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## Summary of Discussion Points

Presented by the Business and Industry Advisory Committee (BIAC) to the  
Global Forum on Competition

Roundtable on Fighting Corruption and Promoting Competition

February 27-28, 2014

### Introduction

1. Normative competition policy principles can promote accountability and transparency in government-business relations and reduce corruption, bribery and bid-rigging (“**CBB**”).<sup>1</sup> That was the position taken by BIAC in its paper and discussion presented last year at the OECD Global Forum on Competition (the “**BIAC Paper**”).<sup>2</sup> Over the last few years, the issues of corruption, bribery and bid-rigging have been major topics of discussion, both in developed and developing countries. Economists and politicians alike have been studying the various types of corruption, their causes and consequences, and searching for ways to fight them. Although the causes and consequences of corruption are diverse and difficult to adequately evaluate due to their highly contextual and subjective character, there is a general understanding, consistent with the BIAC Paper, that corruption serves as a deterrent to investment and economic growth”. This is because business investors are reluctant to invest in unpredictable and unsecure environments where they also expose themselves to potential criminal indictments. Business entities’ concerns about uncertainty therefore give rise to a wariness of investing in corrupt countries.
2. However, the enactment of competition legislation does not necessarily offer a panacea against corruption, and in certain instances, corruption can coexist alongside otherwise competitive processes.<sup>3</sup> Only “effective” competition built on (1) principles of independence and accountability, (2) transparency of the process and (3) normative substantive principles and coupled with complementary anti-corruption mechanisms incentivizing businesses to comply with the law and self-disclose any detected violations, will have an effect on the fight against corruption. These principles have been clearly stated by BIAC’s Anti-Bribery Taskforce in its contribution to the recent celebration of the 15<sup>th</sup> anniversary of the OECD’s

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<sup>1</sup> The reference to bid-rigging in this context, and as used throughout this paper, refers primarily to bid-rigging in relation to public sector contracts; in this respect, bid-rigging is essentially the same as horizontal corruption in relation to public sector payments.

<sup>2</sup> BIAC, “Competition and Poverty Reduction” at para 1. This paper was presented at the OECD Global Forum on Competition on February 28, 2013.

<sup>3</sup> BIAC Paper, *supra* note 2 at para 7.

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Convention on Combating Bribery of Foreign Public Officials in International Business Transactions in 1997 (the “**OECD Anti-Bribery Convention**”).<sup>4</sup> The fact that only effective competition will have an impact on corruption may help explain why despite considerable efforts of deregulation and liberalization aimed at increasing competition and despite the establishment of competition authorities and rules, corruption, bribery and bid-rigging are still significant issues faced by business investors.

3. This paper examines the relationship between corruption and competition. The paper begins with an overview of the importance of the fight against corruption, and why and how competition should play a role in that fight (part 1). However, as experience has shown, putting in place an environment promoting competition is not sufficient. To fight corruption, countries need to establish and enforce an efficient competition framework, built on the three core pistons of effective competition and complementary to the established anti-corruption framework (part 2). Several countries have sought the help of international organizations such as the OECD to assist them with the proper implementation of their competition laws. In this regard, BIAC would support developing a survey that analyzes the effectiveness of the competition authorities and laws from the perspective of large international businesses likely to invest in those countries (part 3).

## **I. How promoting competition can play a role in the fight against corruption**

### *A. The importance of the fight against corruption for economic development*

4. In 1996, James D. Wolfensohn, the then-President of the World Bank, gave a groundbreaking “cancer of corruption” speech at the World Bank/IMF annual meeting, citing corruption as a major burden for the poor in developing countries.<sup>5</sup> Since then, corruption has been widely recognized as a major impediment to development and has been the subject of various discussions in the international community. A look at the World Bank Enterprise Survey on corruption<sup>6</sup> shows shocking statistics on corruption. For example, in the Middle East and North Africa, 37.7% of firms experienced at least one bribe payment request during 6 transactions dealing with utilities access, permits, licences, and taxes, with that number being 29.2% in South Asia. The country-by-country statistics in some cases are even more alarming – for example, the Syrian Arab Republic and Yemen have respective percentages of 69.6% and 68.9%, and each has a competition law framework. This is consistent with the Corruption Perceptions Index of 2013 that scores 177 countries and territories on a scale from 0 (highly corrupt) to 100 (very clean) and shows that two-thirds of

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<sup>4</sup> See the BIAC Anti-Bribery Taskforce Key Messages paper (December 11, 2013) *available at* [http://www.biac.org/members/brib/mtgs/2013-12-brib/FIN\\_13\\_11\\_Anti\\_Bribery\\_Convention\\_15\\_years\\_on.pdf](http://www.biac.org/members/brib/mtgs/2013-12-brib/FIN_13_11_Anti_Bribery_Convention_15_years_on.pdf). The Key Messages paper has also been published in the Journal of Business Compliance 1/2014, *available at* [http://www.biac.org/members/brib/docs/2014/BUCO\\_01\\_2014\\_Moosmayer\\_Rosenbaum.pdf](http://www.biac.org/members/brib/docs/2014/BUCO_01_2014_Moosmayer_Rosenbaum.pdf).

<sup>5</sup> The World Bank, “James D. Wolfensohn and the World Bank” (2005), *available at* <http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/ORGANIZATION/EXTPRESIDENT/EXTPASTPRESIDENTS/PRESIDENTEXTERNAL/0,,contentMDK:20309401~menuPK:232053~pagePK:139877~piPK:199692~theSitePK:227585,00.html>.

<sup>6</sup> This survey captures the different types of bribery in 135 countries. The results are based on surveys of more than 130,000 firms. The survey is available at <http://www.enterprisesurveys.org/Data/ExploreTopics/corruption>.

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countries score below 50 (with the Syrian Arab Republic and Yemen scoring 17 and 18, respectively), indicating a serious worldwide corruption problem.<sup>7</sup>

5. The fight against corruption is indispensable to economic development. As discussed in last year's BIAC Paper, in addition to minimizing costs associated with corrupt markets, an increase in government accountability and transparency boosts investor confidence and maximizes anticipated returns, thereby encouraging foreign investment.<sup>8</sup> Indeed, the value that international investors place on transparency when selecting where to invest is well-documented.<sup>9</sup> The preference for transparent governance is not surprising, given that investment decisions depend heavily on the predictability and fair application of rules.<sup>10</sup> Business investors abhor unpredictability and are more willing to invest where there is increased transparency and government accountability.<sup>11</sup> They want to minimize risk and be able to predict the various parameters that will affect their return on investment. Over the last 20 years, there have been numerous examples of multinationals being impacted by events that were not foreseeable to them in a corrupt environment, even after partnering with a local entity. The high level of unpredictability existing in corrupt environments is not only an issue to the detriment of consumers but also affects suppliers' margins and therefore discourages investments.
6. Business investors are also increasingly unwilling to take the high risks involved when dealing in corrupt countries. This is due in great part to the adoption of the U.S. Foreign Corrupt Practices Act of 1977 (the "**FCPA**")<sup>12</sup> and later of the OECD Anti-Bribery Convention, which criminalize bribery taking place in foreign countries. Although the FCPA has not eradicated foreign bribery,<sup>13</sup> it appears that growth of U.S. investment in more corrupt countries lagged behind growth in other countries.<sup>14</sup>
7. With business investors not wanting to invest in unpredictable business environments and refusing to take the risks associated with investing in corrupt economies, we see that the number of companies that have been deterred by an otherwise attractive investment because of the host country's reputation for corruption is high and growing. A 2006 survey of seven countries by risk consultancy Control Risks found that more than 35% of companies surveyed had been deterred by an otherwise attractive investment for those reasons, with

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<sup>7</sup> Transparency International, Corruption Perceptions Index 2013, *available at* <http://cpi.transparency.org/cpi2013/results/>.

<sup>8</sup> BIAC Paper, *supra* note 2 at para 11.

<sup>9</sup> BIAC Paper, *supra* note 2 at para 11, citing OECD, "Public Sector Transparency and the International Investor" (2003) at 14, *available at* <http://www.oecd.org/daf/inv/investment-policy/18546790.pdf>.

<sup>10</sup> BIAC Paper, *supra* note 2 at para 11.

<sup>11</sup> BIAC Paper, *supra* note 2 at para 11.

<sup>12</sup> See also by way of additional example of similar legislation, the British Bribery Act 2010 and the Canadian Corruption of Foreign Public Officials Act of 1999.

<sup>13</sup> The FCPA blog reports 92 companies subject of an ongoing and unresolved FCPA-related investigation, many of which are major international corporations. See <http://www.fcpablog.com/blog/2014/1/8/the-corporate-investigations-list-january-2014.html>.

<sup>14</sup> See for example James R. Hines, Jr., "Forbidden Payment: Foreign Bribery and American Business After 1977" (1995), for data on U.S. outward investments from 1977 to 1982.

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this number rising to 48% in 2010.<sup>15</sup> These statistics highlight an undeniable need for transparency, accountability and anti-corruption measures in order to encourage investments and economic development.

8. These real world considerations of how corruption impacts businesses highlight the fact that business investors, who are often viewed as drivers of corruption, are in fact victims of the corruption, and even though their motivations might be different, they are just as incentivized to fight corruption and more generally CBB as the individuals and groups fighting corruption as a way to advocate good government. BIAC has seen a clear transition since the 1990s in the perception of businesses as “bad guys” to the realization that businesses want to participate in the fight against corruption.
9. For example, in 2004, a group of CEOs founded the Partnering Against Corruption Initiative (“**PACI**”) under the auspices of the World Economic Forum, the Basel Institute on Governance and Transparency International. PACI is a global platform that counts more than 80 signatories, including industry leaders from multiple sectors and global locations, which allows companies and business leaders to maximize their collective impact in the fight against corruption. PACI recognizes that taking a leadership role in the fight against corruption is not only a matter of ensuring organizational compliance but it is a strategic imperative for every CEO.<sup>16</sup> As pointed out by David Seaton, Chairman and CEO of Fluor Corporation:

“Corruption cannot be addressed solely by Governments and NGOs. We believe international business must play a decisive role, which is why the company is a global leader in battling the bribery and corruption that unfortunately still permeate much of the engineering and construction industry.”<sup>17</sup>

### *B. Competition and corruption: cause or consequence of each other*

10. The increasing awareness of corruption issues has led to several studies on how to fight corruption. Early studies conducted by economists such as Susan Rose-Ackerman and Alberto Ades and Rafael Di Tella suggest that competition lowers corruption. As pointed out by Ades and Di Tella:<sup>18</sup>

“Lawyers often argue that the way to reduce corruption is to reform the legal system so as to increase the punishment for malfeasance. Businessmen sometimes suggest that the problem of corruption lies in the low salaries bureaucrats receive relative to private-sector employees with comparable responsibilities [...] The economist’s natural approach to corruption control is to appeal to the concept of competition as it is argued that bribes are harder to sustain where perfect competition prevails.”

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<sup>15</sup> Control Risks, “Integrity Matters, Big Question Results” (2010), *available at* [http://www.controlrisks.com/webcasts/studio/integrity\\_matters/issue\\_02/im\\_big\\_question.html](http://www.controlrisks.com/webcasts/studio/integrity_matters/issue_02/im_big_question.html).

<sup>16</sup> See Partnering Against Corruption Initiative, World Economic Forum, *available at* <http://www.weforum.org/issues/partnering-against-corruption-initiative>.

<sup>17</sup> *Ibid.*

<sup>18</sup> Alberto Ades and Rafael di Tella, “Rents, Competition, and Corruption” (1999).

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The relationship between corruption and competition can also be derived from views of economists such as Robert Klitgaard. Indeed, his understanding of corruption as a result of monopoly plus discretion minus accountability<sup>19</sup> seems to imply that creating a competitive environment (and thus eliminating the monopoly) may have an impact on the factors that fuel corruption.<sup>20</sup> This view has come under further scrutiny recently with some economists suggesting that corruption will tend to flourish under competition and may be less pervasive when competition is less fierce.<sup>21</sup> This is consistent with others who have argued that developing countries' lack of supporting institutions will lead to a misuse of competition policy that continues the cycle of corruption, instead of curbing it.<sup>22</sup>

11. However, these studies are based on theoretical models and are a simplistic version of the much more complicated reality where companies and public officials cannot as easily be categorized as “good” and “bad” or “ethical” and “unethical”. Moreover, even though they appear to disagree, a look at the much more complex reality of corruption and competition shows that these studies are not that inconsistent with each other. Indeed, there are circumstances where competition laws will not have the intended effect of curbing corruption. As mentioned in last year’s BIAC Paper, the enactment of competition legislation does not necessarily offer a panacea against corruption.<sup>23</sup> The laws on paper might be a step in the right direction but the reality of how they are applied is what will really matter. In order to reduce corruption, the competition laws established have to be effective and adequately enforced. Therefore, it is not enough to look at the relationship between competition and corruption; only effective competition will help fight corruption.

## **II. Promoting effective and enforceable competition laws to fight corruption in conjunction with adequate anti-corruption measures and incentives**

### *A. Promoting competition frameworks built on the three core principles of effective competition*

12. In order for the promotion of competition to have a positive impact on limiting factors fuelling business-related corruption and to contribute to foster a corruption-free business environment, it is important to establish strong, independent and accountable competition authorities with adequate investigative, enforcement and regulatory powers.<sup>24</sup> Indeed, without the necessary safeguards, how would we prevent the competition authority from being subject to corruption? Without effective mechanisms, competition laws and authorities could be just as corrupt as the other public officials, meaning that the establishment of these

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<sup>19</sup> Robert Klitgaard, “International Cooperation Against Corruption” (1997).

<sup>20</sup> Marie Chêne, “Integrating anti-corruption measures in Georgia’s newly established competition agency” (2011).

<sup>21</sup> Kaushik Basu, Tamara McGavock and Boyang Zhang, “When competition corrupts: A theoretical analysis of market structure and the incidence of corruption” (2013).

<sup>22</sup> For example, see Louise Plessis et al., “Competition law in the developing world: A fish out of water?” (Paper delivered at the Fifth Annual Competition Law, Economics and Policy Conference, Oct 4-5, 2011) at para 3.10 and Anthony Amunategui Abad, “Competition law and policy in the framework of ASEAN” in Josef Drexl et al., eds. *Competition Policy and Regional Integration in Developing Countries* (Massachusetts, Edward Elgar Publishing, 2012), at 47-48.

<sup>23</sup> BIAC Paper, *supra* note 2 at para 7.

<sup>24</sup> Chêne, *supra* note 20.

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institutions would have little effect on the corruption they are trying to fight. Indeed, recent scandals have shown that competition authorities are not immune from corruption. For example, in 2006, a top official of Greece's Hellenic Competition Commission was sent to jail on charges that he demanded a €2.5 million bribe from Mevgal, a major Greek dairy company.<sup>25</sup>

13. In order for the competition framework established in a corrupt country to be efficient, it needs to include the three pistons of effective competition which are:

- *the independence and accountability of the decision maker*: competition authorities should be independent and autonomous regulatory bodies, they should have a “distinct legal mandate, sound human resources practices including professional criteria for appointment, involvement of both legislative and executive branches in appointments, fixed terms for senior staff, [...] protection from removal, staggered terms of appointments, [...] independent oversight and audit mechanisms”<sup>26</sup> (both internal and external);
- *the transparency of the process*: there should be “effective complaint procedures in place as well as effective whistle blowing provisions to allow all stakeholders to raise concerns of corruption as well as a broader range of unfair competition;”<sup>27</sup> the competition authorities should also publish their opinions in order to promote transparency, stimulate public debate and facilitate the adoption of pro-competitive arguments by other interested parties;<sup>28</sup> and
- *the application of normative substantive principles*: effective competition should be based on public guidelines that stakeholders can have regard to and that indicate the principles that are applicable to them. These guidelines should lay out principles that individuals and companies alike can base their conduct on. For example, the International Competition Network (the “**ICN**”) has developed recommendations on merger reviews which represent objective standards such as the fact that local entities should not benefit from any special, “national” treatment and rather should be treated similarly to their foreign counterparts. BIAC has also been an advocate of the application of normative substantive principles and in particular of the establishment of convergent best practices that encourage the implementation of crucial minimum standards in the complex environment of competition law.<sup>29</sup>

If all three pistons of effective competition are effectively in place, then CBB will inevitably decrease. However, if a competition authority is not independent, not accountable, does not operate transparently and does not apply normative principles, the chances that CBB will

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<sup>25</sup> See <http://www.law360.com/articles/10274/greek-competition-head-jailed-on-bribery-charges> and [http://www.nytimes.com/2006/10/12/world/europe/12iht-greece.3140682.html?\\_r=1&](http://www.nytimes.com/2006/10/12/world/europe/12iht-greece.3140682.html?_r=1&).

<sup>26</sup> See Chêne, *supra* note 20. See also Farzana Nawaz, “Integrating anti-corruption measures in the design of public law enforcement/regulatory agencies” (2010) on anti-corruption measures in public law.

<sup>27</sup> Chêne, *supra* note 20.

<sup>28</sup> “State-created Monopolies Analysis Pursuant to Unilateral Conduct Laws – Recommended Practices” (Report by the International Competition Network Unilateral Conduct Working Group, 2007-2008).

<sup>29</sup> See for example, BIAC’s paper on “Procedural Fairness: Transparency Issues in Civil and Administrative Enforcement Proceedings” presented to the OECD Competition Committee (2010).

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continue and will not be reduced are greater. One undeniably needs the three pistons in place and working to drive the anti-CBB engine.

*B. Establishing and enforcing an efficient competition framework complementary to the anti-corruption regulations*

14. There is no doubt that establishing effective competition materialized by “good laws for the financing of political parties, high ethical standards in the civil service, low concentration of suppliers, a satisfactory level of resources and technical expertise as well as transparent information for the controlling bodies of civil servants or elected officials [...], stronger antitrust and anti-corruption laws will all contribute to reducing the importance of corruption.”<sup>30</sup> However, as Frédéric Jenny points out in his study for the OECD, it would be useful to establish a better coordination between the enforcement of antitrust or competition laws (usually entrusted to the competition authority) and the enforcement of anti-corruption statutes (usually entrusted to the judiciary or anti-corruption body).

*C. Establishing an efficient competition framework incentivizing investments*

15. An effective competition system should also provide the appropriate incentives to business investors, encouraging them to fight corruption as well as anticompetitive behavior. Fostering compliance and encouraging voluntary self-disclosure are two key incentives that, when coupled with an effective competition framework should have a noticeable impact on the reduction of corruption.<sup>31</sup>
16. Compliance should be understood not just as adherence to the law and internal company rules, but as a key component of business integrity. Companies should be encouraged to invest in well-functioning anti-corruption and antitrust compliance systems and support projects that work towards the creation of incentives for good performers. Such efforts should be duly recognized in the respective legal frameworks: compliance incentive systems should be encouraged in national legislations, with consideration given as well to rewarding investment in compliance systems. This concept is – for the time being – only partly recognized regarding anti-corruption compliance.<sup>32</sup> However, this concept is not yet widely recognized in competition law,<sup>33</sup> even though we believe it could play an important role in the fight against corruption and anticompetitive behavior.<sup>34</sup>
17. Encouraging voluntary self-disclosure of corruption situations should also be encouraged. Whereas leniency for companies in case of early voluntary self-disclosure is a very powerful instrument of many antitrust jurisdictions (including the European Commission), this concept has not been adopted by authorities in case of anti-corruption enforcement. For an effective competition framework to have an impact on the reduction of corruption, we believe that

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<sup>30</sup> Frédéric Jenny, “Competition and anti-corruption considerations in public procurement” (2005).

<sup>31</sup> See BIAC Anti-Bribery Taskforce Key Messages paper, *supra* note 4.

<sup>32</sup> See for example the provisions of the British Bribery Act 2010.

<sup>33</sup> For example, the European Commission still rejects any idea of mitigating compliance efforts.

<sup>34</sup> See BIAC Anti-Bribery Taskforce Key Messages paper, *supra* note 4.

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companies should be rewarded for detecting and reporting violations of the law, regardless of whether the violations concern the antitrust laws.<sup>35</sup>

### III. Proposed survey on investors' experience with countries with competition laws

18. Over the last few years, the fight against corruption and the promotion of competition have been at the forefront of international policy discussions. Thirty-four (34) OECD member countries and six non-member countries have adopted the OECD's Anti-Bribery Convention. In 1996, the OECD also issued a recommendation on the tax deductibility of bribes to foreign public officials which has also led to a shift in several countries' attitude towards the taxation of bribes (until then, bribes to foreign public officials were tax deductible in many jurisdictions). Several countries have also adopted competition laws and established a competition authority. By 2008, 111 countries had enacted competition laws, which is more than 50 percent of countries with a population exceeding 80,000 people. 81 of the 111 countries had adopted their competition laws in the past 20 years, signalling the spread of competition law following the collapse of the Soviet Union and the expansion of the European Union.<sup>36</sup>
19. As mentioned above, we realize that establishing competition and corruption frameworks is not sufficient and corruption scandals continue to arise even in countries with established competition laws; only effective competition built on the three principles discussed above will help fight corruption. Moreover, this fight will be more efficient with the right incentives offered to companies and with the appropriate enforcement mechanisms for both the competition and anti-corruption frameworks. However, we realize that even with all of these factors in place, effective competition might not affect all aspects of CBB equally. Indeed, the link between the promotion of effective competition and the reduction of corruption may be fairly direct in terms of corruption around bid-rigging of government contracts but perhaps it will not affect corruption in other areas of the law to the same extent, where corruption is rampant in other areas of government. Some competition authorities are regarded as being effective competition authorities but are impotent in matters where political power enters the picture. We have to recognize that effective competition laws will have the most optimal effect on corruption where the other governmental institutions will also be running effectively. In particular, the level of democracy, the efficiency of public administration and regulatory systems and the efficiency of the judicial system will all impact the efficacy of an otherwise effective competition framework.<sup>37</sup>
20. The OECD is a leader in the international fight against corruption. By mandating and monitoring the imposition of criminal sanctions in signatory countries for the bribery of foreign public officials, the OECD pursues the dual objectives of fighting corruption and

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<sup>35</sup> See BIAC Anti-Bribery Taskforce Key Messages paper, *supra* note 4.

<sup>36</sup> Papadopoulos, Anestis, "The International Dimension of EU Competition Law and Policy" (2010).

<sup>37</sup> For more information on the different "regimes" of competition considered by the literature and the characteristics of an effective competition law regime, see for example Abel M. Mateus, "Competition and Development: What Competition Law Regime" (2010).

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creating a level competitive playing field for all companies.<sup>38</sup> In light of all this and as mentioned in last year's BIAC Paper, the OECD is well-positioned to guide the adoption of effective competition policies with an aim to reducing corruption.<sup>39</sup>

21. Therefore, we would suggest that the OECD conduct a survey of countries that have adopted competition laws.<sup>40</sup> The survey would be addressed to a group of companies with international investments and would include questions regarding their experience with corruption in those countries that have – on paper at least – adopted competition laws. This would be a first step in the evaluation of the effectiveness of the competition frameworks necessary to fight corruption. The survey would include questions aiming at determining whether or not the competition laws in place in that country meet the three core principles of effective competition discussed above. The survey would also analyze the impact of effective competition on the various forms of corruption, bribery and bid-rigging of government contracts. For example, a few suggested areas to be covered would be:

- to what extent is the competition authority independent;
- to what extent are the decisions of the competition authority transparent;
- to what extent is the competition law decision-maker accountable;
- are there any guidelines and bulletins available to explain to the public how the competition law system works in that country;
- to what extent competition policy has been applied to improve the environment in terms of corruption; and
- to what extent an ineffective competition policy or corrupt agency has exacerbated the corruption problems.

22. BIAC believes that the results of this survey would help both businesses and governments alike to evaluate the effectiveness of competition laws in place in order to better fight corruption. This would also allow the OECD to further its anti-corruption and pro-growth goals, encourage more effective competition, stimulate greater investment and enhance economic efficiencies, all of which would result in overall wealth creation.

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<sup>38</sup> BIAC Paper, *supra* note 2 at para 19, citing OECD, “No Longer Business as Usual: Fighting Bribery and Corruption” (Paris: OECD Publications, 2000) at 3.

<sup>39</sup> BIAC Paper, *supra* note 2 at para 20.

<sup>40</sup> Whether the survey goes beyond OECD member states is a matter for the OECD Competition Committee to consider.