Integrity Regime Submission

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?*

Debarment under the Integrity Regime is a very serious consequence for a business. It is important to tailor the length of the debarment to the seriousness of the wrongdoing. Flexibility in the Integrity Regime will allow the government to appropriately punish companies for wrongdoing while incentivizing companies to address deficiencies within their own internal compliance regime.

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?*

A 10-year debarment may effectively lead to the dissolution of a firm that is highly dependent on government contracts; however, even a 5-year term could have the same effect. Discretion to modify the term of ineligibility would be useful to avoid overly punitive outcomes that also have negative implications for blameless persons. Such flexibility would be even more important if the government does not proceed with DPAs, which presumably are intended, in part, to avoid application of the Integrity Regime. The same factors that are relevant to considering use of a DPA would also be relevant to applying a flexible approach to debarment of corporations and other entities.

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?*

If the government wants to take a wider scope of offences into account, it should consider issuing guidance on the appropriate weight to any such offences, rather than rendering an entity completely ineligible for government contracts regardless of the offence.

In terms of additional offences, if a company commits a crime or a civil "offence" equivalent in a foreign jurisdiction it makes sense from a fairness perspective for this conduct to qualify for debarment. For example, an entity involved in price fixing in Europe (civil offence) would be debarred in Canada on the same basis as if it violated the criminal price fixing offence in the Canadian *Competition Act*.

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

When determining whether new offences should be included within the Integrity Regime, the government must consider the best interests of the public. However, the government should also consider the effect of additional offences on the government procurement system as a

whole. If the number of offences is increased and more companies are debarred, the Canadian public may suffer because of higher prices and lower quality of government projects.

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?*

Debarment before charges or conviction would seem to be a violation of due process rights. However, if a disqualification is based on a contractual violation (e.g., failure to perform a contract or a history of failing to perform), the government may be justified in considering debarment.

Consider the U.S. provisions that allow temporary debarment pending completion of an investigation cited at page 11 of the discussion document.

(a) The Integrity Policy should expressly state whether the corporation may be debarred by virtue of entering into a DPA or applying for immunity or leniency under competition or antitrust laws. Presumably, the intention of DPAs, in particular, is to avoid debarment, but the Integrity Regime discussion document suggests that the government might debar an entity even in the absence of a charge or conviction.

(b) A similar issue raised by section 7(d) of the existing Integrity Policy is the potential to suspend a supplier for "admitting guilt". A supplier is not required to advise the Registrar of admitting guilt to a Competition Act offence in the context of applying for immunity or leniency under the Competition Bureau's immunity or leniency policy. These admissions are made on a confidential basis and their disclosure would undermine the Bureau's policy.

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

In certain circumstances, a taxpaying corporation should be denied government services contracts because it has committed an offence. The example given of discretionary Trade Commissioner Services on page 12 of the discussion document provides a good justification for why the government should not promote corporations that do not have a strong corporate culture of compliance. However, applying the Integrity Regime determinations of ineligibility for non-procurement contracts seems to be an example of government overreach. Discretion to decide whether other federal departments and agencies want to do business with a company that has committed an offence should be left to the particular federal department or agency.

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?*

Cross debarment seems to make sense as a general principle, but PSPC should have the discretion to make its own determination on whether an organization should be debarred. This discretion is important if PSPC were to determine that the debarment process in the relevant foreign jurisdiction was not properly conducted or that the responsible authority reached an incorrect conclusion. Ultimately, we do not want to have a situation where a foreign jurisdiction debars a Canadian company without grounds but for the purpose of having the company debarred in Canada to limit competition.

Question 8: *What types 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?*

The Canadian Chamber of Commerce supports all government initiatives that preclude those with known membership in or associations with organized crime from being awarded a federal contract or real property agreement.

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?*

The discussion paper expressly points to Crown corporations as an area where the Integrity Regime's scope could be expanded. Expanding the Integrity Regime to Crown corporations could give Crown corporations additional tools to combat corporate crime. However, it is possible that the Integrity Regime may impose a significant burden on some Crown corporations. It may be helpful to clarify the implications for a Crown corporation if it fails to follow the Integrity Regime. Some Crown corporations are designed to be more independent of the government than others. Extending the Integrity Regime to all Crown corporations regardless of their mandate may undermine the objectives of specific Crown corporations.

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

Using the Integrity Regime to achieve other social, economic, and environmental policy objectives introduces significant uncertainty and unduly limits the entities prepared to bid on government contracts. The government should recognize that broader debarment adversely affects not only the debarred company, its employees and shareholders, but also taxpayers who are left with a less competitive process and may pay more or receive lower quality on government contracts.

The overall objective of incorporating human rights, environmental and labour offences is unclear since these offences are less connected to the award of a government contract. The operating environment is so complex that it is unrealistic to expect companies to fully comply at all times with all elements of all applicable laws and regulations – this would be onerous and would make corporations liable for wider categories of employees or representatives.

Other Comments

- The Government should be commended for consulting on possible changes to the Integrity Regime. As a general proposition, it would be preferable also to consult on future significant changes to the Integrity Regime given the severe consequences to some entities and the risk of unintended consequences.
- Given the significant consequences of debarment for not only the corporation but also other persons, the government should take care to ensure that the Integrity Regime is clear and well defined. For example, it is difficult for corporations to provide the requisite certificates of compliance given the open ended and unclear definitions of "affiliate" and foreign offences that are "similar" to the listed Canadian offences.[1]
- The continuing obligation under the existing Integrity Regime to inform the Registrar within 10 working days of "any charge, conviction, or other circumstance relevant to the Policy with respect to itself, its affiliates and its first-tier subcontractors" is very onerous, particularly for large multi-national companies. There would seem to be a large scope for error, even by a company making diligent efforts to comply.
- An automatic 10 year suspension applies if PSPC believes that a supplier has provided a false or misleading certification or declaration in relation to the policy, with no potential for reducing this suspension period. A more practical approach might be to limit the automatic suspension to failure to disclose charges or convictions for specified offences by the supplier or its controlled subsidiaries, and make suspension for failure to disclose charges or convictions for a broader category of offences or a broader category of affiliates a discretionary decision. In those cases, PSPC could evaluate all the relevant circumstances and would have the additional options to either elect not to disqualify the supplier, or to reduce the period of ineligibility.

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[1] The definition of "affiliate" includes controlled persons, and the concept of "control" includes "deemed control". "Deemed control" has a non-inclusive and circular definition – section (b) of the definition essentially says that deemed control includes a situation where a person is deemed to be controlled by an entity. PSPC should amend this definition to make it meaningful, if only to say something like "deemed control" means a situation in which PSPC determines that an entity is controlled in fact by another entity. (A number of legislative schemes, such as the CRTC, have control in fact concepts that could be incorporated by reference.) In any event, section (c) of the definition of "affiliate" makes clear that affiliates might include entities with which a company shares facilities or employees, implying a potentially the very broad concept of "control" and "affiliate".