November 17, 2017

Submission to the DPA & Integrity Regime Consultations
Executive Summary

ITAC welcomes the Government's decision to consult on the current Integrity Regime, and Deferred Prosecution Agreements. ITAC is Canada's national ICT business association, we champion the development of a robust and sustainable digital economy in Canada. We advocate for the expansion of Canada's innovative capacity and encourage technology adoption to drive productivity and performance across all sectors. ITAC has over 340 members, from large telecommunications carriers, to large Canadian and multi-national firms, and over 200 SMEs. ITAC members are the entities responsible for laying the foundation of the digital economy.

ITAC believes that serious cases of corporate fraud and economic crime should be addressed by Government. ITAC has worked co-operatively with the federal government in recent years to clarify and streamline the Integrity Framework Guidelines. We appreciate the opportunity to continue engaging with PSPC and offer balanced comments that we believe are in the public interest.

General Comments:

ITAC is of that view that current Integrity Policy is unnecessarily broad and rigid. A more targeted and flexible approach is needed to achieve an outcome that best serves and balances the interests of all stakeholders.

Deferred Prosecution Agreements have an important role to play in providing the necessary balance that is missing from the current Integrity Policy.

Affiliates

The significance of the challenges with reference to affiliates cannot be understated. Particularly for suppliers who are multinationals, ensuring that lists of charges and convictions are accurate and remain up to date will be very difficult given that they operate globally. Large global corporations often have hundreds of foreign affiliates, and their internal corporate compliance and reporting processes were likely not designed to collect information about non-corruption offences. Moreover, in certain circumstances, it could be possible that the Government would learn about misconduct by an affiliate before the Canadian arm of the company itself.

For this reason, ITAC recommends that the definition of affiliate be narrowed to, at a minimum, exclude (i) affiliates over whom a supplier does not have direct corporate control or indirect control through a clear "directing mind", and (ii) senior officers.

Integrity Regime Responses

Question 1: To what extent, if any, should the duration of ineligibility and/or suspension be modified to ensure appropriateness while continuing to mitigate risk?

The duration of debarment under the Policy should be reduced significantly. The most common debarment period is 10 years, with a possible reduction to 5 years upon entering into an administrative agreement. A debarment of 10 or even 5 years amounts to a timeframe that is punitive, particularly

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when a vendor has taken responsibility for past behaviour and taken all reasonable steps to prevent a recurrence.

To address the shortcomings in Canada's approach, the Policy should be revised to: (i) reduce the circumstances in which debarment is automatic (rather than discretionary), (ii) shorten the debarment period to 3 years (the timeframe in the United States), and (iii) allowing for the debarment period to be reduced (potentially to no time) in appropriate circumstances (e.g., if the vendor enters into an administrative agreement).

Question 2: How could the exercise of greater discretion be built into the Integrity Regime to address issues associated with periods of ineligibility? What factors should be considered in determining whether a supplier should benefit from discretion?

Greater discretion can be built into the Integrity Regime by adopting the "self-cleaning process" found in the European Union's integrity directive or the "mitigation analysis" followed in the United States before a suppler is debarred. In addition, deferred prosecution agreements can be incorporated within the Regime.

All relevant factor should be taken into consideration in determined whether a supplier should benefit from discretion. These factors would include:

1. The nature and scope of the violation or offence that was committed;
2. The policy measures and internal compliance controls of an organization;
3. Whether the organization reported in a timely manner;
4. Whether the organization investigated the circumstances associated with the cause of the ineligibility;
5. The degree of cooperation by the organization with the Government of Canada;
6. Whether the organization agreed to make restitution to those who were adversely affected by the offending activity;
7. Whether the organization has taken action against the individuals responsible for the alleged misconduct; and
8. Whether the organization has put in place remedial measures, policies and procedures to address the potential for future wrongdoing including those recommended by the Government of Canada.

Question 3: Are there other offences that call into question the integrity of a supplier that should be considered for inclusion within the Ineligibility and Suspension Policy? If so, what are they?

The offences listed in the Policy include crimes that go beyond bribery, fraud, and similar corruption-related wrongdoing. By way of example, listed offences include: (i) misleading marketing practices, (ii) sending a deceptive notice of winning a prize, and (iii) lobbying infractions – including such administrative oversights as the failure to file a return on time. The Policy also would purport to suspend a supplier where a subcontractor has received a prior suspension which is unknown to the supplier.

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The breadth of the listed offences creates two key challenges:

i. it increases the likelihood of a supplier being automatically debarred in circumstances where a conviction has nothing to do with corruption or, on an objective standard, does not make the supplier unfit to supply goods or services to the Government; and

ii. it increases the likelihood of a supplier being automatically debarred for inadvertently providing a false or misleading list of charges or convictions pertaining to itself, its affiliates and its proposed first tier subcontractors.

The significance of these challenges cannot be understated. Particularly for suppliers who are multinationals, ensuring that lists of charges and convictions are accurate and remain up to date will be very difficult given that they operate globally, they often have hundreds of foreign affiliates, and their internal corporate compliance and reporting processes likely were not designed to collect information about non-corruption offence.

ITAC is concerned that the inclusion of non-corruption offences in the Integrity Regime, together with automatic debarment for making a false or misleading certification, will inevitably result in the debarment of suppliers who, on an objective standard, have not engaged in the type of conduct that makes them unfit to supply goods or services to the Government.

For this reason, ITAC recommends that PSPC narrow the scope of offences covered by the Integrity Regime to crimes that involve bribery, fraud and similar corruption-related wrongdoing. ITAC does not favour expanding the list of offences.

Question 4: What factors should be considered in determining whether new offences should be included?

ITAC does not favour expanding the list of offences.

Question 5: At what point should the Government of Canada consider actions regarding corporate wrongdoing when making a determination of suspension or ineligibility? What wrongdoing or action would warrant a federal response?

The Integrity Provisions include an obligation on a bidder to certify (among other things):

i. that it has provided with its bid a complete list of all foreign criminal charges and convictions pertaining to itself, its affiliates and its proposed first tier subcontractors that, to the best of its knowledge and belief, may be similar to one of the listed offences in the Policy; and

ii. that none of the domestic criminal offences, and other circumstances, described in the Policy that will or may result in a determination of ineligibility or suspension, apply to the bidder, its affiliates and its proposed first tier subcontractors.

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A bidder that provides a false or misleading list of charges (domestic and foreign) pertaining to itself, its affiliates and its proposed first tier subcontractors faces automatic debarment for 10 years, with no opportunity for the punishment to be reduced.

On its face, the Policy does not provide PSPC with flexibility to consider factors such as inadvertence, honest mistake, or impracticality. As well, there is no obvious process for a bidder to present evidence that it had no knowledge of the inaccuracy of the information that it certified.

Additionally, a supplier will face suspension at the discretion of PSPC if it has been charged with (or admits guilt of) any of the offences listed in the Policy or a similar foreign offence.

ITAC is concerned that, by tying debarment to "charges" (rather than convictions), the Policy violates the presumption of innocence and the fair procurement principles reflected in Canada's trade agreements. Further, in doing so, the Policy is susceptible to legal challenges before the courts and the Canadian International Trade Tribunal and increases the prospect of anti-competitive behaviors by governments in foreign jurisdictions (who may decide to charge a foreign supplier if doing so will make them ineligible for a procurement in Canada being competed for by one of its domestic companies).

Question 6: How should Integrity Regime determinations of ineligibility be applied to non-procurement federal services?

ITAC's view is that the regime and debarments should be limited to federal procurement and should not be applied to non-procurement federal services.

Question 7: What impact should a debarment decision made in another jurisdiction or by another organization have on a supplier's status under the Integrity Regime?

As foreign regimes differ and may not be aligned with Canada, debarment decisions made in foreign jurisdictions should not be applied in a Canadian context. Further, given that the Integrity Regime applies to convictions in other jurisdictions, including in respect of affiliates, makes it inappropriate to expand the debarment rules in Canada.

Question 8: What type of measures should be taken to preclude those with known membership in or associations with organized crime from being awarded a federal contract or real property agreement?

By including the "organized crime" offences within the Integrity Regime, Canada has adequately addressed the issue.

Question 9: Should application of the Integrity Regime be broadened to include federal entities beyond departments and agencies? What factors should be considered when determining what other organizations should be required to adopt the Integrity Regime?

Until such time that Canada has successfully implemented and fully tested a new integrity regime, it should defer consideration of expanding application to other federal entities.

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Question 10: How could the Government of Canada use the Integrity Regime to achieve other social, economic or environmental policy objectives?

Until such time that Canada has successfully implemented and fully tested a new integrity regime, it should defer consideration of additional policy objectives.

Deferred Prosecution Agreements Responses

Question 1: In your view, what are the key advantages and disadvantages of DPAs as a tool to address corporate criminal liability in Canada?

DPA's can encourage engagement and proactive disclosures by organizations which will in turn result in improved compliance with the regime and encourage companies to take action against employee misconduct. This supports the goals and policy outcomes of the regime by allowing organizations to limit consequences for stakeholders, including employees, investors and other third parties who had no connection to the misconduct.

Question 2: For which offences do you think DPAs should be available and why?

DPAs should be available for all offences included within the ambit of the Integrity Regime. A subset might be acceptable, but only if discretion on debarment is built into the Regime in a way that covers all offences.

Question 3: What role do you think the courts should play with respect to DPAs?

ITAC believes that courts should play only a very limited role with respect to DPAs. DPAs represent an agreement between the prosecutor and the corporate violator, and the government's decision to enter into a DPA is an exercise of prosecutorial discretion. Accordingly, courts generally should not be empowered to question the decision to enter into a DPA, or to modify its terms. ITAC believes the court's role should be limited to reviews of jurisdiction regarding decision making by the Government, so issues of disrepute or unfairness could still be addressed. We'd suggest a role, similar to the U.S. model, where there is no explicit function of the court other than enforcement of the DPA.

Question 4: What factors should to be taken into account in offering a DPA?

ITAC contends that there should be an administrative process by which an organization can proactively submit a DPA or settlement proposal without prejudice to any future proceeding, or to the independence of the public prosecutor.

To ensure flexibility is built into a DPA regime, any relevant factor should be taken into consideration by the public advocate when assessing whether to enter into DPA negotiations. Factors should also include:

- Engagement by the organization with the public advocate regarding pro-active disclosure and self-reporting.
- History of corporate offences, similar conduct of alleged wrongdoing, ie, regulatory, financial, etc.
- The presence of a corporate compliance programme and policies to address employee or corporate wrongdoing.

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- Evidence that the organization has engaged proactively in remediation to address the alleged misconduct.
- Whether the misconduct represents the actions of individuals or rogue employees or by the company.
- Whether the individuals who engaged in the misconduct are still with the organization.
- Whether the organization has taken action to reform or improve its compliance frameworks and reporting structures so as to take steps to avoid any future misconduct.

Question 5: When would a DPA not be appropriate?

DPAs would not be appropriate if, in the view of the public advocate (non-exhaustive list):

- the size and scope of the misconduct was such that it impacted a significant number of citizens;
- an organization has a history as a repeat offender;
- the organization made no attempt to address the misconduct;
- the organization lacks an effective compliance program; or
- the organization has failed to bring forward misconducts in a timely manner so as to limit the impact of the misconduct.

Question 6: What terms should be included in a DPA?

A DPA should include (non-exhaustive list):

- a statement of the facts of the case;
- the public prosecutor's basis for entering into a DPA, including the factors described above;
- the duration of the DPA;
- acknowledgment of responsibility for the conduct by the organization;
- suspension of penalties for the duration of the DPA to ensure compliance;
- obligations on organizations to address those who engaged in the misconduct;
- the consequences of further misconduct (i.e. removal of the suspension of penalties);
- improvements to the organization's compliance program;
- future cooperation requirements (if applicable);
- monetary penalty or restitution (if applicable);
- the imposition of a monitor (if applicable); and
- reporting the DPA publicly.

Question 7: What factors should be taken into account in setting the duration of a DPA?

The duration of a DPA should depend upon the circumstances of each case. DPAs should have a schedule for review and expiry. Ongoing reviews should be leveraged to encourage organizations to take additional actions and develop further policies against misconduct to limit the duration of the DPA (e.g. limitations for good corporate behavior).

Question 8: Under what circumstances should publication be waived or delayed?

To encourage proactive disclosures of misconduct, organizations and their representatives need to have a safe harbor to negotiate the DPA. Organizations would be less likely to come forward and negotiate a DPA if their negotiating position might be compromised by early publication of the facts.

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As circumstances vary from case to case, the evaluation as to waive or delay public disclosure should be assessed to limit any potential degradation of the proceeding. Restrictions may be necessary to protect the credibility of the process.

Question 9: How should non-compliance be addressed?

Non-compliance should be brought to the attention of the public advocate without delay and the organization should have the opportunity to address non-compliance before court action is merited. Organizations should also be afforded the ability to renegotiate the terms of the DPA with the public advocate. As noted, the court's role should be limited to ensuring the enforcement of the DPA, but a stage of review and re-negotiation should take place prior to any court action.

Once a public advocate has assessed and finds on-going non-compliance, consequences could include removal of suspension of penalties, new financial penalties, new compliance terms and conditions, extension of the expiry date of the DPA, or even termination of the DPA.

Question 10: When should facts disclosed during DPA negotiation be admissible in a prosecution against a company?

See Question 8.

Question 11: How should compliance monitors be selected and governed?

Independent compliance monitors should report both the office of the public prosecutor and the organization in accordance with the DPA. The criteria for selecting monitors should be agreed upon as part of the DPA. DPAs should include terms of reference for the engagement and a schedule of engagement of the independent monitor (i.e. the length of the DPA).

Question 12: What use should be made of compliance monitoring reports?

Compliance monitoring reports should review the implementation of an organizations compliance programme and policies, and its obligations under a DPA, against the criteria of the public prosecutor. The monitor's report should provide recommendations for improvements to the compliance programme of the organization. Implementation of a monitor's recommendations should be made in a timely manner by the organization.

Question 13: Under what circumstances should victim compensation (i.e. anticipatory restitution) be included as a DPA term?

Restitution as part of the terms of a DPA should consider any relevant factor including;

- other actions and proceedings;
- whether the Government has imposed a fine; and
- whether there was any profit for the organization stemming from the misconduct.

Imposing further restitution obligations for an offence may be inappropriate given relevant access to other processes for alleged victims which may include schedules, actual and statutory damages. Should there be other actions or proceedings in place, victim compensation should be left to the other proceedings.

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