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Working Group on Bribery in International Business Transactions (CIME)

FOUR ISSUES RELATED TO CORRUPTION: A QUESTIONNAIRE

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FOUR ISSUES RELATED TO CORRUPTION: A QUESTIONNAIRE

Introduction

1. At its meetings on 30 March and 1 April and on 29 June to 1 July 1998, the Working Group on Bribery discussed ways to respond to the decision of the OECD Council that the CIME through its Working Group on Bribery shall examine on a priority basis the following issues with a view to reporting conclusions to the 1999 OECD Council meeting at Ministerial level:

- bribery acts in relation with foreign political parties;
- advantages promised or given to any person in anticipation of that person becoming a foreign public official;
- bribery of foreign public officials as a predicate offence for money laundering legislation;
- the role of foreign subsidiaries in bribery transactions;
- the role of offshore centres in bribery transactions.

2. The Chairman of the Group suggested that with respect to the first four issues the Secretariat should propose a questionnaire to elicit information on whether current national laws and national laws which would be adopted to implement the Convention, as well as any other relevant laws or measures (administrative law, corporate governance standards), would cover a number of significant cases of undue payments that concern the Group. The delegation of France offered to submit a note on approaches to the role of offshore centres in bribery transactions, and this has since been issued as DAF/IME/BR(98)11.

3. The present note suggests a number of basic cases that are relevant to each of the four issues. A questionnaire is attached as Annexe 1. Delegates to the Working Group are requested to submit replies to the questionnaire to the Secretariat (Ms. Carolyn Ervin; fax: 331 45 24 78 52; e-mail carolyn.ervin@oecd.org) by **18 September 1998** so that they may be part of the basis for discussion at the informal meeting of experts to be held on 5-6 October 1998.

Foreign political parties and party officials

4. A number of delegates are concerned that important cases of undue offers or payments to foreign political parties or party officials which are part of a quid pro quo transaction to obtain the award of a specific business contract or improper business advantage from a foreign public official acting in relation to the performance of official duties, will fall outside the coverage of the Convention. (The Group would not be concerned with illegal party or campaign financing intended only to develop a favourable relationship with public officials.)

5. The basic, direct bribery transaction concerning a foreign public official is one involving two actors: the briber and the recipient who is the public official who is induced to act or refrain from acting in

relation to the performance of official duties. The Convention will cover offers or payments to political party officials when this is part of a direct 2-actor transaction between the briber and the foreign public official:

- when the party official is a public official or exercises a public function, including the case of a one-party state; or,
- when the transaction is between the briber and the public official and the political party is the beneficiary of the bribe transaction.

6. The quid pro quo transaction to obtain the award of a business contract or improper business advantage from a foreign public official can be more complex if there are three actors -- the briber, the party official and the public official. If both the party official and the public official are involved with the offeror in the bribe contract, then it is a typical case of direct bribery with an intermediary. The bribe contract remains a contract between the briber and the public official. (However, if the party official is serving as an intermediary, but has not yet made the offer to the public official, then the crime has not been fully committed. It is only in the preparatory stage.)

7. A more interesting case is a typical situation involving political parties and party officials where two actors, the offeror/payer and the party official conclude the bribe contract; the party official promises to influence the public official to award the business or improper advantage. The third actor, the public official is not a direct participant in the illegal bargain, but provides the illegal quo. The public official is possibly unwitting, i.e., not aware of the bribe bargain, and consequently, merely the tool used by an outsider, the party official, who does not have the necessary qualification (public official) in order to deliver the illegal quo.

8. Participating countries might cover the case of a 3-actor transaction where the contract is between the offeror and the party official in a number of ways:

- The party official is considered to be an agent, intermediary or accomplice. The case is then covered by traditional concepts and by the Convention;
- The offer or payment to the party official might be covered by laws on trading in influence, party financing, or misuse of company funds.

9. The direct approach where the party or party official is equated to a public official, as in the US Foreign Corrupt Practices Act (FCPA), might be seen as another alternative. The FCPA expressly criminalises (emphasis added),

“the use of the US mails or any means or instrumentality of US interstate and foreign commerce in furtherance of any offer, payment, promise to pay -- or authorisation of any offer, payment or promise to pay -- any money or thing of value to foreign government or political party officials or candidates for foreign political office for the purpose of influencing their acts or decisions or inducing them to use their influence to affect or influence any act or decision of a foreign government in order to assist in the obtaining or retaining business or directing of business to any person”.

It would not, however, be necessary to isolate this case in legislation. Instead, one could ask whether the situation described in the FCPA -- where a briber makes an offer or payment to a party official in order to influence a public official in the performance of his/her duty -- would be covered by the application and interpretation of general provisions. In this situation, is the foreign political party official an intermediary,

agent, or accomplice? Do other concepts apply, such as traffic in influence, party financing, misuse of company funds, conspiracy or one-party state?

Candidates

10. The case of offers or payments to a candidate for public office might be treated like the 3-actor situations described above where the second and third actor are the same person, acting at different moments in time. The offer/payer (actor 1) makes the bargain with the candidate (actor 2), who then changes status and becomes the public official (actor 3). Two variations might be considered:

- 1) The offer/promise is made before the election, and the payment is made before the election; the pro quo occurs later, after the election when the candidate is a public official.
- 2) The offer/promise is made before the election; the payment or part of it is made (or is meant to be made) later when the candidate is a public official; and the pro quo occurs later when the candidate is an official.

11. In variation 2, when a payment is made after the candidate has become an official, in fact, the full quid pro quo transaction has occurred with the public official. The payment is part of the quid and, in effect, repeats the offer/promise. The case is obviously covered by the Convention. On the other hand, if the payment is only meant to be made, but is not made, it will be more difficult to pursue the illegal bargain as an attempt to bribe. If the bribe transaction is interrupted because the candidate does not become an official this might be an “attempt”: there is intent, but the object of the attempt does not achieve the quality (public official) to carry out the bargain. A similar situation might arise if the candidate becomes an official, but there is no post election payment for other reasons.

12. The first variation in paragraph 10 above, reflects a frequent real-life situation in which the offeror will make a significant campaign contribution. It is more difficult to cover and may be treated differently by countries participating in the Convention. Two ways to cover this case might be:

- 1) Candidates are equated to public officials in the law, which is the case of the FCPA or Japanese criminal law in domestic cases.
- 2) The offer or promise to a candidate of undue advantage is treated as a preparatory act, an attempt or a conspiracy to bribe.

Bribery as a predicate offence for Money laundering

13. The Convention requires “national treatment” for money laundering: if bribery of a domestic public official is a predicate offence for money laundering legislation, the bribery of a foreign public official should also be a predicate offence. A number of delegates expressed concern that this solution would lead to an imbalance in the application of the Convention, despite the general trend among countries to expand the list of predicate offences.

14. A simple means to begin to assess eventual coverage of the Convention is to inquire of each participating country whether bribery of domestic public officials is a predicate offence for money laundering legislation. Is a bank officer who has reason to believe that a deposit to his bank is a bribe payment to a domestic official obliged to report the transaction to appropriate authorities? Would prosecutors have a basis for acting against the bank officer if he did not report the deposit to the appropriate authorities? In the foreign public official variation, is a bank officer who has reason to believe

that a deposit is a bribe payment to a foreign official obliged to report the transaction to appropriate authorities? Does failure to report provide prosecutors with a basis for acting against the bank officer?

15. The fact that the proceeds of a bribe of a foreign official (profits or other benefits derived by the briber from the transaction or other improper advantage obtained or retained through bribery) will be subject to seizure as required by Article 3, paragraph 3 of the Convention, will increase incentives to hide proceeds in the financial system. A case would be where a company deposits or transfers the proceeds of a contract that was obtained by virtue of a bribe. Under money laundering legislation, would a bank officer who has reason to believe that the funds are the proceeds of a contract obtained by bribery of a domestic or foreign official be obliged to report the deposit to the appropriate authorities? Would prosecutors have a basis in money laundering legislation for acting against the bank officer if he did not report the deposit to the appropriate authorities?

Foreign Subsidiaries

16. The question of the role of foreign subsidiaries is essentially whether authorities in the country of the headquarters of the corporation can take action against officers of the company headquarters or the company if its foreign subsidiary bribes a foreign public official. The interesting case is where the authorities of the country where the company is headquartered can not take direct jurisdiction because the bribe takes place entirely outside the country of company headquarters and the officers of the subsidiary who are directly responsible are not nationals of the country of company headquarters. The relevant action could be taken by criminal prosecutors against officers of the company headquarters or against the company where the country applies the concept of corporate criminal liability. Action might also be taken by other authorities against officers of the company headquarters or the company. Actions by non-prosecutorial authorities will be especially interesting when a country does not apply the concept of corporate criminal liability.

What actions are possible when in the circumstances described above (the act occurs outside the home territory and is accomplished by non-nationals) the representative of the foreign subsidiary pays a bribe to a foreign public official and:

- a) the company headquarters knows nothing about the bribe?
- b) the company headquarters “should have known” about the bribe?
- c) the company headquarters actually knows about the bribe?
- d) the company headquarters authorised the bribe?

Annexe 1

Questionnaire relating to Four Issues

Political parties and party officials

Case 1: A company officer approaches a political party or political party official and offers to pay or pays a substantial sum to the party, if the political party or party official promises that a public official will award a specific business contract or improper advantage to the company.

- 1.1. How would your national criminal or other laws treat this case if the contribution were to a national political party, with the purpose of obtaining a contract or advantage from your national government?
- 1.2. How would your national laws that will implement the Convention treat this case if it involved a foreign political party and a foreign public official?

Possibilities might be: the party official is considered to be an agent, intermediary or accomplice; the offer or payment to the party official might be covered by laws on trading in influence, party financing, or misuse of company funds; the concept of a one-party state; or a direct approach where the party or party official is equated to a public official in the law. (See paragraphs 4-9 above.)

Candidates for political office

Case 2: A company officer agrees with a candidate for public office to make a substantial campaign contribution in return for the promise that the candidate will award the company a contract if the candidate wins the election and becomes a public official.

- 2.1. How would your national criminal or other laws treat this case if the contribution were to a candidate for a national public office?
- 2.2. How would your national laws that will implement the Convention treat this case if it involved a candidate for a foreign public office?

Possibilities might be that the candidate is equated to a public official in the law, or the offer or promise to a candidate of undue advantage is treated as a preparatory act, an attempt or a conspiracy to bribe, or that the case be covered by laws on the financing of political parties or election campaigns. (See paragraphs 10-12 above.)

Case 3: A company officer offers a candidate for public office a substantial campaign contribution immediately and another substantial payment once he/she has been elected, in return for the promise that the candidate will award the company a contract if the candidate wins the election and becomes a public official. The second payment -- after the election -- is not made.

- 3.1. How would your national criminal or other laws treat this case if the contribution were to a candidate for a national public office?
- 3.2. How would your national laws that will implement the Convention treat this case if it involved a candidate for a foreign public office?

Bribery as a predicate offence for Money laundering

Case 4: A deposit is made to a domestic bank. An officer of the bank has reason to believe that the deposit is a bribe payment to a domestic public official.

- 4.1. Under your money laundering legislation is the bank officer obliged to report such a deposit to appropriate authorities? Does the failure to report the transaction to the appropriate authorities give criminal prosecutors or other authorities a basis to take action against the bank officer?
- 4.2. How would your national money laundering laws treat this case if the bank officer has reason to believe that the deposit is a bribe payment to a foreign public official?

Case 5: A company's financial officer makes a deposit or transfer to a domestic bank of company assets received in payment of a contract with the national government. An officer of the bank has reason to believe that the funds are the proceeds of a contract obtained by bribery of a domestic public official.

- 5.1. Under your money laundering legislation is the bank officer obliged to report the transaction to appropriate authorities? Does the failure to report the transaction to the appropriate authorities give criminal prosecutors or other authorities a basis to take action against the bank officer?
- 5.2. How would your national money laundering laws treat this case if the bank officer has reason to believe that the funds are the proceeds of a contract obtained by bribery of a foreign public official?

Foreign subsidiaries

Case 6 The foreign subsidiary of a corporation with headquarters in your country bribes a foreign public official in order to obtain a contract. The bribery act occurs entirely outside your territory; the officers of the subsidiary who are directly responsible are not nationals of your country.

- 6.1. Under your national laws and/or rules that will implement the Convention, can your authorities take action in criminal or non-criminal proceedings against officers of the corporation headquarters or against the corporation headquarters itself:
 - a) if the company headquarters knows nothing about the bribe?
 - b) if the company headquarters "should have known" about the bribe?
 - c) if the company headquarters actually knows about the bribe?
 - d) if the company headquarters authorised the bribe?
- 6.2. Under your national laws and/or rules that will implement the Convention, can any of your authorities take action against the foreign subsidiary? What other circumstances are necessary?