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TRANSPARENCY INTERNATIONAL CANADA RESPONSE TO GOVERNMENT OF CANADA CONSULTATION ON INTEGRITY REGIMES

This report is in response to Public Services and Procurement Canada's (PSPC) open consultation between September 25 and November 17, 2017: "Integrity Regime consultation: Expanding Canada's toolkit to address corporate wrongdoing".

PSPC provided a discussion guide for their current thinking on the topic, which included a series of questions for which they sought specific advice.

Transparency International Canada has responded to the specific questions in the discussion guide, drawing upon its previous 2015 public submission to the Government of Canada on this topic, which can be found on TI Canada's website and is linked and attached to this submission.

The responses were discussed amongst TI Canada's Legal Committee, and coordinated by TI Canada Chair Paul Lalonde and Treasurer, Stefan Hoffmann-Khunt.

James Cohen
Interim-Executive Director

November 17, 2017
Toronto, Canada

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1 Time periods associated with ineligibility and suspension

Q1	To what extent, if any, should the duration of ineligibility and/or suspension be modified to ensure appropriateness while continuing to mitigate risk?
Q2	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?

i. More flexibility with regard to the sanction period would allow alignment with other international sanction regimes (World Bank Group, US or UK) where sanction periods mostly are determined based on a variety of factors resulting in case-by-case determination of sanction periods.

ii. The current Integrity Regime does not sufficiently allow for proportionality of sanction to offence, which Transparency International considers an important fairness principle to be observed. More discretion would allow for a more measured consideration of sanction period impact on the supplier, thus helping to ensure proportionality of the effects of the sanction on the supplier to the wrongdoing that led to the sanction.

iii. To the extent PSPC is granted discretionary powers to adjust the ineligibility period, the mitigating and aggravating factors that will be considered should be established and transparent. Factors to be considered should include:

- Did the supplier self-disclose the misconduct?
- How long ago did the wrongdoing occur?
- Are the responsible actors still employed by the supplier?
- What measures did the supplier take to address/rectify the wrongdoing?
- To what degree did the supplier cooperate with enforcement authorities?
- To what extent has the supplier implemented credible reforms to prevent recurrence by the supplier or lack thereof?
- To what extent has the supplier publicly taken responsibility and accountability for the wrongdoing?
- What is the magnitude of the harm caused by the supplier's wrongdoing? (This should include consideration of the broader societal harms caused by the wrongdoing, such as corruption and bribery.)
- The impact of the proposed sanctions on the supplier, with particular focus on the extent to which the sanction will impact innocent employees.
- Any other factor that may be of relevance in the case at hand.

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iv. Conditions for early release from debarment on a case-by-case basis should be included in the toolbox of the Integrity Regime. However, the exercise of any discretionary power to grant early release should be in the context of known, transparent criteria (such as demonstrated implementation of credible compliance measures). In addition, release decisions and detailed statements of reasons should be made public.

2 Criteria for ineligibility and suspension

Q3	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?
Q4	What factors should be considered in determining whether new offences should be included?

i. Civil or provincial offences that have led to a conviction in the respective province could be taken into account.

ii. However, overall proportionality of sanction and offence must be maintained. The legal principle that defendants should not be prosecuted multiple times for the same offence needs to be appropriately considered when imposing additional federal sanctions on suppliers that have already been sanctioned on a provincial level.

iii. TI Canada considers that the selection of the specific offences leading to ineligibility should be carefully reviewed. It is not clear on what basis the current list of offences was developed. It appears that the offences are economic crimes that were believed to be most relevant to procurement-related risks. However, the selection criteria are not known. We urge PSPC to openly explain its policy approach to the selection of offences that lead to ineligibility.

While a detailed analysis of offences that should lead to ineligibility is beyond the scope of the current response, TI Canada urges the Government of Canada to carry out a thoughtful analysis of this issue, including a thorough comparative review of ineligibility measures abroad to gain insight from the experience of other jurisdictions. For example, many procurement regimes around the world provide for debarment of suppliers found guilty of various offences not listed in the Integrity Regime. For example, some jurisdictions impose debarment for offences relating to human trafficking, violations of international economic sanctions, the use of conflict minerals, among others. A careful analysis of how Canada's Integrity Regime could

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appropriately contribute to the fight against these kinds of offences (and the corruption that often accompanies them) should be undertaken.

Offences that should be considered for addition to the current list include (in additions to the ones listed in the previous paragraph) offences related to participation in organized crime, money laundering and terrorist financing offences, tax evasion, violations of international human rights and international humanitarian law and violations of political financing laws.

Q5	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?

i. TI Canada does not at this time propose a change to the current system with regards to the timing of when actions regarding corporate wrongdoing should be considered. Currently implemented procedures seem appropriate to allow for measures to be taken when there are serious reasons for concern (i.e. administrative agreements as a measure when suppliers are charged). As an organization dedicated to the central importance of the Rule of Law, we espouse the fundamental principle of innocence until proof of guilt in accordance with appropriate legal process. However, the current administrative agreement system to deal with suppliers facing charges strikes a balance between the need to protect the integrity of the procurement process (and protect the government from risk) and reasonable fairness to suppliers on the other hand.

Q6	How should Integrity Regime determinations of ineligibility be applied to non-procurement federal services?

i. Unless there are compelling reasons for an exception, the guiding principle should be that the principles of the Integrity Regime (including determinations of ineligibility) should apply in the context of all federal government activity, including non-procurement federal services and agreements.

Q7	What impact should a debarment decision made in another jurisdiction or by another organization have on a supplier's status under the Integrity Regime?

i. In principle, we agree with the current approach of ineligibility for similar offences committed abroad. With respect to foreign ineligibility decisions or by international organizations and/or authorities, we also agree that such decisions should lead to ineligibility in Canada. However, this should be

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analyzed on a case by case (with appropriate opportunity for the supplier's submission to be taken into account) to ensure that the foreign ineligibility decision was made in a manner that meets adequate standards of procedural fairness in a context of respect for the Rule of Law (such as, for example, the debarment standards and processes implemented by the World Bank Group). Cross-debarment between the Integrity Regime and other debarment systems outside Canada should not be automatic, but only following a determination that the foreign debarment was not arbitrarily imposed.

3 Addressing organized crime

Q8	What type of measure 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?

i. While we support the notion to individuals associated with organized crime from participating in federal government contracting, care should be taken to clearly define "association with organized crime". Corporations whose ultimate beneficiary or controlling shareholder is found to be a member of organized crime should rightfully be debarred. However, there may be corporations who have legitimate business transactions with individuals subsequently found to be members of organized crime and who themselves have not acted in any wrongful way. Care, therefore, must be taken in how the "association" with organized crime is defined.

4 Expanding the scope of application

Q9	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?

i. In general, we believe that the scope of application of the Integrity Regime should be as broad as possible and should therefore include all federal (and federally funded) entities and crown corporations.

Q10	How could the Government of Canada use the Integrity Regime to achieve other social, economic or environmental policy objectives?

i. As we have stated before, we believe it is legitimate for the federal government to use its purchasing power to drive corporate behaviour in relation to issues such as corruption. We continue to hold this position and urge the Government of Canada to carefully consider the extent to which

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the list of offences that lead to ineligibility should be expanded. That said, a detailed review of what other societal, economic or environmental objectives could be pursued through the Integrity Regime is beyond the scope of our submission.

As a general observation, we recall TI Canada's earlier submissions relating to the Integrity Regime and maintain that it should be implemented by statute or regulation, not just as a matter of policy instrument. We also repeat our earlier calls for greater transparency in the administration of the program. We, therefore, encourage the Government of Canada to ensure that the Integrity Regime includes more clearly articulated criteria for the exercise of PSPC discretion and more public disclosure on the activities of the PSPC under the Integrity Regime (including the publication of reasons for ineligibility decisions and annual reports detailing qualitative and quantitative information on PSPC's Ineligibility and Suspension Policy activities).

Attachment 1: "TI Canada responds to the new Integrity Regime introduced by PWGSC in July 2015"