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Working Group on Bribery in International Business Transactions (CIME)

FIVE ISSUES RELATING TO CORRUPTION

This document is distributed to the Working Group for discussion at its meeting on 3rd - 5th November (item 4 of the agenda).

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FIVE ISSUES RELATING TO CORRUPTION

Informal meeting of experts

Milan, 5-6 October

(Note by the Secretariat)

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, 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. For each issue, the Report to Ministers would analyse existing coverage, assess the adequacy of that coverage, and recommend appropriate action. The Secretariat proposed a questionnaire on the first four issues [DAFFE/IME/BR(98)9/REV1] covering a number of significant cases of undue payments that concern the Group. The methodology agreed by the Working Group is to examine what is the actual extent of coverage under existing national laws or national laws which would be adopted to implement the Convention, and what is the minimum standard required by the OECD Convention. The Working Group should then assess the extent of areas not covered and determine whether there is a need for further international action. The replies of the 21 countries that responded to the questionnaire can be found in DAF/IME/BR/WD(98)4/REV1 or in DAF/IME/BR/WD(98)4/ADD1. The French submitted a note on approaches to the role of offshore centres in bribery transactions, issued as DAF/IME/BR(98)11/ADD1 and the United States contributed a note on bribery of foreign political parties, party officers and candidates for political office in international business transactions DAF/IME/BR(98)12.

3. This report summarises the discussions of the informal meeting of experts held in Milan on 5-6-October under the chairmanship of Prof. Sacerdoti, based on answers to the questionnaire and comments to the notes by France and the United States. It sets out proposed conclusions on the five issues for consideration by the Working Group at its meeting on 3-5 November, 1998 to assist the Group in the preparation of the Report to Ministers. This report is submitted to the Working Group for consideration and advice on further action.

Foreign political parties and party officers

4. A number of delegates are concerned that certain important cases of undue offers or payments to foreign political parties or party officers might fall outside the coverage of the Convention. The offers or payments involved would be those that 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. When the quid pro quo is between two actors (the company officer and the public official), the case is covered by the Convention, but the situation of a three-actor bribery transaction can be more problematical. This issue would not include illegal party or campaign financing to develop a favourable relationship with party officers.

5. Countries were asked to assess coverage of the following cases:

Case 1. Payment (or promise to pay) by a company officer made to the political party/party officer in exchange for promise that a public official will award a contract or improper advantage to the company.

1.1 treatment of contribution to a **national political party** under national criminal laws

1.2 contribution to a **foreign political party** under national laws implementing the Convention

6. Experts agreed that both these situations are about a quid pro quo transaction, the offer of an undue advantage for a specific result (a quo). Where the political party officer is also a public official, or where there is a one-party state, there is no problem covering this situation. Most countries thought that the Convention would also cover the case when the bribe is made to the public official but the beneficiary of the transaction is the political party, although a few countries indicated they might have difficulty with this. In both these cases, there are only two actors (the briber and the public official). The quid pro quo transaction might also include three actors -- the briber, the party officer, and the public official. If all three are involved in the bribe contract, then it is a classic case of direct bribery with an intermediary or an accomplice (i.e., the party officer). Here, the contract is still between the briber and the public official.

7. The case that needs closer examination is where the political party officer is not a public official. If the bribe contract is between the offeror and the party officer who promises to influence a public official, the third actor (the public official) may not be a direct participant but provides the illegal quo. This case might be captured directly, or through general approaches:

- i) the party officer is equated to a public official,
- ii) the party officer is considered an agent, intermediary, or accomplice
- iii) the offer or payment to the party officer is covered by laws on trading in influence, party financing, or misuse of company funds

8. A more difficult case is where the public official is unaware of the bribe contract or has been tricked or is acting under duress or pressure. Concepts of aiding and abetting or complicity require the notion of an author who is usually the public official. These concepts cannot be used when there is no author. Some countries indicated that other general provisions might be applicable here, such as trafficking in influence, misuse of company funds, or indirect bribery. The difficulty is that there is no homogenous coverage.

Possible conclusions for consideration by the Working Group

9. At a minimum, the report to Ministers should clarify that the issue being addressed is not party financing, but corruption. The report should highlight that this issue is relevant. It should note that the Convention covers situations where the party officers and the public officers are in collusion (co-authors), where party officers are also public officials, and where party officers are intermediaries or accomplices. The experts considered that the Convention covers (or should cover) the case where the political party is a beneficiary (provided it can be considered to have received an undue advantage from the public official). If necessary, this could be made explicit in an interpretative note.

10. For those cases not covered, (lack of intention, lack of knowledge, no benefit), the Working Group should consider looking more closely at these to determine how significant this problem actually is. It is an area where domestic laws appear to be different but some experts emphasised that what is important is to focus on the conduct that we want to capture. The status of the actors involved should not be the determining factor. They thought it would be an extremely difficult task to try to define political parties and political party officers. For some countries, it would be very difficult to equate a party officers to a public official, although it might be possible to reach similar results by focusing on the act itself.

11. In summary, when a public official is knowingly involved in the transaction it is covered. The more difficult case is when the public official is not aware and is not a party to the illegal transaction of undue benefit. The experts noted that the Convention and ratifying legislation of most countries would not cover this case. However, most national laws would cover such an instance either under specific laws on trafficking in influence or political party financing, or like the UK with its general statute and the US which has a specific provision which equates officials of foreign political parties to foreign public officials.

12. Experts also noted the concerns of some delegations regarding unequal application of the Convention and that potentially this is a problem to watch. However, until the Convention is in force and some experience in its application is gathered, it is difficult to judge whether this is a major problem and what action is needed to remedy it. The monitoring process of the Convention should be particularly attentive to this issue.

Candidates for Public Office

13. The case of offers or payments to a candidate for public office might be treated like a three actor situation, similar to the one involving company officers, political party officers and public officials. In this case, the second and third actors are the same person but their status changes in time when the party officer later becomes a public official.

14. There are two variations this case:

1) the offer/promise is made before the election, payment is made before the election; the quid pro quo occurs later when the candidate is a public official;

2) The offer/promise is made before the election, payment (or part thereof) is made when the candidate is a public official and the quid pro quo occurs when the candidate is a public official.

15. This first variation is difficult to cover and may be treated differently by countries in the Convention. Candidates might be equated to public officials, or the offer or promise to a candidate is treated as a preparatory act, an attempt, or a conspiracy to bribe.

16. In the second variation, the Convention will cover the case when the payment is made after the candidate is a public official and the quo is delivered once the candidate is an official. It is more difficult to cover the case where the payment is only promised, but not actually made. When the payment is not made because the candidate does not become a public official, the case might be considered an “attempt”.

17. The questionnaire asked countries to consider the following cases:

“Case 2. 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 a contract or improper advantage to the company.”

2.1 what would be the treatment under national laws if contribution were to a *national* party

2.2 what would be the treatment under national laws to implement the Convention if contribution were to a *foreign* political party.

“Case 3. company officer offers a candidate for public office a substantial campaign contribution immediately and another substantial payment after election 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 payment after the election is not made.”

3.1 what would be the treatment under national laws if contribution were to a candidate for *national* office

3.2 what would be the treatment under national laws to implement the Convention if contribution were to a candidate for a *foreign* political office

18. Case 2 remains very difficult for most countries to cover. Quite a few countries cannot apply national penal, or anti-corruption laws, etc. unless the party officer is also a public official. Some countries are considering in their legislation to implement the Convention, a provision that would equate both national and foreign candidates to public officials. For others, if assimilation of a candidate to a public official were valid on a national level, it could be argued that there should be symmetry with the international situation. But some countries that said they cover national candidates, also said they could not cover foreign candidates.

19. Where candidates are not considered as public officials, even the concept of “attempt” is problematical for most systems because the person is not invested with any qualification to deliver the quo. For some countries, there cannot be an attempt to corrupt since corruption itself is a preparatory act (to distort an official decision). Countries indicated however that there may be indirect ways of reaching the company official through other laws such as financing rules for election campaigns, misuse of company assets, trafficking in influence, or breach of trust.

20. In case 3, there was more agreement that if a **payment is made** after the candidate becomes a public official, the case is easier to cover. If the candidate becomes a public official but for some reason the **payment is not made**, there may be alternative ways to get the company officer that has offered the

bribe, perhaps misuse of company assets, campaign financing laws (although it is not clear whether these are applicable transnationally), or perhaps even conspiracy. Conspiracy might work, but only under specific circumstances. If there is only a company officer and a candidate for a foreign public office, this might not be enough to trigger conspiracy statutes. Applying laws regarding misuse of company funds might also be problematical if the behaviour to bribe a candidate is not also illegal in the country where it occurs. Would this still be abuse of company funds ?

Possible conclusions for consideration by the Working Group

21. This issue raises concerns over the transparency of the political process. The purpose of the OECD Convention is to guarantee equality of conditions in international business transactions. There should be some responsibility on the part of the home countries of MNEs that they do not obtain international contracts through corruption. Then, if company officers make payments to political candidates in anticipation of their becoming public officials, the experts considered this a relevant problem.

22. To sum up, there was consensus that case 3, where a promise is made to a candidate --the candidate is then elected -- and payment is made when the candidate is a public official, is covered. It is for consideration by the Working Group whether this should be a general standard under the Convention. Even where there is a payment before the candidate becomes a public official (and no payment afterwards), there is a tendency to say that it should also be covered as long as a public official is induced by a promise of money to improperly favour one company over another. But most countries said they might only be able to cover this latter situation under other laws on such as campaign financing. In general, case 2 (where payment is made before a candidate becomes a public official) would not be covered under the Convention nor by implementing legislation but could be covered under other laws like trafficking in influence or abuse of office.

23. One additional aspect that needs to be kept in mind is that of dual criminality-- is it necessary that the act also be illegal in the country of the foreign public official in order to apply such laws as misuse of company assets, or conspiracy.

24. The Working Group needs to determine how significant this issue of payments to candidates before they are public officials is, in order to decide whether further action is necessary. .

Money Laundering

25. 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.

26. A simple means to assess eventual coverage of the Convention is to determine whether participating countries make bribery of a domestic public official a predicate offence for money laundering legislation. Is there an obligation on the part of the bank officer to report that a deposit is a bribe payment to a **domestic public official**, and would there be a basis for acting against the officer for failure to report? In the case of a bribe payment to a **foreign public official**, is the bank officer who has reason to believe that a deposit is a bribe payment to a foreign official obliged to report the transaction?-- Does failure to report provide a basis for acting against the bank officer?

27. Article 3.3 of the Convention makes the proceeds of a bribe of a foreign official subject to seizure. This may increase the 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 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?

Case 4: Bribe payment to a domestic or foreign public official

4.1 and 4.2 Obligation to report such a deposit and sanctions for failure to report

Case 5: Proceeds of contract to bribe a domestic or foreign public official

5.1 and 5.2. Obligation to report transaction and sanctions for failure to report

28. In many cases, countries make bribery a predicate offence for money laundering legislation. A few make only passive, not active, bribery a predicate offence. Many of these countries provide for reporting obligations on the part of the bank officer who has reason to believe that the deposit is a bribe payment to a domestic public official. Where this applies to bribe payments to domestic officials, the countries apply the legislation also with regard to bribe payments to foreign public officials.

29. The treatment of the proceeds of a contract obtained by bribery was less clear. Some countries do provide for an obligation on the part of bank officers to report transactions that they have reason to believe are proceeds of a contract obtained by bribery and they apply this obligation to both cases where the bribe was to a domestic or foreign public official. Other countries said that it was difficult to identify what funds were part of the proceeds of a contract obtained by bribery and which funds were part of legal transactions and so make no provision for reporting obligations.

30. While the work of the OECD and the Convention are often characterised as oriented principally towards the supply-side of corruption, this is only part of the story. It is true that the Group is concerned with what companies are doing abroad but there is also an interest in what financial centres are doing. The *raison d'être* of Articles 3, 7, and 8 of the Convention is independent of the supply side logic. It is important to target the activity of financial centres because large scale corruption is not possible without slush funds and money laundering.

31. ***Laundering of the bribe.*** *On the international level*, the OECD Convention does not go beyond requiring domestic treatment for the bribery of a foreign public official. Another instrument which is not a convention, the FATF Recommendation of 1996 asks countries to broaden the scope of predicate offences for money laundering to all serious crime. The missing link between the two is to provide that grand bribery abroad is a serious offence. That is not in the OECD Convention but it is in the logic of FATF. *On the domestic level*, this discussion has shown relatively clearly that most countries have the possibility of pursuing such transactions. This does not refer to the administrative set-up but rather to criminalisation, although the administrative set-up is an accessory to criminalisation.

32. ***Laundering of proceeds.*** *On the international level*, the FATF would also apply to proceeds, that is, not only to the salary of the criminal (the bribe) but also the proceeds from all serious crime. If the

proceeds are laundered, this should be a predicate offence. This is a difference between what we have been doing and what the FATF is doing. The OECD Convention is unclear on proceeds because it only stipulates domestic treatment. Article 3.3. of the Convention does require seizure and confiscation of proceeds which is a different thing from money laundering. *On a domestic level*, those countries that define money laundering as impeding confiscation (i.e., obscuring the money trail) indirectly extend the scope of the crime of corruption to transnational corruption. In doing so, they automatically include the laundering of proceeds as part of money laundering. But this is not something required by the Convention.

Possible conclusions for consideration by the Working Group

33. Although experts thought that the Convention's requirement of national treatment concerning bribery as a predicate offence for money laundering, could prove an imbalance in the application of the Convention, they felt that the Working Group cannot do everything, especially where there are other experts already in this area. A priority should be to insist on implementing the Convention. If the Working Group wants to do something beyond this, it could consider supporting the FATF 1996 Recommendation by stating that Member countries consider transnational bribery as a serious offence. The Working Group could propose such a Recommendation to Ministers in May 1999 that would be transmitted to FATF.

34. Some experts cautioned about the use of the expression "serious offence"-- this concept should not substitute for the legal concepts as developed in the Convention. However the concepts in the Convention already imply that it is focused on serious, or grand corruption. In implementing the Convention, many countries have taken care to use the breach of duty concept so as not to include types of grease payments; others exclude these facilitation payments directly.

Foreign subsidiaries

35. 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 itself, if its foreign subsidiary bribes a foreign public official.

36. Countries were asked to consider under what circumstances their authorities could take action, criminal or non-criminal, against officers of the corporation headquarters, the corporation headquarters itself, or the foreign subsidiary.

37. **Case 6: foreign subsidiary bribes a foreign public official to obtain a contract, act occurs outside the territory, officers of the subsidiary are not nationals**

6.1. Action against the **officers or corporate headquarters**

a) company headquarters has no knowledge of the bribery transaction

38. Most countries indicated that under their national laws they cannot take action against officers, or corporate headquarters, in the case where there is no knowledge of the bribery transaction.

b) company headquarters "should have known" about the bribe, and
c) company headquarters "knows" about the bribe

39. The answers to these two questions were not substantially different. What was determinate in most cases was whether in the relevant national corporate law, there was a concept of corporate responsibility. Under this concept, officers or the company headquarters, could be liable if the circumstances could show that there was breach of duty, or gross negligence, or reckless disregard of legal provisions concerning corporate organisations and control of parent companies over their subsidiaries. Even where there is criminal corporate liability, unless there is “knowledge” as in case (c) which could be considered either complicity or conspiracy, it would be difficult to take action against the officers or the corporate headquarters. Some countries however indicated that they could not take either civil or criminal proceedings in these circumstances because of the lack of a territorial link to the act of bribery, or because no national was involved.

d) company headquarters authorised the bribe

40. In this case, most countries said they could take action against the officers or corporate headquarters since the act of authorising the bribe would be a sufficient territorial link to take jurisdiction. Action could be either civil or criminal. In some cases, authorisation would allow prosecution for complicity, active bribery, or conspiracy.

6.2 Action against the **foreign subsidiary**

41. Most countries thought that where the bribery transaction occurred entirely abroad and where no nationals of the corporate headquarters home country were involved, it would be extremely difficult to exercise jurisdiction in this case. If nationals were involved, then under the extended nationality principle, some countries would be able to take action against the foreign subsidiary provided they recognise criminal liability of companies.

Possible conclusions for consideration by the Working Group

42. Experts shared the view of the crucial importance of this subject for the effective implementation of the Convention. They were of the opinion that the issue of how to deal with foreign subsidiaries is linked to how countries deal with notions of corporate responsibility in their national company laws. There was concern that the different approaches in jurisdiction may hamper effective implementation and lead to uneven application of the Convention.

43. Experts considered whether the Working Group should recommend that countries introduce the concept of corporate responsibility of the parent in the supervision of the activities of the foreign subsidiary especially with a view to ensuring that bribery is not committed through foreign subsidiaries. Countries could attach civil sanctions, which many experts considered could be a more effective means than criminal sanctions, to the lack of effective supervision of foreign subsidiaries. Other means to enforce some control would be to encourage corporate governance schemes in headquarters and in subsidiaries. Indeed, standards relating to corporate governance, business ethics, and international accounting standards, could be effective means of promoting self-regulation than legal rules themselves.

44. However, experts thought that a definitive solution should await the entry into force of the Convention as well as experience among countries with its application. It would be necessary to closely survey this problem through the Convention’s review and monitoring mechanism. In the meantime, it would be important to find ways to improve Member countries’ ability to control the actions of their corporations and to encourage companies to take more responsibility for self-policing.

The role of offshore financial centres

45. The informal meeting discussed the issue of the role of offshore financial centres in the development of financial crime on the basis of a note by the French delegation [DAFFE/IME/BR(98)11/ADD1]. The purpose of that note is to propose that the Working Group on Bribery make a contribution on this issue, taking as a basis the work realised in other organisations (in particular FATF) and avoiding overlap and duplication of effort.

46. The approach proposed is to identify the practices that impede the success of anti-corruption investigations. These obstacles stem largely from practices such as abuse of bank secrecy, absence or insufficiency of rules on identification of clients, legal forms of companies which do not permit the identification of the true owners, and de facto or de jure obstacles to the smooth progress of investigations and administrative or judicial international co-operation.

47. The experts agreed that this area was particularly sensitive and one which represents a serious problem. There was strong support to develop further information and to identify the methodologies related to corruption. To analyse the topic, one needs to identify the practices involved using the substantial amount of information already available, as well as practical experiences by prosecutors. The French expert thought this work should call attention to the problem and identify which fora are better equipped to deal with the whole issue.

Possible conclusions for consideration by the Working Group

48. The experts concluded that this issue raised serious concerns and considered several proposals for furthering this analysis. They decided to recommend to the Working Group that it consider the convening of a special, ad hoc session with prosecutors that have experience in the areas concerning the Convention. The session (possibly chaired by France) should identify the problem, define what is an offshore centre, and also identify the specific problems created by these centres. The session could formulate a preliminary list of practices, used especially by offshore centres, which impede the successful pursuit of investigations and prosecutions of bribery of foreign public officials. Countries that wish to participate in the special session could nominate a team of officials, including a prosecutor. The experts agreed that this proposal be noted on the agenda for the upcoming November meeting of the Working Group so that the Group may discuss it and give its advice.