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BIAC experiences with challenges to anti-bribery associated with hiring intermediaries

I. Introduction

BIAC participated at the OECD expert seminar on the role of foreign intermediaries in international bribery on 8 December 2008 in Paris. This paper reproduces the key points raised by BIAC at this seminar and adds some additional details. BIAC submits this paper as a contribution for the upcoming OECD publication on the role of foreign intermediaries in international bribery which is planned to be released in the second half of 2009.

In the following paragraphs, BIAC describes some main elements of due diligence procedures that companies can put in place to eliminate the risk of becoming involved in bribery through an intermediary, shares some information about business experiences with such procedures and raises issues for further discussion. This submission reflects the experiences of some BIAC members. It does not aim to reflect any broad business consensus views.

II. Intermediaries and bribery

Intermediaries, agents, consultants, lobbyists or otherwise external service providers are individuals or corporations who assist others to obtain or retain business by providing them marketing assistance. Their added value resides in their knowledge of the local language, customs, laws, businesses and contacts. This enables them to provide their client access to senior officials, to promote their products or services and to guide them through the sometimes opaque labyrinth of local decision-making structures.

Intermediaries provide a valuable service and are an integral part of the commercial nexus (in some countries, the use of a local agent is even required). However, their familiarity with the local environment, which is one of the main reasons for hiring them, may also lead them to engage in promoting their client's products or services through methods widely practiced

locally, but qualifying as bribery, and therefore subject to prosecution in their principal's country. In fact, where bribes are paid in international transactions, they appear to transit, more often than not, through an intermediary.

The OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, as well as other anti-bribery legislation, provides therefore that the criminal offence of bribery applies whether an undue pecuniary or other advantage is offered, promised or given to a public official directly or through intermediaries.

Where the bribe payment is made with the principal's knowledge, the intermediary will be considered as a channel for the bribe and the principal will be accountable for the intermediary's action. However, where the undue advantage constituting the bribe is granted unbeknownst to the principal, the latter will normally be able to deny any liability. In order to avoid being accused of wilful blindness, he will want to show that he has exercised all due diligence in selecting and instructing the intermediary and that the services effectively rendered by the intermediary in compensation of its remuneration could be demonstrated through appropriate documentation (activity reports, exchange of information etc.). This has led many companies and organisations to devise due diligence protocols for the hiring of intermediaries.

III. Elements of due diligence procedures

The due diligence procedures may vary from company to company. Often they include the following steps:

1. Identification of the intermediary and justification of the need for using one: it is generally the company's commercial arm which will identify an individual or a corporation with local connections who appears to be able to assist in obtaining a contract from the local government or in presenting a tender. The intermediary may be a local businessman or firm or an expatriate with experience in the target country. The commercial arm should specify who recommended the intermediary and provide the justification for using one.
2. Once the intermediary has been identified and the need for using him validated by a senior manager, the application for using him has to be reviewed and an investigation has to be conducted into his background. The review and the investigation should be entrusted to an officer one step distant from operations

(Compliance Officer, General Counsel, Internal Auditor) having the authority to engage third parties if necessary.

3. The investigation covers the following aspects:

- Define the risk profile of the situation or transaction(s) for which the intermediary is hired: country risk, sector of activity, involvement of public officials etc.;
- Details of the intermediary: office address, registration (if incorporated), office facilities and staff, relevance of line of business to engagement, representation of other companies, possible conflicts of interest;
- Ownership: identity of the beneficial owner(s) of the intermediary if it is incorporated;
- Financial information: financial statements, bank references;
- Curriculum vitae of individual(s) involved in rendering the intermediary's services;
- Background and reputation: references – including appraisal e.g. by embassy or local office of principal's auditors – media search, criminal record if available; does the intermediary have links through current or past activity or family relations to public officials who may influence the transaction(s) for which he is hired?; the intermediary should of course not be a public official him/herself;
- Proceedings: are there any convictions or pending criminal investigations against the intermediary? Is the intermediary involved in civil litigation?
- Expertise, contacts and knowledge of the relevant environment;
- Business structure, appropriate means in place (staff and experience) to achieve the services;
- Proposed remuneration: is the proposed remuneration commensurate with the services provided and the risk assumed by the intermediary both percentage wise and in "dollar" terms:

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- Is the remuneration in line with the remuneration for another service provider of similar ranking, without leaving sufficient room for the payment of a bribe to a public official of sufficient seniority to influence the granting of business?;
 - If the remuneration is a success fee, does the intermediary assume the risk of not recovering his expenses and the cost of the time spent by him and his associate if the business does not materialise?;
 - Where is the payment to be made? Payment should be made by bank transfer or check – never in cash – in the country of the intermediary, unless exceptional circumstances justify payment in another country. Payment should also always be made to the intermediary, and not to a third party, especially not to an offshore company. Attention should also be paid to the time of payment;
- Face to face interview: The officer in charge of the investigation should have a face to face meeting with the proposed intermediary, at least in cases presenting an unfavourable risk profile.
4. The relationship with the intermediary must be formalised in a contract including the following provisions:
- informed commitment by the intermediary to obey the principal's anti-bribery policy;
 - commitment by the intermediary to comply with all applicable laws and regulations and specifically with those governing bribery in the intermediary's and the principal's country;
 - declaration from the intermediary where he confirms that neither the intermediary company nor any of its executives is undergoing current criminal investigations nor has been convicted under the criminal law of the country of operation or abroad for facts relating to bribery, corruption, money laundering;
 - commitment by the intermediary that confirms his sub-contractors, employees or stakeholders are not public agents;

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- commitment by the intermediary to write regular reports on the service rendered by the intermediary for which he has been hired and on which his immediate (retainer fee) or potential (success fee) remuneration depends;
 - commitment by the intermediary to deliver to the company invoices for each operation provided by the contract;
 - possibility for the principal to inspect the intermediary's books;
 - possibility for the principal to terminate the contract without compensation if the intermediary is in breach of his obligations, especially of the anti-bribery provisions;
 - no assignment by the intermediary of any of his rights or obligations under the contract without the principal's prior approval (which will be subject to the same investigation as for the intermediary);
 - the contract shall only become effective, and the intermediary shall only start work, upon all internal approvals having been obtained by the principal.
5. The investigation should be properly documented and the file kept in accordance with the company's record retention policy.
 6. Following completion of the investigation, the application should be reviewed and approved (or rejected) at senior management level, e.g. by the principal's Ethics or Business Conduct Committee if there is one, and in any case at a level above that of the management involved in the operations for which the intermediary is hired.
 7. Once the engagement of the intermediary has been approved, his activities should be monitored on a continuous basis.

IV. Practical experiences

Experience gained with implementing a policy for the hiring of intermediaries shows mixed results:

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- The implementation of the policy leads to a reduction in the number of intermediaries, be it that the policy has a dissuasive effect on applying for the approval of intermediaries or that it is an opportunity to get rid of dubious or less useful intermediaries; this reduces the exposure to dishonest intermediaries and, by the same token, reduces costs as there are less intermediaries to pay;
 - Eliminating payments to offshore centres, shell companies or on accounts not in the name of the intermediary (which is a feature of the policy relatively easy to implement) considerably reduces the risk of improper payments or money laundering;
 - The investigation, if properly conducted, takes often more time than the pace of business allows; this may lead to considerable time pressure being put on the investigator;
 - Imposing strict contractual conditions on the intermediary is necessary but has little impact. An intermediary is indeed very unlikely to challenge a prohibition to pay bribes: he has no reason to do so if he is honest; if he is not honest, he will not hesitate to accept the provision with no intention to comply with it;
 - Whatever the procedure for approving the intermediary, operational management will generally strongly lobby in favour of the intermediary while the relevant internal investigator (Compliance Officer or General Counsel) will take a more balanced view. Most of the discussion will require energy, diplomatic skills and independence on the part of the managers involved. Even then, the dynamics of the situation are such that requests for approval of an intermediary are more likely to be approved than rejected;
 - In spite of the due diligence procedures summarised above, it remains unclear when the remuneration of an intermediary is critical as there are often no services with which to compare theirs in the countries where they do business.

V. Issues for further discussion

BIAC sees a need for clarification in two areas in order to remedy the weaknesses of the system:

- What is an acceptable level of remuneration for intermediaries? While it is admittedly difficult to define a level of remuneration acceptable in all circumstances, it should be

possible to give companies guidance on the level of remuneration which is presumed to be acceptable and that which will require additional caution. That level could be defined as a percentage with a sliding scale to account for different transaction sizes;

- Guidance is also needed on the amount of due diligence presumed to be sufficient in hiring intermediaries provided that additional due diligence may be required if warranted by the risk evaluation. For example, when should the investigation be entrusted to an external investigator, or how many references should be checked for a company to have satisfied its obligation?