

Anti-corruption: A business case?

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“Corruption undermines the very base of the free enterprise market.”

Fighting corruption was, until recently, the monopoly of the police and judiciary bodies. Bribing or being bribed was considered just another crime, and the general populace were not supposed to have any involvement in the fight against it. To be recognized as a good citizen one needed simply to stay away from corrupt practices. Moreover, corruption as a topic was reserved for university professors in criminal law who lectured on it as they would on any crime—for instance, arson or embezzlement.

An active involvement for the enterprises?

When, in 1994, in my capacity as company lawyer, I was asked to chair a committee on extortion and bribery in international business transactions at the International Chamber of Commerce in Paris (ICC), I wondered why. Everybody knew that corruption of civil servants was forbidden and there was, I thought, no need to dwell on the matter. Since then, however, I have become aware that corruption is more than just another crime and that we need to talk about it in order to prevent it.

Now, within the last decade, corruption has become everybody's problem, as public international organizations, Governments, NGOs and individual citizens scramble to find a place in the (by now) crowded movement against corruption. There are so many different anti-

bribery initiatives that one wonders what the latest one can contribute to the already large existing pack.

Is there a business case for an active anti-corruption attitude?

Despite this dramatic and global evolution of minds against corruption, there is still a question whether businesses, in their own capacity, have a unique contribution to make to this highly discussed struggle. Should business not leave the subject completely to specialized NGOs? What new elements could the business community contribute, without repeating what has already been said by others? And what reasons would compel the enterprises not only to submit to the provisions of the law, which they have to do in any case, but also to actively participate in anti-corruption efforts? In other words, is there a case for enterprises to enter the fray and engage actively in the combat against corruption?

ICC clearly took the option to become involved almost three decades ago. It was the first international organization to express in no uncertain terms its plain rejection of any form of extortion and bribery and to formulate a programme of action to combat corruption. This happened in 1977, immediately after the American Congress voted unanimously to pass the Foreign Corrupt Practices Act (FCPA). In fact,

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ICC, as the world business organization, went a few steps further than the American legislator with the FCPA, when it rejected any form of corruption, be it active or passive, national or international, private or public.

At this early stage, the original ICC committee on anti-corruption set a forthright and ambitious standard. The present commission continues to work with the same aim. It has a unique and specific input to make in the fight against corruption and will do so, together with other friendly organizations, whenever possible, or alone, if there is no other possibility. But let's not jump to conclusions and let's try, without at this stage paying attention to larger societal or moral interests, to analyse impartially what can motivate an enterprise to aim for anti-corruption behaviour, or, alternatively, not to.

We will have to look at the basic mechanics of bribery and see if they fit the needs and demands of the enterprises. Do bribery and business work harmoniously together? Is there a business case for corruption, or is there a business case for anti-corruption? To determine this, we will need to isolate, identify and analyse the delicate interface between business and corruption.

A bribe is often money badly spent

Does bribing achieve its goal?

The first reason for an entrepreneur to be concerned about bribing—which is rarely if ever mentioned—is that indulging in bribing is actually taking a “casino risk,” as the briber never receives any kind of firm or reliable assurance that the advantage he intends to obtain—with money paid in advance to the bribee—will effectively be delivered.

This raises the question of the capacity and the connections of the bribee to manage the commitment he has taken on: Does he have the necessary network to acquire the desired advantage for the briber? It also raises the question of the bribee's motivation to obtain the promised result.

Moreover, the projected deal is criminal in nature;

therefore, there will be no legal evidence of the result of the bribery contract. Without evidence, it will be almost impossible to obtain redress before any jurisdiction or arbitration panel. From a *risk assessment/risk management* point of view, a bribery deal can hardly be defended. The shareholder puts his money at risk without any certainty of obtaining something in exchange.

Compare this to the situation of competitors who form cartels. Promises are exchanged: they will raise prices, divide or exchange territories amongst themselves and rig bids, with no guarantee that their promises will materialize. Participants risk prosecution and heavy fines, but the results of anti-competitive attempts remain random, as they depend solely on the goodwill of participants who are not legally bound by their promises, and the deal, being illegal, is null and void.

The bribery market is opaque

It is difficult to ascertain the effectiveness of bribing; it is even harder to grasp what amount one is supposed to pay for obtaining an advantage. A businessman who resorts to corruption will never be sure that he is paying the “fair price” or the “market price.” In other words, he can never be certain that the price he is ready to pay is equal to the value of the service he intends to buy.

The “bribery market” indeed is opaque. There is nothing like a reliable index, a transparent reference, objective quotations, price indications or a posted tariff allowing for a quantification of the bribery cost. Probably, some figures will be whispered between so-called specialists, but nobody ever knows if the figure suggested is a “normative price” or, on the contrary, an amount that is largely over-inflated.

A bribe can be any of several things: a lump sum paid as a success fee, a percentage of the business to be acquired or to be maintained, a monthly amount payable over the lifetime of the contract as a consultancy fee, an equity share in the company to be registered, a percentage share in the gross/net result of the operation or any other form of advantage, like for instance a scholarship or a support programme for a (family) foundation.

It is therefore difficult, not to say impossible, to determine if a deal, under the various forms mentioned, is cut at a bargain price or at a highly exaggerated level. From a *costing/purchasing/pricing policy* point of view, the giving, determining and measuring of a bribe is a headache. So, a briber is not sure about what he will get and remains in doubt about the adequacy of his payment. He never knows if he has been fooled into paying too much or if he made a mistake in not paying enough—a nasty situation from the point of view of the *allocation of corporate resources*.

Registering a bribe: An accountant's nightmare

Whether a payment is made directly by a corporation or through an intermediary, an entry must be made to reflect the transaction in the accounts of the local subsidiary or affiliate and also in the consolidated accounts of the mother company. How will a bribe be accounted for? No ready or adequate answer is available; actually the accountant, who has to make an entry in the books, will be faced with a dilemma. Indeed, under the legislation passed during the last decade and under generally accepted accounting practices, it has become impossible to identify a payment as a bribe, as this would be an admission of an offence. It has also become unacceptable to falsely identify the payment (as for instance “promotion expenses”). Falsified accounts lead to false financial reporting, which, if discovered, could destroy the company's reputation.

Wrong accounting, truncated entries, use of false documents, misinformation for the board of directors, the shareholders and the investors' public—all of that contributes to a heavy price to be paid by a company for a single, risky and shady bribing transaction.

“Hidden treasures in the islands”

Bribery money will often originate from “black money” circuits, money undeclared to the shareholders and not reported to the tax administration. It will in general come from hidden and faraway sources. Bribes are indeed often paid out of slush funds, from amounts hidden in off-the-books accounts, stowed away in anonymous and non-

accessible entities, located in offshore centres or other “non-cooperative jurisdictions.”

The executives in accounting, finance and investors' relations at the corporate headquarters will not necessarily have sufficient control over these non-consolidated, overseas affiliates, not to speak about the internal and external auditors of the company, who may even be ignorant of their existence. From a *control policy* point of view, this is a situation difficult to manage.

“Thou shalt not serve two masters”

When paid out, the hidden money becomes vagrant money. The intermediaries chosen to approach the official and set up the deal are often partial beneficiaries. They will invariably “kick back” part of the compensation they receive to certain executives or employees in the company, so as to implicate them in the bribery scheme.

While solidarity may develop between the various beneficiaries of bribes and kickbacks both inside and outside the corporate structure, conflicts of interest may build up between company employees on one side and the external beneficiaries of bribes and kickbacks on the other.

Good corporate governance postulates an un-failing accountability to the board of directors and to the shareholders, not to bribing third parties. On top of that, employees who are directed to pay out bribes may be tempted to blackmail their employer.

From a *human resources policy* point of view and from a *corporate governance* perspective, an uncomfortable situation arises for the employee, whose loyalty is divided between the employer, who pays a fixed salary, and the person who pays a large kickback which sometimes greatly exceeds the salary.

Corruption undermines the very base of the free enterprise market

By accepting or tolerating bribery (active or passive) in the enterprise, the very base of *free enterprise thinking* is undermined. Indeed, a liberal economy requires the exchange of supply and demand, conducted by economic

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agents free of bribery and corruption in a transparent market. Contracts are drawn up based on free and independent decisions of both parties. Bribery corrupts what would otherwise be a clear agreement based on mutual consent and instead creates a complex arrangement clouded by deception. Free competition is gone, as dishonest economic agents do not fight with the legitimate and accepted weapons of pricing, quality, service, expertise, continuous research and development, but rather with the obscurity of bribes, trading on hidden influences.

A transaction that should have taken place only between a buyer and seller is now distorted by the disturbing appearance of the bribee (a local or foreign official), and the payer (an employee of the company or an intermediary chosen by it), as well as possible beneficiaries of kickbacks. What should have been a level playing field, with only a few legitimate players, has become a disorderly game with several intervening parties.

What about bribery in cases of extreme hardship?

Still, one may argue, there could be times that the corporation will require more extreme measures to save it from being destroyed by savage competition. If, for instance, an enterprise needs to obtain an order to escape bankruptcy and/or closure and to avoid having to lay off its employees, is bribery justified? In other words, is a company allowed to bribe in order to survive?

The French Supreme Court hovered for a long while between acceptance and rejection of this solution, deciding initially that the recourse to bribing could be excused in extreme cases. Subsequently the Supreme Court reversed its position, condemning any form of bribery as an abuse of corporate assets.

Admittedly, the temptation can be very big to resort to bribery to avoid a “bigger evil,” such as closure and bankruptcy. However, in its medium and long-term interest an enterprise would be wise to avoid bribery altogether. Ultimately, all forms of corruption lead to misuse

of corporate assets, even if the immediate purpose of the transaction is to save the enterprise.

A tentative conclusion

We have tried to present convincing elements that, even without taking into consideration moral and societal interests, show that the very mechanics of bribing cannot be reconciled with the efficient and effective operation of an enterprise in a liberal economy. Bribery undermines free enterprise. So, in conclusion, we claim that there is indeed a business case for anti-corruption, and we strongly advocate that free enterprise join the battle to eliminate corrupt practices within the private sector.