deductibility of Bribes (http://www.biac.org/pubs/anti-bribery_resource/section_2.htm#tax), OECD Guidelines for Managing Conflict of Interest in the Public Service (http://www.biac.org/pubs/anti-bribery_resource/section_2.htm#public), OECD Action Statement on Bribery and Officially Supported Export Credits (http://www.biac.org/pubs/anti-bribery_resource/section_2.htm#export), Principles for Donor Action in Anti-Corruption (http://www.biac.org/pubs/anti-bribery_resource/section_2.htm#donor), the Paris Declaration on Aid Effectiveness (http://www.biac.org/pubs/anti-bribery_resource/section_2.htm#aid), and most recently the OECD Recommendation of the Council for Further Combating Bribery of Foreign Officials in International business transactions (26 November 2009).

¹² See in particular the Basel Committee Guidelines on Customer Due Diligence for Banks (http://www.biac.org/pubs/anti-bribery_resource/section_2.htm#basel), and the rules and guidance issued by the Financial Action Task Force (http://www.biac.org/pubs/anti-bribery_resource/section_2.htm#faft).

than promises "if you bribe you will win the competition". Moreover, the worst cases are not necessarily those where the highest margins are made by the suppliers - the margin just goes elsewhere.

12. As stated in the "Clean Business is Good Business" document¹³, "Business organisations, and the companies they represent, have actively involved themselves in the fight against corruption. Companies are increasingly engaging in sector-specific or multi-industry initiatives, locally, regionally and/or globally, to share their experiences, learn from peers and, in partnership with other stakeholders, contribute to levelling the playing field."

13. BIAC has been at the forefront of the fight against corruption through its Task Force on Anti-Bribery and Corruption. This Task Force consists of business experts nominated by BIAC member associations. Since its inception in 1997, it supported the development of the OECD Anti-Bribery Convention and assisted in ensuring its implementation including through participation in consultations in the context of OECD country reviews. BIAC has also been engaged in alerting OECD governments to the on-going problem of bribe solicitation. More recently, the main focus has been to contribute business views to the ongoing review of OECD anti-bribery instruments and to the design of the future OECD monitoring of the implementation of its Anti-Bribery Convention.

14. Other international business organisations are also very active. For instance, the International Chamber of Commerce (ICC) has long been involved in the fight through its Commission on Anti-Corruption. In 2005, it issued a revised version of its Rules and Recommendations to Combat Extortion and Bribery, first published in 1977. The World Economic Forum Partnering against Corruption Initiative (PACI) is a platform for companies to commit themselves to develop, implement and monitor their anti-corruption programmes through peer network meetings and provision of private sector-driven support tools, based on the PACI Principles for Countering Bribery. PACI was initiated by World Economic Forum member company CEOs in Davos in 2004 and has widely expanded since.

15. Similar initiatives take place at the regional level, such as that of the Pacific Basin Economic Council (an association of senior business leaders in 20 economies grouped around the Pacific Ocean) and at the national level, where many national confederations publish and update recommendations on the prevention of corruption.

16. Companies also engage in "multi-stakeholder" initiatives such as those of Transparency International, which introduced in December 2002 its Business Principles for Countering Bribery, or the United Nations Global Compact. The latter is a voluntary initiative with a mandatory requirement for its 4,000 business participants to disclose, on an annual basis, performance changes in the issue areas. In 2004, a 10th Principle was added to the United Nations Global Compact, stating that: "Businesses should work against corruption in all its forms, including extortion and bribery". Another multi-stakeholder example, targeting a specific sector, is the Extractive Industries Transparency Initiative (EITI) initiated by the British government, and which has issued a set of principles and criteria, and sets of illustrative guidance for "resource-rich" countries and for extractive industry companies.

17. Beyond the statement of principles, practical tools (case studies, action guides, guidelines for whistleblowing, etc.) have been developed to assist companies in the fight against corruption and extortion. Such tools may originate from international governmental organisations like the OECD¹⁴ or the World Bank¹⁵, from national governments¹⁶, from international business organisations like ICC¹⁷, from national

¹³ See note 1 above.

¹⁴ OECD Risk Awareness Tool for Investors in Weak Governance Zones.

¹⁵ Business Fighting Corruption, The World Bank Institute's Resource Centre for Business.

trade associations¹⁸, from NGOs, international like Transparency International¹⁹ or domestic, or from multi-stake-holder organisations²⁰.

18. Special attention must be given to industry sector initiatives. Remarkable efforts have been made in certain sectors, which are particularly vulnerable to corruption and extortion. One example is the “Common Industry Standards” developed by the members of the Aerospace and Defence Industries Associations of Europe (ASD), including commitments to avoid all forms of direct and indirect corruption, and providing guidance on compliance matters. Similarly, U.S. defence industry companies have signed the “Defence Industries Initiative Principles of Business Ethics and Conduct”. Another example is the “Guidelines on Reputational Due Diligence” published by the International Association of Oil and Gas Producers, a practical tool to assist companies in the evaluation of the potential risks of doing business through associates and the implementation of measures to reduce those risks.

19. Understandably, antitrust authorities may be wary of situations where competitors get together to address issues related to their behaviour on the market. However, companies dedicated to “top-class” standards of business conduct, cannot succeed (or even survive) if they are alone in their stand against corruption. The sector initiatives described above are key contributions to the levelling of the playing field, and their goals are of such importance to the development of the world’s economy that they must seriously be encouraged.

20. The authorities should also be clearly supportive of compliance programmes developed by companies, which are generally multi-subject and may address both anti-corruption and antitrust issues. Indeed, both collusive and corrupt behaviour can only be successfully combated if employees, who may be tempted either by personal greed or be put under pressure to achieve performance targets to give in to extortion or engage in illegal action, are clearly made aware of the principles and values on which the company will not compromise, are provided with adequate training and be subjected to adequate internal controls. In this respect, the OECD urges its member countries to encourage internal compliance programmes in companies²¹ and the relevant authorities should properly take those programmes into account in both their advocacy and their enforcement roles, especially as a potentially mitigating factor or remedy when reviewing companies’ conduct.

¹⁶ For instance, the Business Anti-Corruption Portal of the Danish International Development Agency.

¹⁷ ICC Guidelines on Whistleblowing.

¹⁸ For instance, “Avoid Corruption, a Guide for Companies” by the Confederation of Danish Industries, “Avoid Corruption in International Business (*Korruption bei Auslandsgeschaeften vermeiden*)” by ICC Austria and the Austrian Federal Economic Chamber (AWO), or “*Démarche Export – Prévenir le risque de corruption*”, a practical guide aimed at SMEs by MEDEF, the Confederation of French Industries.

¹⁹ Transparency International’s “Six-Step Implementation Process” (a guide for companies in the process of devising and implementing an anti-bribery programme), “Self-Evaluation Module” (to assist companies wishing to assess their anti-bribery performance) and “Global Integrity Pact” (a process that including an agreement between a public purchase and all bidders for a public contract).

²⁰ For instance, “RESIST” is a joint project of ICC, PACI, Transparency International and the UN Global Compact to develop concise advice on how to resist different extortion scenarios.

²¹ OECD Recommendation of the Council for Further Combating Bribery of Foreign Officials in International Business Transactions, p.5. See also the International Standard Organisation’s draft “Guidance on Social Responsibility” document ISO/DIS 26000, currently circulated for comments, which spells out recommendations for compliance programmes relating to, among other issues, anti-corruption (p. 46) and fair competition (p. 48). See also the UK Bribery Bill approach, as referred to in note 9 above.