International Chamber of Commerce
The world business organization

Department of Policy and Business Practices

Memorandum to the OECD Working Group on Bribery in International Business Transactions

Recommendations by the International Chamber of Commerce (ICC) on further provisions to be adopted to prevent and prohibit PRIVATE-TO-PRIVATE CORRUPTION

Prepared and submitted by the Commission on Anti-Corruption on 13 September 2006

1.- ICC has for many years, on the basis of studies it has inspired and conducted[1], drawn the attention of the business world, national governments and international organizations to the damage that private-to-private corruption inflicts on competition in international business transactions.

In particular, it has conveyed to the OECD Working Group on Bribery in International Business Transactions (the Working Group) that private-to-private corruption, even though it does not affect directly public trust vested in public officials, undermines the smooth functioning and credibility of free, open and global competition. By adding an artificial and unwarranted element to the cost of business, it distorts the terms of exchange of international business transactions and penalizes loyal market participants.

ICC has noted that such form of corruption has grown in scale in recent years, notably as a result of the continuing positive trends of privatization and market liberalization, and that it has pervaded many sectors and business activities. ICC believes therefore that fighting private-to-private corruption will be a key element of worldwide efforts to create a level playing field for all market participants, to build public and private sector trust in the rule of law and to lower trans-border transaction costs.

The recent probing of allegations of large scale corruption involving staff members of an auto parts firm of one country and affecting one or more car manufacturers in another country shows again how significant, widespread and dangerous the phenomenon can be.

[1] *Private Commercial Bribery, A comparison of National and Surpranational Legal Structures*, Günter Heine, Barbara Huber and Thomas O. Rose, editors., Joint publication by Max Planck Institute for Foreign and International Criminal Law and ICC Publishing, Paris, 2003.

2. - The illegitimate practices ICC is concerned with can be defined as follows

- ***the intentional offering, promising or giving, whether directly or through an intermediary, in the course of international economic, financial or commercial activities, of any undue pecuniary or other advantage, to any person, who directs or works for, in any capacity, another private sector entity, for this or another person, in order that this person act or refrain from acting in breach of this person's duties;***

- ***the intentional solicitation or acceptance, whether directly or through an intermediary, in the course of international economic, financial or commercial activities, by any person who directs or works for, in any capacity, a private sector entity, of any undue pecuniary or other advantage or the offer or promise thereof, for this or another person, in order that this person, act or refrain from acting in breach of this person's duties.***

One will note that the above definitions encompass "facilitation payments", as set forth in article 6 of the 2005 revised *ICC Rules of Conduct and Recommendations to Combat Extortion and Bribery*[2] (the ICC Rules of Conduct).

3. - ICC has therefore proposed, in accordance with its long lasting stance against private-to-private corruption, that enterprises tackle these corruptive practices through self regulatory rules inspired by the ICC Rules of Conduct [3] and embedded in their own corporate codes of conduct.

ICC has noted with approval that many enterprises have already introduced measures of prevention and prohibition of private-to-private corruption in their corporate rules of conduct.

4. - Corporate self-discipline and international and national norms should however go hand in hand to be efficient and reinforce each other, particularly in an area as sensitive as integrity in international business transactions.

---

[2] First issued in 1977, redrafted in 1996, revised in 1999 and redrafted again in 2005, the ICC Rules of Conduct state in their article 6 that:
"a) Enterprises should not make facilitation payments. In the event that an enterprise determines, after appropriate managerial review, that facilitation payments cannot be eliminated entirely, it should establish controls and procedures to ensure that their role is limited to small payments to low-level officials for routine actions to which the enterprise is entitled;
b) The need for the continued use of facilitation payments should be reviewed periodically with the objective of eliminating them as soon as possible."

[3] For the prohibition of private-to-private corruption, see in particular article 1, a, 3rd indent of the 2005 edition.

A number of international organizations have already identified private-to-private corruption as a high level priority and have incorporated its prohibition in their international instruments.

The following instruments, listed in chronological order, may be mentioned as valuable examples:

- the Criminal Law Convention on Corruption of the Council of Europe[4], which opened for signature on January 27, 1999, entered into force on July 1, 2002 and has been ratified by 34 States,

- the Civil Law Convention on Corruption of the Council of Europe[5], which opened for signature on November 1, 1999, entered into force on November 1, 2005 and has been ratified by 27 States,

- the United Nations Convention against Transnational Organized Crime[6], which opened for signature on December 12, 2000, entered into force on September 29, 2003 and has been ratified by 122 States,

- the African Union Convention on preventing and combating corruption[7], which opened for signature on July 11, 2003 and has been signed by 21 States,

- the Framework Decision of the Council of the European Union July 22, 2003[8][9] on combating corruption in the private sector, for which the deadline for transposition in the legislation of the Member States was July 22, 2005,

---

[4]Articles 7 ("Active bribery in the private sector") and 8 ("Passive bribery in the private sector") impose on the State Parties the obligation to enact legislative and other measures criminalizing both active and passive bribery in the private sector.

[5]Article 1 imposes on the State Parties to provide effective remedies for persons having suffered damage as a result of acts of corruption and article 2 contains a definition of corruption, encompassing implicitly public and private corruption.

[6] Article 8 provides for the criminalization of corruption of public officials, while the 2nd indent of this article requires each State Party to consider establishing as criminal offences other forms of corruption.

[7] Article 5 provides that the State Parties undertake to adopt legislative and other measures to establish as offences the acts mentioned in article 4; article 4, 1, indent (e) lists *i.a.* active and passive corruption in relation with a private sector entity.

[8]This instrument repeals the Joint Action of December 22, 1998 adopted by the Council on the basis of Article K.3 of the Treaty of the European Union, on corruption in the private sector .

[9]Article 2 requires the Member States to criminalize both active and passive corruption in the private sector (within profit and non-profit entities).

- The United Nations Convention against Corruption (UNCAC) [10] opened for signature on December 9, 2003, entered into force on December 12, 2005, and has been ratified by 61 States.

5. - ICC believes that it would be appropriate and timely for the OECD, which has constantly promoted a policy of free and fair competition in international markets, to widen the scope of its condemnation of corruptive practices by adding to its efficient and powerful instruments combating international corruption a firm declaration against the forms of corruption between enterprises, as mentioned in item 2 hereinabove.

Such addition would ***strongly recommend***, on the basis of the now firmly established technique of functional equivalence, that ***each State Party takes such legislative and other measures as may be necessary to establish that it is a criminal offence under its law to proceed or attempt to proceed with*** any of the above mentioned forms of private corruption, ***and that this crime, as well as its prosecution, be made a high enforcement priority.***

This modification could be achieved through an addition to the 1997 Revised Recommendation or through the adoption of a new Recommendation, as long as the new provisions be made part of the norms subject to the strict OECD monitoring mechanism (self evaluation and peer review).

ICC stands ready to provide its assistance and expertise to the members of the Working Group in exploring the modalities of the incorporation of the prohibition of private-to- private corruption into OECD instruments.

Such initiative would close a gap in the OECD provisions against corruption and would bring the OECD instruments on par with the existing texts of other international organizations.

--*-*-*-*-*-*

[10] Article 21 provides that each State Party shall consider adopting legislative and other measures criminalizing both active and passive bribery in the private sector.