

RESPONSES TO THE CONSULTATION PAPER ON THE REVIEW OF THE OECD ANTI-BRIBERY INSTRUMENTS

Comments from Duncan Smith (Senior Investigator)

(Note that the comments presented herein are made in the author's personal capacity, and do not necessarily reflect the views of the European Investment Bank)

(1) the general impression concerning effectiveness and implementation of the OECD Convention (and other instruments) is that, although some parties have been rather slow to recognise the harm that corruption does to development and indeed may have sent out mixed signals about the importance of corruption as an issue, in the last few years this has changed. Most if not all parties have now acknowledge the importance of corruption and governance issues. The problem is that enforcement takes time and the time-lag means that the investigations and prosecutions take a while (some times many years) to filter through the system. One would hope and expect that, starting soon, the number of investigations and resulting prosecutions will rise to match the increasing number of FCPA investigations launched by the US DOJ. As a driver of change (in particular raising awareness of corporate executives), big cases that hit the headlines are very important, so this process may be expedited by cases such as Titan Corp and the current Siemens case.

(2) the definition of "foreign public official" should include officials (and their spouses and other family members - the costs of educating a child are sometimes used as a corrupt payment to the parent) working international public organisations or agencies (such as loan officers working for and supervising the procurement decisions in MDB loans).

(3) the definitions adopted in the Uniform Framework Agreement by the IFI Anti-Corruption Task Force in September 2006 provide a harmonised definition of fraud, corruption, collusion and coercion that applies to all the IFIs. The definitions are sufficiently broad to include private sector bribery and consequently avoids a debate about whether an agency (such as a privatised utility company) is a public or private entity. FYI, the link to the IFI Uniform Framework is: www.eib.org/publications_unlisted/ifi-anti-corruption-task-force-uniform-framework.htm

(4) in terms of sanctioning corruption, the World Bank and other IFIs have put in place (and EIB is committed to putting in place) an effective sanctions mechanism to provide debarment as one option in the range of sanctions available when addressing corrupt entities. Sanctioning (and publicising the sanction) is not merely concerned with the company's profit motive (although debarment can affect the income stream quite dramatically in some cases) but it is also a function of reputational and regulatory deterrence - the prospect of being "named and shamed" can provide effective deterrence to misconduct.

(5) one jurisdictional issue in particular is the evidential problem of relying on documents from another jurisdiction (perhaps with a perceived "less effective or reliable" judicial system) in domestic proceedings, even assuming the foreign authorities are willing and able to cooperate in meeting the MLA request for documents.

(6) One key issue going forward will be the effectiveness of new compliance systems in providing real-time reports of (attempted) corrupt activities to (i) regulatory and (ii) investigation agencies. Stopping the transaction is a primary function of such a compliance system but even if the company walks away from the contract or procurement process in order to avoid getting involved, other companies may be less scrupulous when faced with a corrupt official and this behaviour would undermine the competitive 'level-playing field'.

I hope these observations are helpful - please do not hesitate to contact me if you require clarification.