LEGAL AND PRACTICAL ISSUES OF COMBATTING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS PRACTICE

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Until recently bribery in international business transactions was considered just a part of business as usual. Large multinational companies have often traded payoffs for favorable consideration by decision makers to win contracts, acquire limited import licenses, reduce import duties, or receive favorable interpretations of laws affecting the firm [13]. On the other hand, bribery involves high level government officials and the disclosure of the corruption case may impact on the political dynamic of the country. The more fragile the economy and democracy in the country the more it tends to favor bribery in dealing with foreign businesses.

Distortions caused by negative effects of bribery and corruption draws the attention to the necessity of fighting corruption thusmultiple conventions and regulations both on the local and international level have been implemented to deal with elimination of this problem.

Defining bribery and corruption

Corruption refers to acts in which the power of public office is used for personal gain in a manner that contravenes the rules of the game [1]. The two major types of corruption are political corruption (used to sustain political power, status and wealth); and bureaucratic corruption, which is entirely reflected in the phenomenon commonly known as bribery, that is, when private actors make payments to public officials to obtain a benefit or

to avoid harm, and when these are pocketed by the recipient or used for partisan political purposes.

The OECD Convention on Combating Bribery of Foreign Public Official in International Business Transaction 1997, defines bribery as: "any Intentional offer, promise or give any undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign public official, for that official or for a third party, in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business" [5].

In practice bribery to foreign public official takes multiple forms, such as bribe, kickback, grease or facilitating payment, extortion and agent fees.

Bribe is an inducement that influences a public official to perform his/her duties in a manner contrary to the course that would otherwise be adopted [12].

Kickback is cash or expensive gifts given to foreign officials so a company would receive contracts that it would not otherwise have been awarded. A typical example is the case of Australian Wheat Board (AWB) that allegedly gave kickback AUS $ 300 million to Sadam Husein in order to win the "oil for food" contract [3].

Another type of this bribery is *grease* or facilitating payments, these are small payments to low-level officials to perform their duties in such way that they may give benefit for the company (e.g. facilitating customs clearance formalities).

Extortion or blackmail is the payments given by MNCs to the corrupt official by means of intimidation and threat of violence. Companies pay to protect the company's assets, staff or financial from the potential governmental injury, interference or expropriation [12].

The last type of bribery to foreign public official is *"agent fee*". Agent fee is commission paid to lawyers, consultants or commissioners, who are family of the high level of officials, but the payment itself is related not to their professional service but is the "fee" for winning the contract or to "secure" the company [12].

The inclination of MNCs and their agents from a particular country to provide bribes to foreign officials is likely to reflect the firm's practices regarding bribery at home. Thus, firms from countries having high levels of domestic corruption are more likely to provide bribes in international transactions. Firms from countries that have extensive trade ties with countries where bribery is expected may be more likely to engage in such practices. Firms from countries conducting a large proportion of trade with industrialized (OECD) countries are less likely to provide bribes in international transactions.

Assessment of the existing anti-corruption measures and their flaws.

Bribery and corruption with all their consequences being widespread in international business transactions, they started to be a matter of high concern only in the 90s. Many countries, especially developed ones began started to regard bribery as a threat to fair conduction of international businesses, and thus enforced and promoted implementation of multiple global, regional and local conventions and legal norms incorporated in the national laws.

International community succeeded in establishing some measures of soft law, constituting various International Organizations actions as well as those of NGOs.

The World Bank designated its anti-corruption actions by following means: preventing corruption projects financed by WB; assisting countries in fighting corruption; supporting international efforts against corruption.

International Monetary Fund considers corruption and accountability issues in its relations with borrowing countries in order to prevent threat that corruption poses to international lending for development.

International Chamber of Commerce issued its Rules of Conduct to Combat Extortion and Bribery in International Business Transactions in 1977establishing a set of guidelines to promote high standards of corporate conduct [9].

World Trade Organization has established the Transparency in Government Procurement working Group to study transparency in government procurement practices [15].

Transparency International is the most proactive NGO in the field of combating corruption, which focuses on increasing governments' accountability and curbing both international and national corruption. Its Corruption Perceptions Index and Bribe Payers Index are the effective tools of information gathering and raising public awareness [14].

Whereas some of the most important legal instruments are the following:

*Foreign Corrupt Practices Act.*A United States law passed in 1977 which prohibits U.S. firms and individuals from paying bribes to foreign officials in promoting a business deal and against the foreign official's duties. It is prohibited by the act to make bribes directly or by intermediaries. Both US business entities acting abroad and foreign firms conducting their business in the United States are subjects to its regulation. Among the punishments under the act are fines of up to double the amount of the benefit expected to be received from the bribery, and imprisonment for up to five years [7].

*The OECD Anti-Bribery Convention.*The Convention on Combating Bribery of Foreign Public Officials in International Business Transactions was adopted by the Organization for Economic Cooperation and Development (OECD) in 1997, with 29 OECD member countries and *five non-member countries as signatories.* It obligates the parties to criminalize

bribery of foreign public officials. The Convention requires the parties to take necessary measures to prohibit the establishment of off-the-books accounts and similar practices used to bribe foreign public officials or to hide such bribery, as well as for purposes of money laundering Implementation of the convention is closely monitored, including three-phased process: in-depth evaluation of each State Party's legislation for complying with the instrument; meetings with relevant representatives from the government, civil society and the private sector in the country being evaluated; monitoring enforcement and willingness to prevent, investigate and prosecute bribing companies and individuals [5].

Inter-American Convention. Inter-American Convention Against Corruption, being adopted in 1996, requires that the States Party take specific steps to combat corruption. It also includes provisions on certain forms of international cooperation and assistance such as extradition, mutual legal assistance, and asset seizure and forfeiture.

GRECO.Group of States against Corruption (GRECO), established in 1999 by the Council of Europe. It helps to identify deficiencies in national anti-corruption policies, fostering the necessary legislative, institutional and practical reforms, as well as provides a platform for the sharing of corruption prevention and detection practice [8].

*The UN Convention Against Corruption*adopted in 2003. Signatories commit to prevent and criminalise corruption, to openly co-operate with one another in cases of cross-border corruption activities and to return stolen assets to countries of origin. Compliance review mechanism includes country self-assessments, a country visit, and the drafting of a review report submitted to the country under review for approval. The UNCAC is the most comprehensive anti-corruption treatyin existence today, both in terms of geographical coverage and issues addressed [9].

Among the other important instruments are the ones creating regulations in Europe: *Council of Europe Criminal Law Convention on Corruption from 1999* (coordinates the criminalisation of a large number of corrupt practices, as well as provides for complementary criminal law measures and improved international co-operation in the prosecution of corruption offences. Monitors compliance through GRECO) and *Council of Europe Civil Convention on Corruption from 1999*(defines common international rules in the field of civil law and corruption in an international treaty. Contracting Parties are required to provide compensation for persons who have suffered damage as a result of acts of corruption) *The Convention on the Protection of the European Communities' Financial Interests and its protocols* (establishes a common legal basis for the criminal-law protection of the European Communities' financial interests. Fraud affecting both expenditure and revenue must be are punishable by effective, proportionate and dissuasive criminal penalties, including, at least in cases of serious

fraud, penalties involving deprivation of liberty which can give rise to extradition) [6].

As it can be seen the tools for combating corruption is vast, but it is constrained by the number of issues characteristic for this problem.

1. First of all even if the country is willing to take active measures in combating bribery, not all the countries define bribery in the same way.

2. Secondly, the countries that take proactive measures for fighting corruption are OECD members, mostly developed countries, while most of the foreign bribery cases were committed in developing countries (non-OECD members in Africa and Asia). Thus, the effort to combat the bribery comes mostly from the side of "briber" (supply side), and less from the side of the "receiver".

3. The next argument regards *conflict ofstates' jurisdiction*. Since the most important element in the prosecution of a crime is the place where it has been committed. Thus, every state that has the domestic law against foreign bribery can conduct the investigation for the case if it is committed in its territory. But to enforce its criminal law on its company that violated domestic law against bribery in the territory a foreign country, the consent of that foreign state in needed.

4. It is still debatable who should be punished: *the individual or a company*? There is no common view on whether the company's employees paying the bribery or the company itself should take the responsibility for the action, because the bribery is the decision for the sake of company's interest.

5. Who should be prosecuted the *parents company or subsidiary*. The critical point lies in whether the decision to bribe was made by the directors in parent company or by the subsidiary alone. In practice, however companies prefer any prosecution to be restricted to the subsidiary, then the punishment will not influence the whole company's business including other subsidiaries in other countries [2].

KPMG, one of the largest professional services company has defined in its Bribery and Corruption Survey, 2011, the key reasons for poor enforcement of anti-bribery and corruption laws:

- Political Interference
- Delayed justice that impairs the effectiveness of the verdict
- Penalties not being harsh enough to deter repetition of the crime
- Involvement of multiple agencies in investigating claims charges filed, which further delays fact finding and eventually the verdict
- Fear of retribution/victimization by affected parties
- Belief that the laws will not change anything
- Lack of understanding of the law by affected parties resulting in little or no attempts to seek legal recourse [10].

The World Bank has estimated that more than 1 trillion USD is paid in bribes each year and that countries that fight corruption, improve governance and the rule of law, could increase per capita incomes by 400% [4, p. 448]. Thus finding effective ways to overcome the obstacles for the wider enforcement of anti-bribery measures is an issue of critical importance. In the case of European Union among such measures the following can be suggested:

- Urge Member States to ratify the existing international and EU bribery instruments
- strengthen judicial and police cooperation in the field of corruption, in collaboration with Europol, Eurojust;
- strengthen the quality of criminal financial investigations;
- improve statistics on corruption crime;
- Strongly focus on the monitoring of anti-corruption policies in candidate countries and potential candidates for EU accession.

International community has recognized threat of bribery and corruption and promoted a number of measures to be taken both at international and domestic levels. Thus many legal instruments were adopted for this issue, while important International Organizations and NGOs put their effort to fight bribery. To this end Foreign Corrupt Practices Act of the United States was adopted in 1977 and the OECD issued the Convention on Combating the Bribery of Foreign Public Official in 1997, these are major documents in international struggle for the transparency and fair conduct of international business transactions.

Consequently to achieve success in combating bribery and corruption the major problems that stay on this way should be overcome. This could be done by means of supervision of the competition for winning the government procurement contract should be supervised by the independence body (domestic or international, say OECD. International community should create the incentives for the development of effective measures against bribery to be among primary interests both of MNCs and governments of developed and developing countries.

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