

High Level Reporting Mechanisms in Colombia and Ukraine

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Executive summary

The responsibility for governments to address bribe solicitation derives from internationally recognized anti-corruption standards all of which prohibit the ‘demand side’ of bribery, namely, the solicitation by a public official of an undue advantage. So far however, most governmental anti-bribery efforts have focused on the offering or giving of bribes by companies and their employees. They have neglected practical solutions to support companies that are faced with explicit or implicit demands for bribes when dealing with public administrations, for example in the context of public contracts, business licensing or tax audits. Unless they pay these bribes, companies may risk losing business or face obstructions to doing business.

The concept of ‘high level reporting mechanisms (HLRM)’ has been devised to help address this gap experienced by companies that are solicited for bribes or subject to other forms of extortion and unfair treatment. Two countries have pioneered the concept so far, namely Colombia and Ukraine. This paper describes the underlying purpose and principles of the HLRM, reviews how this was translated into national mechanisms in these countries, and offers some initial comments on the lessons learned.

The HLRM is not a legal procedure; it is a voluntary process (companies can always choose legal redress if they prefer), which offers an alternative and complementary approach to other functions or dispute resolution systems be they legal, administrative or regulatory. What distinguishes the HLRM is that it consists of giving companies and/or individuals confronted with solicitation or other forms of bribe pressure direct access to a mechanism that is above - and separate from - the agencies where solicitation occurs. Ideally it is a readily accessible means for businesses to address bribery-related issues – directly, rapidly and at a high level.

As the examples in Colombia and Ukraine show, there is no rigid definition of a HLRM and it needs to be adapted to each jurisdiction’s particular context. It can be designed to respond to a broad cross section of industries, or it can be tailored to a specific industrial sector, or it can serve the requirements of business in relation to a particular public process (such as business licensing, customs, public procurement). A HLRM can also start out on a small scale as

a pilot, before being rolled out more broadly, and it can be designed as a process at national or at sub-regional levels.

The starting point for any HLRM is strong commitment from the top levels of state authorities, without which the HLRM is unlikely to be effective. And whilst the form and scope of the HLRM are flexible, it should embody a set of key principles and functionalities. These include clear, transparent and sufficiently independent governance structures to ensure that no party to the complaint can interfere with the fair conduct of the resolution process. As a prerequisite for this, the HLRM should offer a reporting channel that is independent of the agencies whose employees are alleged to be soliciting bribes. In addition, the companies must be empowered to share their concerns freely without fear of retribution. Confidentiality and safeguarding of personal data collected in relation to a complaint, and an option for complaints to be submitted anonymously where necessary, are also basic attributes to be included in the HLRM.

One of the strengths of a HLRM is its power to use informal means for quick problem solving. The power to initiate a dialogue with the complainant company in formal and informal settings, including where possible with managers from the agency about which the complaint has been made, is important as a means of resolving disputes expeditiously. It may also help prevent a conflict from escalating. These features have been noted in the pilot phase of the Colombia HLRM.

The governments of Colombia and Ukraine have both established mechanisms in line with the concept of the HLRM, called HLRM in Colombia and Business Ombudsman in Ukraine. Whilst there are marked differences in the scope, legal set-up and processes, there are significant commonalities as well, notably in the desire by these governments to address extortion and the unfair treatment of business in a practical way so as to boost competitiveness and to prevent corruption.

Introduction

Being solicited for a bribe is not a defence; companies are also well aware that once they have paid, they only open the door to further extortion, which brings increasing risks and an erosion of their internal compliance programmes and integrity standards. Reluctance on the part of companies to report extortion due to concerns about loss of business and retaliation leaves a gap that needs to be addressed in many countries. The concept of ‘high-level reporting mechanisms’ (HLRMs) may provide a means for companies not only to report, but also to obtain practical redress on issues that may not otherwise be addressed by the courts. But before looking at the details of how HLRMs are being implemented, their scope and how they can be utilised, it is worth recalling that HLRMs came about in answer to demands by the private sector seeking solutions to the ‘prisoner’s dilemma’. Deliberations with the General Counsels of several major power technology and energy companies revealed that their main concern was solicitation of bribes in certain key markets and what could be done to address these risks. It was through deliberations with these partners on these particular challenges that the concept of HLRMs was developed under the auspices of the OECD by Nicola Bonucci, the OECD’s Director of Legal Affairs, Prof Mark Pieth from the University of Basel and the Basel Institute on Governance and, at that time, Chair of the OECD’s Working Group on Bribery, and Fritz Heimann of Transparency International.¹ Support for developing HLRMs was found at the B20 – a forum through which the private sector produces policy recommendations for the annual meeting of the G20 – to assist in developing a practical approach for handling bribe solicitation. As a result, the B20 recommended in 2012 that G20 governments “establish appropriate forms of ‘high level reporting mechanisms’ to address allegations of solicitation of bribery by public officials.” In response to this call, the G20 in 2013 adopted guiding principles that encourage the establishment by governments of “easily accessible channels for companies and individuals that have been solicited

to report to public authorities”². In 2014, the B20 requested the G20 to address further the need for practical solutions by taking “steps to install and/or build capacity for HLRMs in at-risk public offices where any party can report violations of anti-bribery and anti-corruption laws”³.

This paper seeks to draw preliminary lessons on HLRMs for businesses from the two such mechanisms that have been established since the B20 call, in Colombia and Ukraine. It first charts the challenges faced by businesses when facing bribe solicitation and discusses the origins and utility of reporting mechanisms to address this issue. Then it looks at the examples of Colombia’s HLRM and Ukraine’s Business Ombudsman Institution, describing what they are, how far they have come, and why they have developed as they have. Finally it looks at the core components of a HLRM and provides a checklist of important policy issues for consideration by governments interested in establishing a HLRM.

1 Fritz Heimann, “High-level reporting: overcoming extortion”, *Collective Action: Innovative Strategies to Prevent Corruption*, Mark Pieth (ed.), Basel Institute on Governance, 2012.

2 G20 Guiding Principles to Combat Solicitation (2013).

3 B20 Anti-Corruption Working Group Report to the B20 Office and Task-force Chairs (July 2014).

Why a high level reporting mechanism?

Integrity challenges and reporting options: Challenges for businesses

Over the past twenty years or so, a vast array of mechanisms, tools, and methods has been developed by governments to alleviate some of the challenges that result from widespread bribe demands. One has been to criminalize bribe demands by public officials. Another strategy has been to strengthen the integrity of public officials as an additional tool to reduce bribe solicitation. Setting principles and standards of conduct for public officials through codes of conduct has been one way in which this has been carried out. In some countries, governments have turned to wide conflict of interest regulations, which include ethic rules that prohibit the improper solicitation or acceptance of gifts or other benefits by public employees, to reduce the space for bribe solicitation. In certain cases, such regulatory framework has gone hand in hand with the creation of reporting mechanisms or internal administrative procedures to handle complaints about breaches of public integrity.

Notwithstanding such developments, bribe solicitation by public officials continues to pose constant challenges for businesses in many countries of the world. Companies faced with bribery solicitation have often only limited strategies to avoid paying a bribe. The judiciary – in principle the institution of choice for resolving alleged breach of anti-bribery laws as long as they provide for the criminalisation of solicitation or “passive bribery” – is not trusted by companies in many parts of the world. Courts may themselves be corrupt and geared towards serving the interests of corrupt officials. Their effectiveness may be limited due to lack of capacity or expertise and, consequently, in many countries a large backlog of cases further reduces trust in the effective administration of justice. Finally, courts also may decide not to act on a report of solicitation. Even in those countries where the solicitation of bribes is a crime, as a matter of prosecutorial discretion unconsummated solicitation – that is instances where a company has been solicited to pay bribes but has refused to do so – is unlikely to be brought before the courts.

Recourse to national or international arbitration – based on either treaties or contracts signed by investors and the state – can be another option. Foreign investors have launched well over 300 international arbitrations against host states over the past 20 years, some of them involving alleged wrongdoing by a governmental agency, including specifically corruption. The downside of arbitration processes, like domestic courts, is that they do not provide a quick solution. High costs incurred by each party for its legal counsel and experts have also been identified as one of the greatest disadvantages of international arbitration in an OECD Study⁴. It should also not be taken for granted that private arbitration is freer from corruption if one of the reasons to use arbitration is to avoid judicial corruption.

Companies are commonly advised to deal with extortion by reporting it to the agencies whose employees are soliciting bribes⁵. In many countries however, companies are unwilling to do so. They fear that they may suffer from retribution in the form of loss of contracts or exclusion from future bidder lists. They can also – at least foreign-based companies – turn to their home countries’ institutions such as embassies or export agencies, to report the instance of solicitation. In practice, the services provided by such institutions are however rarely used. Firms are reluctant to communicate the nature of a particular solicitation to their own authorities out of fear that it will expose them to a greater level of scrutiny and potential investigations down the road⁶. Finally, companies may also decide to pay the bribe. Paying bribes nevertheless feeds demands and exposes them to the risk of prosecution, either domestically where the bribe has occurred or, if the company originates from a country with foreign bribery legislation, under its home country’s laws. As an option of last resort, companies may decide to stop

4 David Gaukrodger and Kathryn Gordon, *Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community* (OECD, 2012).

5 See, for example: International Chamber of Commerce, Transparency International, United Nations Global Compact, World Economic Forum, *Resist: Resisting Extortion and Solicitation in International Transactions. A company tool for employee training* (2010).

6 *Improving Action Against Solicitation. G20 Anti-Corruption Working Group – Note Prepared by the OECD* (2013).

investment and close operations in the concerned country, a decision which is not lightly undertaken and can have serious business implications.

For these very reasons, alternative processes such as HLRMs, may have a potentially powerful role to play. First, they can be a stopgap measure to compensate for the shortcomings of the judiciary, and can also address issues at an early stage at moment when courts may decline to get involved. They further have the scope to provide quick solutions to companies' grievances by providing businesses with a direct line of communication with a public authority at a high level, by mitigating fears of retaliation by allowing them to report these to an institution that is independent from the agencies whose employees are soliciting bribes, and by empowering them to become partners with public authorities in advancing their rights and their business interests through their involvement in the dispute resolution process.

The origins and utility of reporting mechanisms

The concept of reporting mechanisms designed to facilitate and handling complaints by individuals, organisations or corporations affected by public authorities' activities is nothing new. In the past fifty years, an area of extra-judicial mechanisms has been established as a means of solving problems that may arise at the interface between individuals, companies and public authorities.

Illustrations of this include complaints offices, sometimes specific to an industry sector or to a public agency, or internal administrative procedures such as reporting systems run by public procurement authorities to handle complaints related to their processes or employees. Other examples include state or sector-specific ombudsmen, which provide mechanisms to handle complaints against governmental actors. One illustration of this is the ombudsman linked to Brazil's anti-corruption agency whose task is to handle complaints about administrative and legal abuse by federal state agencies. Another illustration is the US business ombudsman whose aim is to assist small and medium businesses facing unfair regulatory compliance or enforcement issues

such as repetitive audits or investigations, excessive fines, and retaliation. Whistleblower systems have also increasingly become popular in some countries, enabling individuals or companies to raise their concerns about breaches of codes of conduct of public officials.

Governments have also established mechanisms to address the supply side of corruption, i.e. instances of bribe giving to public officials by unscrupulous companies. The OECD National Contact Points (NCPs) provide one example: the NCPs offer a state-based, non-judicial system, through which individuals and organisations can seek redress in such instances. In this case, they handle complaints against the company itself, not the public official or agency⁷.

The common denominator among most such mechanisms is that they act as redress mechanisms. Their main purpose is to find resolutions of complaints outside the judicial process for reasons such as time and cost saving, informality, a desire to avoid confrontation and a need to protect the integrity of an institution or a process. With a few exceptions, these mechanisms are voluntary mechanisms. They are not intended to replace or undermine existing legal processes at the country level but wish to serve the purpose of offering a less formal and quicker way of resolving disputes.

The HLRM in a nutshell

In describing what constitutes an HLRM, it is important to keep in mind that it is not a legal mechanism, but a process that provides an early point of recourse for companies confronted with extortion or other similar concerns in specific administrative processes or public projects. HLRMs function alongside law enforcement and should be complementary to other systems to prevent bribery.

The mechanism provides companies with a voluntary alternative to mediation, arbitration or public accountability systems, and differs from these forms of dispute resolution in that it offers a simplified, faster way to settle issues, while still recognizing the right of companies to take their

7 OECD (2011), OECD Guidelines for Multinational Enterprises, OECD Publishing: Chapter VII. Combating Bribery, Bribe Solicitation and Extortion and Commentary on Combating Bribery, Bribe Solicitation and Extortion.

grievances to courts or use other procedures. They are also distinct, as - unlike many other legal or quasi-judicial mechanisms - they do not require the company to show a breach of standards. That said, any grounded suspicion of bribery or other criminal, administrative matters should be referred to the authorities. One of the strengths of a HLRM is its power to use informal methods such as initiating a dialogue with the complainant company in formal and informal settings, including where possible (i.e. when there is no fear of retribution for openly voicing complaints) with managers from the agency about which the complaint has been made. Not only is a resolution expedited; it may also help prevent a conflict from escalating.

When a government embarks on establishing a HLRM it is clear that there is no one-size-fits-all approach because it has to take account of the existing legal and regulatory framework. It is however, important for the 'high-level' element to be established from the outset with a champion from the political arena such as the President, and the assumption is also given that the government is committed to anti-corruption reforms and will commit sufficient resources to make the HLRM sustainable over time.

Many companies are reluctant to report incidences of extortion as they may be concerned about exposure to scrutiny of their activities, or are wary of somehow raising suspicion about their business practices more generally. Overcoming this wariness is not easy so it is clear that a HLRM will only work when companies are encouraged to share their concerns freely, without fear of retribution. Coming out with a complaint concerning bribery can pose risks for companies. A HLRM should incorporate ways to prevent harm. These precautions may include a policy of non-retaliation, measures to ensure confidentiality, safeguarding of personal data collected in relation to a complaint, and an option for complainants to submit anonymous complaints where necessary.

These elements and other aspects of the HLRM are discussed more fully in the final section of this paper.

The benefits for businesses and governments

Compared to the mechanisms enumerated above, the HLRM has a number of advantages or particular features that make it attractive to business and governments alike. A HLRM is not just an internal administrative procedure or hotline for handling complaints. Whereas an internal administrative procedure is attached to a specific agency, with all the potential conflicts of interest this may pose for the individuals responsible for handling complaints, a HLRM is an institutional arrangement, which is above and independent of the agencies whose employees solicit bribes. Furthermore, in the case of a whistle-blower system, the primary purpose of the mechanism is not to resolve a dispute but to address concerns about breaches of public integrity, which may or may not harm companies, and are of concern to the specific agency or the state as a whole, not to the company itself.

Many of these mechanisms also emphasize investigations and formal responses, whereas a HLRM is a process premised upon dialogue and problem solving. For example, a swift response when requests for bribes occur in the context of obtaining business licences or customs clearance is critical for businesses. A prompt response in the context of public procurement, prior to the awarding of the contract, is equally important. Furthermore, response times of other mechanisms are often long, for example from one to four months in the case of the US ombudsman and from three to 12 months for the OECD National Contact Points⁸. As a result, these mechanisms are often underutilized or even not used at all.

The potential benefits for business and governments alike are quite important. First, where other accountability mechanisms are slow, a mechanism that is tasked with responding swiftly to cases of bribe solicitation or extortion should satisfy business expectations for a "quick fix". Companies should also be less reluctant to report bribery demands, as

8 Office of the National Ombudsman, Report to Congress - Fiscal Year 2012, Washington D.C., 2012, p. 18; OECD (2011), "Implementation Procedures of the OECD Guidelines for Multinational Enterprises", OECD Guidelines for Multinational Enterprises, OECD Publishing, p.87.

the mechanism is independent of the agency whose employees are soliciting bribes should guarantee they will not be subject to retaliation by the agencies where solicitation occurs. A HLRM may also help create further “a level playing field for commerce” as unscrupulous competitors who act unfairly may ultimately be held accountable. All these factors provide strong incentives for companies to use HLRMs. For a country considering a HLRM, the incentives for doing so include first the likelihood of favourable responses by country credit rating agencies as well as international companies considering direct investments, and positive reputation repercussions. A HLRM may help demonstrate that the state is concerned about reducing bribery and a well-functioning business-related services sector. A HLRM may in particular play a key role in creating an environment conducive to investment. Business may have greater confidence in investing in a country if they know that, when solicited to pay bribes, they will be able to take their grievances to a dedicated body for speedy resolution.

A HLRM may also help mitigate or prevent adverse impacts of bribery on public processes and projects. For example in the context of procurement, a prompt response may prevent financial damages linked to early repair costs to maintain corrupt investments or adverse environmental or societal impacts. In the context of tax inspections, a quick remedy may prevent reputational damage to tax authorities that could be caused by lingering suspicion of improbity. A HLRM can also serve as an early warning system for wider problems; yield insights from individual complaints that spotlight changes that might be needed to the concerned process or agency’s management system; capture wider lessons and thus help government address more systemic issues.

In line with the B20 call for the establishment of HLRMs to address allegations of solicitation of bribery by public officials, two such mechanisms have recently been created. Colombia was first to establish one (‘Mecanismo de Denuncias de Alto Nivel para Empresarios’), which has been operating since early 2014. A few months later, in May 2014, a decision was made in Ukraine to establish a similar mechanism, taking the form of an Ombudsman for Businesses, through operationalization of this mechanism required a number of

laws or decrees to be passed which, due to the subsequent political changes in Ukraine, took until late 2014. So Colombia and Ukraine can provide case studies of both: a High Level Reporting Mechanism for Businesses and a Business Ombudsman Institution.

The context

The origin of the Colombian HLRM is usually attributed to the President of the Republic of Colombia, who gave strong backing to the project from the outset, facilitated the process and ensured the HLRM became a reality within a rather short timeframe. In addition, the start of the negotiations for Colombia’s accession to the OECD gave a strong boost to those in Colombia who wanted, like the President, to reform the country’s anti-corruption framework; they were also a way for the OECD to exert leverage over the direction of these reforms in Colombia, including with regards to new policies designed at coping with bribery in international business transactions, one of which being the idea of a HLRM.

The active leverage of the European Bank for Reconstruction and Development (EBRD) was similarly a key factor in the decision to establish an ombudsman in Ukraine. The largest investor in the country, the EBRD considered the business climate in Ukraine as needing reform in a pragmatic way so that the bank could continue to disburse its investments responsibly⁹. In other words, as explained by Ukraine’s Interim Prime Minister at the time of the signing of the Memorandum of Understanding that created the function of the Business Ombudsman, its establishment meant that “funds invested by the Bank into the Ukrainian economy will be used on a transparent basis and corruption risks will be minimized in the process of using these funds”¹⁰. The fact that Ukraine was moving towards signing landmark agreements on association and free trade with the European Union created further incentives for Ukraine to listen to EBRD’s demand that it takes more robust actions to improve the work climate for investors and businesses.

⁹ The EBRD invests about EUR 1 billion a year in Ukraine.

¹⁰ “Independent Business Ombudsman Institution Established in Ukraine – Memorandum of Understanding to Support Ukrainian Anti-Corruption Initiative”, Web-Portal of Ukrainian Government, 12 May 2014.

Addressing bribe solicitation: two examples of high level reporting mechanisms for businesses

Motivations

The motivations for establishing HLRMs in Colombia and Ukraine somewhat differed. They were distinct in that the original concept behind the establishment of Ukraine's mechanism came about in 2013 with a gradual realization by Ukrainian politicians of the need for sustainable economic growth and that such economic growth would require an increase in private investment – which required a radical improvement of the business environment that had been hampered by systemic corruption for many years. As such, the primary motivation for establishing a reporting mechanism in Ukraine was to set up a system that will address business concerns in relation to endemic corruption. The Colombian HLRM meanwhile was firmly rooted in Colombia's infrastructure modernization project from the outset and the importance of ensuring the participation of international companies in multimillion dollars projects linked to it. Increasing levels of corruption characterized the years after the 2004 "Orange Revolution" in Ukraine. This increased pressure affected first of all medium-sized companies, often forcing them out of the market. But not only: pressure on business, corruption and complex laws severely stymied larger domestic companies and foreign investors as well. Companies also faced challenges when dealing with Ukrainian customs and tax administrations' arbitrary inspections. A dramatic decrease in foreign investment combined with increased domestic and international pressure for reform led to amendments to the criminal code in 2012, regulating conflicts of interest by government officials and criminalising the giving and receiving of gifts. Nevertheless, these amendments had a minimal effect on the level of corruption in political circles because of weak rule of law and enforcement. Furthermore, the 2012 amendments to Ukraine's public procurement laws eradicated transparency in public bids, allowing for the embezzlement of state funds.¹¹ All of this triggered initiatives by local business groups and foreign investors for measures to improve the business climate, which, in turn, led to the gradual understanding

by Ukrainian government of the need to take more robust actions. One of these was the idea, promoted by the American Chamber of Commerce in Ukraine and then taken up by EBRD, to provide a consolidated platform for handling problems of individual companies, thus serving the purpose of helping enhance Ukraine's business climate¹². One event was nevertheless crucial to Ukrainian authorities' acceptance of the idea of such a platform: the recognition in early 2013 that existing Ukrainian clients of EBRD and foreign investors looking for opportunities could not be attracted to Ukraine anymore given the levels and extent of corruption and the consequential risk of doing business there. Unless Ukraine were to seriously address corruption and the problems faced by businesses, investment flows would dry up¹³. By contrast, rather than private sector concerns, state political will in connection with the expansion of Colombia's infrastructure system was the driving force behind the creation of the HLRM in Colombia. The idea surfaced in conjunction with Colombia's decision to launch a major road infrastructure project, encompassing roughly 40 projects and 8,000 km of roads, and representing a total investment of USD 25bn over seven years – the so-called 4th Generation Roads Project (4G Project)¹⁴. With the recognized need to attract private investment, Colombia then decided to pass laws and enact policies to create a friendlier environment for accomplishing this, one of these being the creation of a HLRM. Its establishment was thus part of a broader set of legal and institutional measures aimed at providing transparency for all the parties in the bidding and construction processes and at supporting the country's infrastructure plan more effectively. Colombia's HLRM was conceptualized as an additional tool to build trust with private investors, ensure transparency and integrity, and ultimately improve the

11 Law of Ukraine No. 5044-VI dated 4 July 2012 "On Amendments to Certain Regulations on Public Procurement in Ukraine".

12 The activity of the American Chamber of Commerce in Ukraine played a role in drawing the attention to the problems of business-to-government ("B2G") relations and in developing the idea of a "special device" entrusted with the function of handling B2G disputes. A Working Group had been working on this "device" since 2012.

13 "Investment Ultimatum: EBRD's André Küüsvek on why foreign investors are fleeing Ukraine and what could make them to stay", *The Ukrainian Week*, 14 April 2013.

14 For more information on the 4G programme, see <http://www.ani.gov.co/proyecto/general/cuarta-generacion-de-concesiones-1068>.

country's public-private partnership programs¹⁵.

Developing the idea in Colombia

The establishment of the HLRM in Colombia was a relatively straightforward process due to the political backing given by the President of the Republic from the outset. President Santos' active involvement to ensure the participation of all relevant public authorities, including the Attorney General Office, the Ministry of Justice, the National Public Procurement Agency and the Industry and Commerce Superintendence (Superintendencia de Industria y Comercio), in the design of the Mechanism was crucial to set the stage for its rapid establishment. In that endeavour, the group, led by the Secretariat of the President for Transparency – an office in charge of policy design and coordination in the anti-corruption field and reporting directly to President¹⁶ – benefited from the support of the Basel Institute on Governance. Its contribution proved valuable when it came to provide special expertise. In the course of a few months, the group articulated an approach of what was to become a “High Level Reporting Mechanism for Businesses”¹⁷.

Colombia's HLRM was formally launched in April 2013. According to President Santos, the mechanism was called upon “to provide anyone having a concern over potential bias in the design or conduct of a procurement procedure the ability to notify the Transparency Secretariat for the purpose of prompt resolution of matters concerning alleged irregularities”¹⁸. The purpose of it would be to receive complaints and address them while keeping the procurement procedures running, thus offering companies an alternative

to protracted legal proceedings and other accountability mechanisms. To make the most of the initiative, the decision was made that the HLRM would initially be circumscribed to the first phase of the tender process for the 4G Roads Project, scheduled to begin in October 2013 and set to last until the second half of 2014. On the basis of the results of that pilot phase, the authorities would decide whether the availability of the reporting system for subsequent bid rounds is justified or not.

Designing a business reporting institution in Ukraine

In sharp contrast to the situation that had prevailed in Colombia, putting together the requirements for a reporting mechanism in Ukraine was difficult. The initial response of Ukraine's executive authorities was rather unenthusiastic. Governmental champions of the idea were hard to find. The Cabinet of Ministers said that the functions of an institution protecting business interests were already being fulfilled by various state agencies, including the Ministry of Economic Development and Trade and the State Service of Ukraine for Entrepreneurship and Regulatory Policy¹⁹. Nevertheless, the fact that the then President of Ukraine, Viktor Yanukovich, had recently issued a Presidential Decree pledging cooperation with EBRD on several fronts, including corruption, paved the way for Ukraine's authorities to progressively, albeit reluctantly, accept the idea.

A Presidential Instruction gave a further impetus to the process. Issued a few days after EBRD President came to Kiev to discuss the need for improving the investment climate in the country and especially for eradicating corruption, the Instruction called upon the cabinet and other involved authorities to step up cooperation with EBRD in tackling corruption more effectively in the framework of an anti-corruption initiative bringing together representatives of the Ukrainian government, business associations and

15 See on this point President Santos' Address to a high-level conference in Bogota, Colombia, on 2 April 2013 which saw the official launching of the Mechanism: http://www.baselgovernance.org/fileadmin/docs/news/mecanismo_denuncias_de_alto_nivel_7_eng.pdf.

16 Presidential decree 4637 of 2011 that establishes the position of Secretary of Transparency: <http://wsp.presidencia.gov.co/Normativa/Decretos/2011/Documents/Diciembre/09/dec463709122011.pdf>.

17 Proposal: High Level Reporting Mechanism – HLRM (Secretariat of the President for Transparency, September 2012, unpublished).

18 “Address by the President of the Republic, Juan Manuel Santos, on the High-Level Whistleblowing Mechanism”, Bogota, 2 April 2013: http://www.baselgovernance.org/fileadmin/docs/news/mecanismo_denuncias_de_alto_nivel_7_eng.pdf.

19 “Who wants to be a business ombudsman”, Forbes Ukraine, 6 March 2013.

international financial institutions active in the country²⁰. At the heart of the Initiative, whose aim was to monitor corruption and increase transparency, was the creation of a business ombudsman institution to which business could bring their complaints about unfair treatment and corruption by Ukrainian public officials²¹.

Documents that are publicly available do not reveal what inspired the Bank to propose a reporting mechanism taking the form of a business ombudsman. Nevertheless, the HLRM as sponsored by the OECD in Colombia was at the core of the Bank's vision. The business ombudsman institution had also already been tried in several countries, such as Georgia, Russia, South Africa, the UK and the USA. When the EBRD launched the idea, it claimed that such mechanisms would provide a model for Ukraine's ombudsman²². Whatever EBRD's source of inspiration, as a result of the Instruction of the Ukrainian President, the Bank was now in the position to work out the details of the mechanism with relevant stakeholders. The plan, as established by the Bank in following up the agreement reached with Ukraine's President, was to set-up a public-private working group to develop the overall concept for the ombudsman institution, to put the memorandum setting the key principles for it with the Ukrainian government by the Summer, and to have the ombudsman function to start working in 2014²³. In fact it took a little longer to appoint a suitable person to the position of Ombudsman, and so he was able to start work in May 2015.

In support of this endeavour, the Bank sought assistance from the Basel Institute on Governance to act as facilitator

to the stakeholder group to enable them to come together in the first place and to help them identify matters of common interest. Thus, in addition to legal advice with regards to the drafting of a proposal for the mechanics of the ombudsman institution, the Institute provided support for the wider process of preparing the creation of the institution. In particular, the Institute assisted in establishing the working group that ultimately developed and agreed upon the concept. In assembling the group, importance was attached to the need to listening to the views of not only government officials and the business sector, but also of the relevant sectors of civil society. Securing adequate government buy-in proved to be much more challenging, as subsequent events were to demonstrate.

The Bank convened the working group for the first time in June 2013. With over 20 participants from government, businesses, civil society as well as international financial institutions, the two-day meeting covered a number of issues, ranging from the purpose of a business ombudsman institution in Ukraine to its scope; whether it should be a type of law enforcement agency or rather a "fire brigade"; whether it should be a public agency, an NGO or a tripartite structure. The mechanisms for ensuring the ombudsman's independence were also discussed.

In practice, the meeting helped clarify the proposed Ombudsman. In particular, the meeting made an important contribution to the concept by agreeing generally to the idea of an independent institution. By independent it was meant a body that is free of any influence from political or governmental bodies. It was felt strongly that, in the Ukrainian context, without such independence, it would not have the credibility to be effective. In this context, there was a general agreement that the new institution should not be housed in a single government department or in an inter-agency/ministry body to avoid conflicts of interest with its goals. There was also a general understanding that the new body will be incidental to other anti-corruption efforts undertaken by the government and that it will not replace or substitute existing governmental agencies but rather complement them by providing an avenue for those companies that would prefer a more independent forum through which to address their grievances. Participants highlighted

20 Instruction of the President of Ukraine of 11 February 2013 No. 1-1/281.

21 "EBRD steps up cooperation with Ukrainian authorities in fight against corruption: President Chakrabarti in London discussions with Ukraine Minister for Revenues and Taxes", EBRD, 15 February 2013; "EBRD steps up fight against corruption: Corruption becoming greater obstacle to economic recovery", EBRD, 13 June 2013: <http://www.ebrd.com/pages/news/press/2013/130215a.shtml> and <http://www.ebrd.com/pages/news/press/2013/130613a.shtml>.

22 See EBRD Director for Ukraine André Küüsvek in an interview with The Ukrainian Week, 14 April 2013.

23 "EBRD steps up cooperation with Ukrainian authorities in fight against corruption", EBRD, 15 February 2013; "Investment Ultimatum: EBRD's André Küüsvek on why foreign investors are fleeing Ukraine and what could make them to stay", The Ukrainian Week, 14 April 2013.

in this context the potential mediation and advisory role of the Ombudsman. The group was nevertheless quite split on the structure, the staffing and the method of appointment of the ombudsman. The scope of the mechanism was also an issue. Business representatives insisted that the new institution should not be dealing exclusively with the issue of corruption and have instead a broader mandate that will extend to the unfair treatment of business more generally. Funding was also a point of contention. The difficult and important questions relating to the status of the ombudsman vis-à-vis other state structures also remained unanswered. Notwithstanding these issues, the meeting agreed on a first set of key principles for the new body. According to the proposal that emerged from the group's discussions, the Ombudsman Institution should be accorded two main functions: 1) receiving and responding to complaints about the unfair treatment of business; 2) advising the government on the systematic causes of the unfair treatment of business.²⁴ The group agreed that the key role of the institution when responding to complaints would be to carry out a mediation function, not a legal one (i.e. the ombudsman will not have the power to take legally binding decisions nor the power to override the decisions of other state authorities). To carry out this task, the group agreed that the new body will need to possess effective response powers, including access to other government institutions for the purpose of obtaining information; powers to recommend a course of action following an enquiry; power to monitor compliance with the recommendations; and power to report to the public. Recommendations or non-binding decisions were seen as being potentially both powerful and compelling if the Business Ombudsman would rely on a transparent process that would allow for the possibility of social pressure for voluntary compliance.

The Group also recommended that the institution be established by presidential decree and not by an act of legislation or government given strong entrenched interests in parliament and the cabinet of ministers militating against it. It was also felt that, given the presidential nature of Ukraine's

political organisation, the status of the institution would benefit from being established by the President. Specifically, it was considered that if the ombudsman institution were created by a presidential decree, the Ombudsman's recommendations would likely be followed by the executive branch – the primary focus of the Ombudsman's activities – because ministers or heads of department would refrain from going against a presidential decision out of fear of dismissal as past events had shown. The proposal also recommended that the cost of the institution be an area of shared jurisdiction between the government, businesses and international financial institutions.

Drawing on these discussions, the Bank convened the working group for a second time in early July 2013, with the hope that the draft MoU would be finalized by that time and signed immediately afterwards or in early September at the latest. However, it quickly became apparent throughout the discussions that there were many remaining controversial issues. The most contentious one concerned the institution's impartiality and, in this context, the appointment process for its key officials. Specifically, the proposal that the government will share the appointment and dismissal power with non-governmental actors was too-far reaching for government representatives. The group also had extensive discussions on the appropriate structure for the ombudsman model (autonomous NGO, government institution, or a hybrid that is non-governmental with an oversight body with government participation). The group felt that a private/NGO structure, as defended by some business associations, was not likely to develop the necessary level of support from government agencies. Likewise, it was felt that a public office being a constituent part of the branches of government in Ukraine (parliament, president, cabinet of ministers) would not be seen as impartial in Ukraine's context. A hybrid structure, consisting of an ombudsman reporting to an advisory council composed of governmental and non-governmental actors was seen by some as the most appropriate for Ukraine.

After these lengthy discussions, it was considered premature to have the MoU endorsed in July or September as originally planned. Specifically, the President's Administration, echoing concerns expressed by various parts of the

²⁴ Draft Proposal for the Ukrainian Business Ombudsman Institution (Basel Institute on Governance, 27 June 2013, unpublished).

government, felt that further discussion was required on the need, structure and location of the Ombudsman Institution. In this regard, the presidential administration made a proposal, whose central feature was to have the Ombudsman become an ex-officio member of the government's Interagency Commission on Investor Rights Protection and Combating Illegal Acquisition and Takeover of Enterprises headed by Ukraine's then First Deputy Prime Minister Dubovik. One argument in favour of such an institutional setting was that the individual acting as Ombudsman could use the Interagency Commission as the main avenue to raise his/her concerns with regards to any reported cases of unfair practices and have them quickly addressed through its interaction with the Commission. This led to amendments made by the EBRD to reflect the new approach. Neither the amended draft MoU, which also incorporated a change in the name of the Ombudsman to "Business Reporting Institution" (BRI), nor the Business Ombudsman proposal were signed due to the events of November 2013 that embroiled Ukraine in a period of considerable turmoil and instability. The idea of the Business Ombudsman Institution was finally formally agreed in May 2014²⁵. According to Interim Prime Minister Yatsenyuk, it was called upon to provide the business community "access to an independent person having the right to publicly appeal to the government in the event they detect corruption in customs, tax, other government agencies and state regulators that would infringe on the rights of entrepreneurs"²⁶. Two events were crucial in Ukraine's decision to establish the reporting mechanism. First, the change in the ruling coalition, with the establishment of an interim government, in March 2014, which was determined to make progress in tackling corruption. During this period, the EBRD engaged in dialogue with the new government to amend the MoU, including stripping out all references in the MoU to the now defunct Interagency Commission and to the Ombudsman as Business Reporting

Institution. Second, the increasing international pressure on Ukraine to address corruption more effectively as a basis for continuous cooperation with the IMF and other financial creditors. The signing in May by the Government of Ukraine, the EBRD, and the OECD as well as Ukrainian business associations of the Memorandum setting the principles for the Ombudsman Institution was closely intertwined with these developments.

Mandate, powers and composition of Colombian and Ukrainian HLRMs

As a matter of introduction, it should be noted that the MoU signed in May 2014 only provides a very general framework for the structure, mandate and powers of the Business Ombudsman Institution. There are both pragmatic and political reasons for this. The situation can in part be explained by the fact that the authors of the Memorandum did not wish to constrain the government. Furthermore, while there was clearly a need for a normative framework, it was also evident that, given the domestic context, it would be impossible to quickly reach a consensus on every single rule. For example, it was agreed not to include a reference to whistle-blower protection in the MoU as it was clear that this would require further advice on Ukrainian law and consideration of the capacity of the Ombudsman Institution to implement a protective mandate. Similarly, it was agreed that setting up definitive criteria for the selection of the Ombudsman would likely detract from a process aimed at establishing the institution in an efficient manner.

From the outset therefore the Memorandum was meant to serve as minimum standards that would likely be supported by Ukraine's public authorities. The idea was first to get the MoU signed by the government and then have the "Group of Parties" – the governing body of the Ombudsman Institution – develop the operating procedures in a separate document broadly along the lines already drafted by the working group²⁷. By contrast, basic procedural rules have been

25 Memorandum of Understanding for the Ukrainian Anti-Corruption Initiative, 12 May 2014.

26 Interim Prime Minister Arseniy Yatsenyuk quoted on Ukrainian Governmental Portal: « Independent Business Ombudsman Institution Established in Ukraine: Memorandum of Understanding to Support Ukrainian Anti-Corruption Initiative », 12 May 2014.

27 According to Memorandum Commitment 1, "the Group of Parties will set forth its other procedures in a separate document".

developed in support of Colombia's pilot HLRM, although they themselves remain silent on some key questions such as the criteria for selection of the experts responsible for reviewing complaints or protection afforded to complainants. It is worth noting in this respect the absence of any constituent act defining the status, role and operating method of Colombia's HLRM. As a result, a comparative analysis of the key functions and operative modes of the two mechanisms is not an easy task. Despite all these constraints the MOU, when combined with the outline for the business ombudsman developed by the working group, allows for the identification of the basic trends and patterns for both mechanisms.

The two mechanisms have mirrored the realities in the respective countries. The instigators and drivers of the HLRM in Colombia and Ukraine have designed the mechanisms in line with their objectives and needs. The selection of a suitable model has also been affected by the prevailing legal system, political situation, administrative culture, as well as by the examples of neighbouring countries or otherwise politically important states. As a result, a review of Colombia and Ukraine's reporting mechanisms reveals differences in the jurisdictions, functions and powers as well as the structure and composition of national mechanisms. The structure and composition of Ukraine's reporting mechanism is perhaps the most visible difference compared to Colombia's HLRM. Ukraine has followed the model of a three-tiered body, consisting of an individual ombudsman assisted by two deputies, a secretariat, and an advisory board carrying out respectively the institution's executive, operational, and oversight functions. By contrast, Colombia has chosen a structure based on a technocratic expert composition. HLRM executive functions are carried out by the Secretary for Transparency, which include receiving and processing applications, cooperation with other state agencies, and coordination of all HLRM activities, the key role among which is played by an ad hoc committee, consisting of four experts in the field of criminal and administrative law, civil engineering, and procurement, and whose task involves review of concrete issues and cases in relation to the 4G Roads procurement process.

Organisationally, Colombia's HLRM operates under the Office of the Secretary for Transparency, a department of the President's Administration. The Office is directly subordinated and accountable to the President. Its activities and the ones of the ad hoc committee are financed exclusively from the State Budget. By contrast in the Ukraine, a separate office, not rooted in government or the administration of the President, supports the Ombudsman's work. Further it is accountable to a governing board comprising local and foreign business associations, international organisations, and government representatives, thus representing a wide cross-section of society. In a further radical departure from Colombia's HLRM, the activities of Ukraine's Ombudsman are based on a "mixed financing model": the operational support for its work comes from the Parties to the MoU. In other words, Ukraine's reporting mechanism, in contrast to Colombia's HLRM, is neither a constituent part of the hierarchy of authority nor accountable to any branch of government.

The process of appointment and dismissal for Ukraine's Business Ombudsman and Colombia's HLRM head reflects this institutional setting. In Colombia, the President of the Republic appoints the Secretary of Transparency serving as head of the Mechanism who in turn appoints the head of the ad hoc committee who in turn appoints the experts on the committee. By contrast, in Ukraine, the governing board appoints the Ombudsman and Deputies who, in turn, appoint members of the secretariat. Further, any board member –business organisations, international organisations, and government- has the right to submit a candidate to the selection committee for consideration for these positions²⁸. Furthermore, if the board believes that the individual serving as the ombudsman is not properly performing his/her functions, the MOU gives the Group the collective right to terminate his/her authority before the end of his/her term²⁹. There are also differences in the jurisdiction and scope accorded to Colombia's HLRM and Ukraine's Ombudsman.

28 Procedures for selecting the Ombudsman and Deputies agreed at the 1st meeting of the Group of Parties (May 2014, unpublished).

29 Commitment 2 under the Memorandum of Understanding for the Ukrainian Anti-Corruption Initiative (12 May 2014).

Functionally, Colombia's HLRM is primarily designed to address the "demand side" of bribery by responding rapidly to suspicions of corruption in on-going procurement processes in relation to the 4G Roads Project. Bidders can also raise technical issues in relation to the tender process. The particular focus is on public procurement in infrastructure. By contrast, Ukraine's Ombudsman has been given a much broader remit. Initially, its jurisdiction was supposed to be limited to complaints of corruption, particularly passive bribery, on the part of Ukrainian public officials. It was thought that limiting the type of complaints it may receive would ensure that the Ombudsman is able to respond rapidly. Business and civil society representatives in the working group nevertheless persuaded other stakeholders to broaden its jurisdiction to confer a general mandate going far beyond "passive bribery", addressing all instances of unfair treatment of businesses by public officials. It was also felt that a mechanism focusing on corruption would entail the risk of being confused with a Hong Kong-type anti-corruption commission. As a result, Ukraine's Ombudsman has been empowered to receive complaints against all kinds of unfair practices against companies in addition to corruption, such as repetitive tax audits or investigations, excessive inspection fees, threats, retaliation or other unfair regulatory enforcement actions by Ukraine's public agencies.

But there are similarities as well. The two mechanisms combine many common features and underlying principles. Both are intended to be incidental to other anti-corruption efforts undertaken by the government and the public in general. They are not intended to replace or substitute other reporting mechanisms nor to undermine existing legal processes but rather to complement them by providing an avenue to those companies that seek a more informal and trusted platform through which to address their grievances and obtain a speedy response to resolve issues (for example, moving the public official whose behaviour is suspicious, delaying the awarding of a public contract, or revising the requirements for customs clearance). In short, they are not judicial tools.

Both mechanisms rely on a third party – the Ombudsman in Ukraine, the Secretary for Transparency in Colombia – who plays the role of being the facilitator between the complainant and the concerned agencies. Both Colombia's

HLRM and Ukraine's Ombudsman have access to relevant information in the possession of government bodies and officials, powers to make recommendations to such bodies and officials and the authority to monitor compliance. At the same time, both mechanisms do not exercise executive authority: their mandate excludes authority to exercise enforcement functions, including prosecutorial powers. Neither of the two institutions has the power to override the decisions of other public agencies or to compel compliance with any recommendations.

Both mechanisms also place a premium on the fairness of their process and, in this regard, emphasize the importance of pluralistic representation within their respective structures. Colombia's HLRM committee structure and Ukraine's Ombudsman multi-member governing body reflect this concern. As a tool to ensure fairness further in the process, the two mechanisms also contemplate the right to publish reports on the operational of the mechanism. Ukraine's Ombudsman has power to publicly report about the complaints it has handled and the way in which it has handled them. The MOU signed in May 2014 expressly makes provision for such communication. Similarly, one of the concept notes for Colombia's HLRM contemplates the duty for the Secretary for Transparency to report each year to the public about the work of the Mechanism. Both mechanisms must also report to complainants regarding the outcome of their complaints. Last but not least, both systems also encompass an advisory role to government. Ukraine's Ombudsman has power to report publicly on the systematic causes of the unfair treatment of business. Similarly, Colombia's HLRM through the ad hoc committee is empowered to make proposals on how to improve the tendering process in future concessions.

Implementing the Mechanism in practice: Colombia's HLRM procedures

Colombia is the first country that has worked out the details of the requirements for filing of complaints and formalized procedures for reviewing these complaints in the context of a High Level Reporting Mechanism. These procedural

rules were developed in connection to the launching of the first phase of the tender process for the 4G Roads Project, which began in October 2013 and lasted until July 2014, involving the award of nine concessions to build roads. They provided a general method for companies that bid on these projects to present their concerns relating to bribery, collusion or other potential irregularities whilst the procurement process was being carried out.

To have a complaint accepted for review by the system, it had to meet two basic criteria: (1) the complaint related to the 4G roads public procurement process; (2) the applicant was one of the pre-selected companies for the bid acting either as a complainant or as an informant³⁰. Complaints could be filed with or without the companies identifying themselves. The system nevertheless encouraged disclosure of identity in order to analyse the credibility of the reports and to request additional information, when necessary. The process for addressing complaints envisaged several stages, including a preliminary analysis of the facts contained in the report, the review of the issue by the ad hoc expert committee, a hearing, and, finally, an operative response to the complaint.

The first stage thus consists of the conduct of an initial assessment of the report by the Office of the Secretary for Transparency, in order to determine whether the report should be subject to the scrutiny of the ad hoc committee. This stage involves face-to-face meetings with the complainant company in situations where the complaint has been filed with the company identifying itself. After having passed this first screening, the vetted report is then forwarded to the ad hoc committee for the purpose of analysing the complaint further and for the committee to send a set of observations about the tender process to the Secretary for Transparency. At this stage, on the basis of the analysis undertaken by the committee, the Secretary for Transparency may schedule a hearing for clarification with all involved parties, including the project's beneficiaries, the other bidders, the contractor and the project structuring agent or broker. After the

committee has evaluated the case, the Secretary, with the input of the committee, makes a set of recommendations (for example, amending the technical aspects of the project, delaying of the awarding of the contract), to be considered by the agency in charge of the procurement process. The last stage consists of the agency's decision to respond, or not, to the recommendations.

A review of a case dealt with by the Mechanism in relation to a technical matter of delimitation of tunnels shows how the process works in practice. After a company's complaint had passed the first filter and being evaluated by the relevant ad hoc committee, the Secretariat for Transparency scheduled a hearing for clarification during which the complainant company, the other pre-qualified bidders, and the National Infrastructure Agency (ANI), the authority in charge of the procurement process, had an opportunity to address the complainant's concerns, provide information and make comments. On the basis of the hearing, the Secretariat came to the conclusion that the facts referred to the Mechanism were not a matter of corruption but instead miscommunication on the part of ANI. With the input of the ad hoc committee, it presented a set of observations to the head of ANI, which resulted in an agreement to amend the controversial technical aspects of the project. Thus, the Mechanism allowed for an independent monitoring of the standards and requirements for the bidding and for ensuring that the inquiry was being responded to within a short time frame. Specifically, the timing of the Mechanism allowed the observations to be made prior to the awarding of the tender. On this occasion, the review and resolution of the case was completed within two weeks.

Scope of activity of Colombia's HLRM during its pilot phase

The Secretary for Transparency started receiving applications in early 2014, in relation to the deadline set up by the authorities for companies to submit their bid for the first nine projects offered to investors in connection with the implementation of the first wave of 4G road concessions. Out of a total of 15 pre-selected companies for the nine projects, the Office of the Secretary for Transparency received

³⁰ As contemplated in the Mechanism's rules, the company acting as informant is just a source of information that may be anonymous or that may bring leads but not precise facts.

complaints from two of them, one in relation to the 190km Girardot-Puerto Salgar project (part of the highway system connecting the capital, Bogotá, with the north coastal region) and one concerning the 90km Loboguerrero-Mulaló project (part of the highway in Colombia's Valle del Cauca department connecting the industrial sectors of the department with the Buenaventura port on the Pacific coast). Neither of them contained allegations of bribery solicitation or extortion, although one expressed concerns over potential collusion in the design of the procurement procedure³¹. The other complaint was of a more general nature, consisting of an inquiry about a technical decision taken by the National Agency for Infrastructure in the framework of the bidding³². It is difficult to determine whether the Mechanism's rather limited use during its pilot implementation phase reflected the actual situation on the ground (namely that the process was free of possible irregularities), or has been the result of other factors, such as insufficient governmental efforts to promote the HLRM, companies' unwillingness to report, or the fact that the scope of the HLRM has been confined to pre-qualified companies. In its initial conceptualisation, it was envisaged that the reporting mechanism would extend to groups and individuals who are not directly participating in the bidding and public procurement process, with the

underlying objective that business associations, NGOs or individuals who may be aware of improprieties would also be able to file a complaint. In the end, the authorities ultimately decided to limit its accessibility to pre-qualified investors partly because the HLRM started as a pilot project and also due to concerns over the potential abuse of the mechanism by third parties.

Little publicity was given to the process and its operation methods may also have contributed to its rather limited use: the government did not set up a dedicated website about the HLRM nor was information about it made available on relevant government websites. The Colombian authorities adopted instead a "targeted approach", using simple marketing materials and face-to-face, informal meetings with pre-selected companies as the primary methods to explain the HLRM. A policy, taking the form of an integrity pact, complemented this scheme. Its central feature was a pledge by pre-selected companies not to enter into dishonest dealings with public officials and backed by specific provisions as to disclosure and reporting, including to the HLRM as an option, and a standard form to be filled in by companies in case of suspicion of bribery or other irregularities³³.

The HLRM is rooted within government, given that it is located within the Office of the Presidency, which gives it a high profile and legitimacy, but this might also have created scepticism and raised concerns among companies, although there is no evidence thus far to indicate this. The involvement and presence of non-governmental, technical experts in the handling of complaints should counter-balance these concerns, if they did indeed exist, although if their appointment had been carried out more transparently this effect would have been considerably greater. Anecdotal evidence from foreign companies operating in Colombia suggests that the HLRM has boosted trust and confidence in the economy and has contributed to an increase in investment in the country, although of course it is likely that this was only one of a few contributing factors.

31 The application was made by an international group in relation to a technical matter of delimitation of tunnels in the framework of the tender for the Loboguerrero-Mulaló project. The consortium believed that an amendment made by ANI less than a month before the closing of the tender - allowing flexibility in the point of entry and the length of tunnels - had limited competition and companies' ability to submit bids, unless they knew of the amendment to the tender in advance. The Secretariat for Transparency met with ANI, the complainant, and the other pre-qualified bidders in order to determine whether changes made in the design responded to the wrongful intention to benefit a particular bidder and concluded that it was more a matter of miscommunication on the part of ANI than of collusion. In addition, an agreement was made with all of the bidders and ANI that the amendment will be changed in order to limit the flexibility, thus ensuring the offers to be technically comparable and that any offers received will be close to original designs.

32 The application was received from one of the consortia registered for the Girardo-Honda-Puerto Salgar project, which held its initial closing on April 11, 2014. The application was made in connection of the contractual and legal aspects of the adjudication of the project, which was finally awarded in July 2014 to a consortium of Costa Rican and Colombian companies specialized in infrastructure work.

33 See, for example, the details for the Girardo-Honda-Puerto Salgar project, posted on the government website "Systema Electronico de Contractacion Publica" (www.contratos.gov.co) which contains, as an annex 7 to the project, the Pacto de Transparencia (<https://www.contratos.gov.co/consultas/detalleProceso.do?numConstancia=13-19-1442282>).

Lessons learned

Overview of the fundamentals

The fact that two countries have included an HLRM in their domestic framework to prevent bribery bears witness to the popularisation of the concept of HLRMs. It is evident that there has been an evolution in approach towards developing new mechanisms to combat bribery with the private sector taking an increasingly active role and giving new impetus in the search for effective methods to tackle a multi-faceted phenomenon. Although the Colombian HLRM and the Ukrainian Ombudsman are not yet mature, they may present a model for consideration by other governments, which could usefully draw on their experiences, as summarized below.

First, as this brief comparative overview shows, although the concept of a HLRM that had emerged in the framework of Colombia's plan to modernize its road network was more focused than the one developed in Ukraine, which has a broader remit, the fundamental purpose of these mechanisms has been similar. The objective was to create national conditions to attract further domestic and foreign investors to boost the countries' competitiveness and economic growth.

Second, the mandate and composition of national HLRMs may vary significantly from one type to another. The diversity becomes even more apparent by looking at the various structures that create both institutions. Nevertheless, the two mechanisms described here share certain common features. Most notably, they have been established by governments with the specific goal of both protecting businesses from abuse and identifying systemic regulatory risks. In other words they are not just accountability mechanisms but also vehicles for change. Furthermore, they are supposed to work independently – even when located within the government structure like in the case of Colombia – to carry out their work impartially and without external interference, in close co-operation with business actors to arrive at practical solutions.

Third, experience in Ukraine has shown that business and citizens' concern with the adverse developmental impact of corruption may not always be sufficient for the creation of a HLRM. In such circumstances, broad coalitions that can withstand the pressures from powerful opponents who

profit from corruption must be forged, in order to succeed in establishing a HLRM. In this regard, partnership and cooperation agreements with international organisations or donors may give the political leverage to enable the parties not only to come together in the first place, but also to identify matters in their common interest. The experience in both countries has shown that political leverage may have an important role to play in establishing an HLRM. That said, without the precipitating crisis that had caused deep economic hardship in Ukraine, building such domestic coalitions would have been a challenge for the international community.

Described in the following sections is a non-exhaustive summary of the interrelated and fundamental considerations for successfully designing and implementing a High Level Reporting Mechanism. It provides a checklist of important policy issues for consideration by any government interested in establishing such a mechanism. Expert advice can assist in applying these fundamental considerations to local circumstances. In particular, establishing a HLRM needs to reflect on the country's institutional framework and government structure, to take into account the relevant constitutional, legal and political circumstances – whilst respecting some key principles.

Key functionalities

A focus on addressing the source of bribe solicitation promptly

A High Level Reporting Mechanism is specifically designed to address the “demand side” of bribery by responding rapidly to incidences –explicit or disguised– of solicitation faced by companies in their dealings with public officials. The focus of the Mechanism is substantiated by the fact that companies are directly, and in some cases significantly, affected by solicitation of bribes or extortion but often lack viable options for raising their concerns through more formal structures such as courts. A HLRM provides a readily accessible means for businesses to address bribery-related issues – directly, rapidly, and informally.

Scope and form: A mechanism scaled to bribery risk and adverse impact on business climate

HLRMs will respond to business needs better if they are scaled to bribery risk and adverse impact on business climate. There is therefore no ideal model or one-size-fits-all approach to HLRMs. A HLRM can take different forms, as exemplified by Colombian and Ukrainian models. At one extreme a single HLRM can have a cross-sectoral function addressing bribery solicitation in a country as a whole, while at the other end of the spectrum individual industrial sectors (such as aerospace and defence industry, mining, infrastructure), or specifically exposed public processes (for example, business licensing, customs/tax clearance, public procurement), may have their own reporting mechanism. A HLRM does not however need to start with a ‘big bang’. It can start on a small scale, covering only a few sectors, as a pilot in the country’s architecture to prevent corruption. As a pilot it should be evaluated and if judged successful the government can scale it up.

The latter approach has been supported by Colombia where its HLRM has so far been piloted in connection with the 4G Roads Project procurement process, it may be extended to other industries such as pharmaceuticals and the oil industry and mining sectors in the future. The multi-industry approach was made by Ukraine where the Ombudsman is intended for all businesses and sectors as a first point of contact. A reporting mechanism that casts the net quite wide may nevertheless lead to a situation where the mechanism potentially confronts problems of follow-up unless it has adequate resources to conduct its activities.

A mechanism that fits into the broader anti-corruption system

HLRMs are intended to be complementary to other anti-corruption efforts. They are not intended to replace other reporting systems nor to undermine existing legal processes but rather to complement them by providing an avenue to companies that seek a more informal and trusted platform through which to address their grievances and obtain a speedy response to resolve issues. A HLRM should thus not inhibit access to judicial recourse or other accountability

mechanisms. Businesses must be clearly informed of their rights to use alternative remedies if they choose to do so without turning to the HLRM or if they are not content with its response. For the same reason, it should be made clear that any grounded suspicion of bribery or other criminal, administrative matters will be referred to the relevant authorities.

A collective undertaking

Successful launch and implementation depends first and foremost on political will. Without support from political elites, be they institutions or individuals, it will be very likely impossible for a HLRM to perform effectively or even be established at all. Political commitment may nevertheless not always happen by itself. It may require, as illustrated by the Colombian and Ukrainian examples, political leverage. Cooperation agreements with the international community can be a tool for political leverage, especially when there are vested interests that oppose genuine anti-corruption reforms. Not all realize such potential however. International leverage presupposes the existence of domestic constituencies, who have incentives to respond to and utilize external pressure. In the case of Colombia, as seen earlier, the establishment of the HLRM was a straightforward process due to the political backing given by the President from the outset. In sharp contrast to the situation that prevailed in Colombia, international institutions had initially failed to influence Ukraine’s domestic politics in part because anti-corruption activism had not reached a significant level within government circles.

A HLRM can also only be successful if firms view it as a better strategy than bribing to win contracts and are willing to work together with government to address instances of bribery. In this respect, the degree of political commitment of the government, the level of trust of companies in the Mechanism, and the ability of the Mechanism to persuade concerned public agencies or mid-level officials to respond to their concerns will likely influence companies’ choice to engage or not with the government in the framework of a HLRM.

Legitimacy and strong commitment from the top

The HLRM must have clear, transparent and sufficiently independent governance structures to ensure that no party to the complaint can interfere with the fair conduct of the resolution process. As a prerequisite for this, the HLRM should offer a reporting channel that is above and independent of the agencies whose employees are alleged to be soliciting bribes. Participation of all stakeholders early in the mechanism design process can also help ensure greater trust and buy-in from them. Without strong commitment from the top of state authorities, the HLRM is however likely to be ineffective or underutilized.

Appropriate protection: A mechanism that prevents retaliation

Coming out with a complaint concerning bribery can pose risks for companies. Although the HLRM is conceptualized as a reporting channel above the level of, and independent from the concerned public agency or ministry in order to alleviate the risk of retaliation from the agency where solicitation has occurred, such an institutional setting might nevertheless not be sufficient to diffuse business concerns. The mechanism has to be accompanied by adequate protection for those companies, organisations and individuals who report bribery solicitation. Where a HLRM allows corporate competitors to report potential irregularities committed by other companies, protective measures are also important as otherwise there is a risk that none will use the mechanism for fear of upsetting the market in which they operate. A HLRM will thus only work when companies are encouraged to share their concerns freely, without fear of retribution or of upsetting the market in which they operate.

Ways to prevent harm may include a policy of non-retaliation, measures to ensure confidentiality, safeguarding of personal data collected in relation to a complaint, and an option for complainants to submit anonymous complaints where necessary. Anonymity is sometimes seen by some whistle-blowers as their ultimate form of protection from reprisal. Anonymity may not however, be the most effective approach. In practice, it is likely that anonymity will significantly impede the HLRMs ability to respond speedily to complaints. In

particular, it might be difficult for the Mechanism to assess the credibility of anonymous allegations. For this reason, although Colombia's HLRM allows reports to be filed anonymously, it encourages disclosure of identity in order to analyse the credibility of the reports and to request additional information, when necessary.

On the other hand, confidentiality should be guaranteed. The philosophy behind offering broad confidentiality is to provide a sense of safety to those using the mechanism, so that they feel confident that they can raise their concerns without fear of disclosure. This position has been supported in practice in Ukraine where the proceedings associated with implementation of the Ombudsman are expected to be entirely confidential³⁴. Colombia's mechanism also affords protection, whereby the complainant's identity is not disclosed unless, with consent of the complainant, there is a need-to-know basis. Regardless, the company is free to reveal its identity if so desired, for example for the purpose of attending the hearing during which the case is discussed with other stakeholders.

A policy of non-retaliation may complete the scheme. There are many examples of non-retaliation policy provided by redress mechanisms. For example, Korea's Anticorruption and Civil Rights Commission Act provides protection against reprisals such as the cancellation of a permit or license, or the revocation of a contract. If this happens, the Commission is entitled to provide appropriate remedies for the purpose of restoring the situation back to its original state, such as ensuring the implementation of the license or contract³⁵. The US business ombudsman has worked with each federal agency to establish a policy prohibiting retaliatory actions by its employees against small businesses having requested

34 The MoU provides that the Business Ombudsman Institution should have the right to protect the confidentiality of data and persons who have assisted with enquiries. In the absence, at this point, of procedures that clearly outline measures intended to protect confidentiality, it nevertheless remains to be seen the extent to which Ukraine's ombudsman will protect whistle-blowers.

35 Korea ACRC Act (2009), Chapter V, Article 62(3).

the Ombudsman's assistance³⁶.

Engaging all parties: A Mechanism based on dialogue

One of the strengths of a HLRM is its power to use informal means for quick problem solving. The power to initiate a dialogue with the complainant company in formal and informal settings, including where possible (i.e. when there is no fear of retribution for openly voicing complaints), with managers from the agency about which the complaint has been made, is important as a means of resolving disputes expeditiously. It may also help prevent a conflict from escalating. As seen earlier, the HLRM in Colombia provides for such possibility.

Complaints Management Process

A HLRM should have a robust process in place for addressing complaints. Although the detail of actual processes for complaints resolution may vary from one country to another according to national context, it should include in its simplest form four steps: (i) receiving and screening the complaint; (ii) assessing the complaint; (iii) selecting a resolution approach; and (iv) settling the issue.

Admissibility criteria

A HLRM may consider complaints from directly affected companies only or from third parties as well. There are advantages and disadvantages in extending the use of the reporting mechanism to third parties. Giving access to a larger group may enable business associations, NGOs or individuals who may be aware of improprieties to report. At the same time allowing third parties may present the danger of a mechanism being used as a "weapon" between competing firms or by politically motivated individuals and organisations. In all cases, the mechanism should be available to all businesses, domestic and foreign. Giving access only to domestic companies may create serious gaps in coverage, as foreign-owned businesses are likely to also

suffer from solicitation. Ukraine has chosen a wide approach that covers different groups: its Ombudsman Institution may receive complaints from domestic and foreign commercial entities, business associations and individuals. Colombia has taken a clearly different approach. Because of concerns over the potential abuse of the HLRM by third parties, its use in the context of the first phase of the tender process for the 4G Roads Project did not extend to groups and individuals who were not directly participating in the bidding.

Screening

Clear eligibility criteria should be established. Eligible complaints may include those where the complaint pertains to the project; the complainant has standing to file; the complaint falls within the scope of issues the HLRM has authority to address. To be most effective, the HLRM should be open to a broad range of concerns, as solicitation encompasses many situations. For example, if a company questions whether the fees it is asked to pay to secure a cleared site for new premises upon application for a business permit to operate are legitimate, the HLRM should address these concerns given that they may be disguised bribe payments.

Reviewing, investigating and settling complaints

For a HLRM to work, complaints should be promptly handled. For example, in the case of bidding, the timing of the HLRM should allow resolution prior to the awarding of the tender. Process should also focus on dialogue and engagement. Specifically, in order to inform the process, HLRM staff responsible for handling complaints should involve managers from the departments/agencies whose activities have resulted in claims. Such inclusion may serve as a basis for the concerned agency's prompt response, or for a set of recommendations or a decision – which can be binding or non-binding- issued by HLRM senior managers. Recommendations or non-binding decisions can be both powerful and compelling, especially if the HLRM benefits from top political commitment and relies on a transparent process that allows for the possibility of social pressure for voluntary compliance with its outcome.

36 Policy of Non-Retaliation Against Small Business (Small Business Administration, 12 December 2009): <http://www.sba.gov/sites/default/files/Policy%20on%20Non-Retaliation%20Against%20Small%20Businesses.pdf>.

Specific case where there are reasonable grounds to suspect a violation of the law

In such situations, deferral to competent enforcement authorities is likely to be necessary. Wherever possible, the entity whose employees have allegedly committed unlawful acts should be expected to take temporary corrective actions (such as suspending the effect of the decision taken by its staff), until a thorough assessment is received from the competent authorities. If it appears that suspicion persists, they will decide what subsequent action should be taken.

Combining a dialogue-based process with the possibility of legal proceedings may nevertheless create a disincentive for companies to look to the HLRM for redress. Complainants may be concerned about retaliation in case of judicial or administrative proceedings. For this very reason, wherever possible, the identity of the complainants – if known – should be anonymised in the report filed with the authorities, provided that they will be able to contact them without delay. In any event, complainants should have an opportunity to make an informed decision about how they wish to proceed. In this respect, the Secretariat for Transparency in Colombia has worked out arrangements with companies in order to guarantee a proper protection of the identity of the complainant in cases where there are reasonable grounds to suspect a violation of the law. If a company wants confidentiality, the Secretariat will pass the report to law enforcement authorities as an anonymous report as permitted under Colombia's Code of Criminal Procedure (CCP). In this case, given that, pursuant to article 69 of the CCP, reporting must be done with supporting evidence, the Office of the Secretary for Transparency will only pass the facts brought to its attention without divulging the source of the information³⁷.

Remedies

HLRMs must be able to provide effective remedies, as the means available to them to resolve complaints will affect

both public perception and their ability to successfully foster a culture of integrity. As such, it should provide a set of possible remedies appropriate for different types of complaints. Remedies may include altering or halting harmful activities through, for example, moving the public official whose behaviour is suspicious or delaying the awarding of a public contract, amending the requirements for customs clearance, or revising the concerned agency's policy.

Ensuring that systematic lessons are learned, not just within the agency or process concerned, but, where applicable, across processes or multiple agencies, is also of major importance in the armoury of a mechanism whose objective is prevention. HLRMs have a major role to play in capturing lessons and sharing learning in this regard. Colombia's and Ukraine's mechanisms envisage this function to a large extent. Ukraine's ombudsman institution is perhaps particularly well placed to achieve this role, given its broad mandate. Colombia's HLRM has nevertheless also been conceived as a tool to build a bank of knowledge of good and bad practices.

Governance

Questions of the establishment, structure and institutional home for the mechanism, governance and oversight, and staffing are complex and important issues that have practical and political ramifications.

Finding a home for the Mechanism

Where the HLRM resides and who is responsible within it will send a strong signal to all stakeholders about the level of government commitment to combat solicitation. For this reason, the HLRM's home should be in a prominent place in the hierarchy of public authorities and high-level personnel should be assigned to manage it. At the same time, its activities should be mainstreamed in the work of government. The reason for this is because the HLRM has to work alongside existing public agencies and send complaints to them, propose remedies and receive responses.

As the examples of Colombia's HLRM and Ukraine's Ombudsman illustrate, a HLRM can be established in the

³⁷ Article 69 CPP, which outlines the requirements for filling a complaint, provides that the report "shall contain a detailed account of the facts known to the complainant... In any case, baseless allegations will be declared inadmissible".

form of a distinct public legal entity (a government ministry, a state committee or any other specialized agency such as an Ombudsman) or be housed in an existing department of the government or the presidential administration. The latter is the option chosen by Colombia where the merits of its HLRM lie in being housed in the presidential administration: better coordination among agencies and ministries, strong incentives for coordination, and better information-sharing among responsible stakeholders at the various stages of the public procurement process. Nevertheless, there is a possible downside of Colombia's choice to locate its HLRM in an existing department of the President. The HLRM might not be seen to be sufficiently impartial in companies' eyes. Much of its credibility is also inevitably tied to the degree of the President's credibility, in particular with respect to cooperation of other government agencies with the HLRM, unless the constitution grants the President executive powers over government agencies and thus allows the HLRM to compel access to and disclosure of information from them.

The option chosen for Ukraine's Ombudsman was to create an apparatus separate from the executive branch in order to address the concerns around the Ukraine political process and the probity of the office of the President. The effectiveness of the HLRM is nevertheless likely to be compromised if it is totally disconnected or only loosely linked to government. In this case, as contemplated in the MoU and the attendant Terms of Reference for the Ukrainian Ombudsman Institution, the HLRM should have a clear legal basis for obtaining the necessary inputs and cooperation from government agencies.

Legal foundations

The choice of the legal foundations for the HLRM can have a further impact on the credibility and effectiveness of the mechanism. In this regard, existing domestic institutions may inform the legal framework within which a HLRM may be best established. Basically, a HLRM can be established through constitutional amendments, by presidential or government decision, or a law which sets out its powers and functions. It may also be possible to take a step by step approach, starting with a simple political decision and the allocation of

sufficient resources for it start functioning in a pilot phase, and then anchoring it through one of the aforementioned means to ensure its continuity. There are strengths and weaknesses associated with each approach.

With the view to ensuring maximum weight to the reporting mechanism, incorporating its establishment and vested powers into the country's constitution may be seen as the ideal solution. Analogous models are found for example in the Philippines where the ombudsman receives complaints from citizens and organizations from the country about alleged cases of corruption committed by public officials. Amending the constitution might nevertheless be cumbersome and in some countries there might be insufficient political will to enact the necessary constitutional changes to establish a reporting mechanism, even if it is a "high level". In countries where the process of constitutional amendment is so difficult that it becomes impractical, it may be then appropriate for the executive branch or parliament to create a HLRM.

In countries like Colombia, which is governed under a presidential system, or Ukraine, whose political regime is semi-presidential, a presidential decree may provide a more flexible method of establishing a HLRM. Subject to their constitutional powers, the President may have the authority to create a distinct public authority; otherwise the Decree would create or nominate a department within the President's administration, much like the structure supporting the HLRM in Colombia. A presidential decree may nevertheless be easily repealed and thus may afford no real guarantee for the continued existence of the HLRM. The ability of a presidential decree to address all relevant matters for the HLRM to perform its functions may also vary, depending on the national system and the hierarchy of legal norms. Most problematically, though, a mechanism created by decision of the President might not be seen to be sufficiently free from improper political influence in the companies' eyes.

Another option is a governmental decision to establish the HLRM. The advantage of this approach is that it is probably the quickest way to get the HLRM off the ground in the first instance, though it could also send a signal that the HLRM is only a temporary measure or not fully

supported, so communication around the plans for its long term establishment would be crucial if this route were selected. On the other hand there are three significant disadvantages with pursuing a governmental decision. First, like the presidential decree option, a HLRM established by decision of the government is unstable, since the mechanism can be terminated in the same manner. Furthermore, like a presidential decree, a government decree/resolution may be limited in scope and thus not allow addressing all relevant matters for the establishment and operations of the HLRM. Third, a mechanism created by government may suffer from a lack of perceived legitimacy in the view of companies. The HLRM's credibility is directly dependant on the government and politicians who are then in power.

A third option is for parliament to create a HLRM through statute, guaranteeing the existence and political, operational and financial independence of the mechanism. Many ombudsman-like bodies or anti-corruption commissions in the world follow this legislative model. Establishing a HLRM through a law, only superseded by the constitution and international treaties in the country's hierarchy of normative legal acts, may indeed have several benefits, including coverage of all major issues related to the establishment of a reporting mechanism, and the possibility to supersede other laws whose provisions may conflict with the core features of a HLRM. The disadvantage of a statute is the time consuming procedures generally necessary to pass new legislation, especially in countries where strong entrenched interests in parliament may militate against a reporting mechanism such as the HLRM. Like a presidential decree or a cabinet's decision, a statute can also be abrogated or amended, unless some safeguards are incorporated in the law to ensure the continued existence of the HLRM such as fixed provisions, amendable only by a special majority vote of the parliament.

Governance structure and staffing

The HLRM must have clear and sufficiently independent governance structures to ensure that no party to the complaint can interfere with the fair conduct of the resolution process. An authority like the HLRM can only be

seen as not subject to improper influence if, in exercising its functions, it is not subject to pressures that might sway its decisions. Although HLRMs are just preventive tools, not judicial remedies, companies' confidence nevertheless requires that the personnel who are involved in complaint handling should be, and be seen to be, as independent and impartial as possible. This requirement is principally linked to legal provisions on the appointment and removal of senior staff. This does not however necessarily imply the need for guarantees that are strict as those designed to ensure the independence of judges in the judicial system. In this regard, separating the functions of complaints handling and process management and assigning clear accountability for each may help reduce opportunities for decisions that favour the interest of the government only. In Colombia, the authorities decided to separate the two functions through the creation of an expert committee in charge of reviewing complaints and of advising on resolution approach.

The HLRMs impartiality can also only be assured if their members of staff demonstrate that they possess the necessary legal and technical expertise to resolve disputes authoritatively. In Ukraine, the two deputies who will assist the Ombudsman as senior case managers will be highly-competent specialists in law, tax, accounting, business administration and anti-corruption. Apart from professionalism, each staff member who will make up the Ombudsman's Secretariat will be expected to uphold a high level of integrity. In Colombia, the HLRM's ad-hoc committee is composed of experts on public procurement, civil engineering and project management.

Involving third parties

As a tool to further ensure that the process is not subject to improper influence, it may be helpful for the HLRM to have an additional governance structure, which may be an advisory council, a governing board or a 'review committee'. Involving third parties – such as academics, NGOs, business associations, all being experts in the HLRM and its goals, may indeed increase the level of trust from businesses as well as overcome certain limitations of the HLRM such as possible conflict of interest and biases; .provided that

the experts themselves are perceived to be unbiased and impartial relative to both the companies and the concerned public agencies. Their role may include reviewing complaints; acting as advisors for the resolution of conflicts; helping safeguard the fairness of the system through oversight functions; and advising on long-term systemic reform. Ukraine's Ombudsman reflects this concern. Its governance structure includes a governing board representing a wide cross-section of society (local and foreign business associations, representatives of the Ukrainian Government and of international financial institutions, in addition to civil society members as observers), and whose mission primarily consists of ensuring the HLRMs fairness, including through appointing the Ombudsman and the deputies.

Funding

The functions of a HLRM are intrinsic to the actions that a state should undertake to prevent and combat corruption and for this reason it should ideally be financed publicly. But given current pressures on public finances in many countries of the world, it should not be excluded that its cost be borne partly or fully by the business community from which the HLRM's work arises or are covered on the basis of mixed financing model (public-private or/and donor funding). This is the option that has been chosen in practice for Ukraine's mechanism, although, when its concept was being developed, most businesses were ready to finance the Ombudsman's activities exclusively or on parity basis with the state. International funding has been seen as an interim and transitional strategy until the Ukrainian state has developed its financial capacity to take on this function over time. The government, on the other hand, funds the Colombian HLRM.

Each strategy nevertheless presents risks. Where companies are to be major funders, this may raise potential conflicts of interest. On the other hand, too great a share of donor financing can erode the HLRMs legitimacy. Donor policies also change and may decide to disengage, especially if they are not content with the performance. Finally, public financing can be a solution as long as there is political commitment to the HLRM. As the experience of many countries in the

world has shown, there is a strong correlation between the level of financial resources that is made available to entities designed to prevent corruption and the government's determination to fight it.

Accessibility, transparency and accountability

Publicizing the mechanism

A HLRM, just like any other tool designated to prevent and combat corruption, should be supported by effective awareness-raising, communication and evaluation efforts. Companies, individuals and organisations can only access the HLRM if they know about it, and where to find it. As part of this requirement the HLRM should have a website, which would also allow the complainants to submit a complaint online as initially contemplated in one of the concept notes for Colombia's HLRM. Any HLRM should also have a published procedure that is clear and simple while providing details about how the mechanism works, who can access it and how.

Information on the outcomes of complaints should also be provided as this knowledge can contribute towards a growing understanding for companies and civil society as to the extent the mechanism is effective and how the complaints have been dealt with. After a couple of years of operations, publication of typologies and/or guidance notes could be useful to illustrate the mechanism's approach to typical cases. This information could typically be published in a yearly report, explaining the work that has been done. As the experience of other grievance mechanisms shows, such reports could include appropriate statistics about the complaints the Mechanism has handled and the way in which it has handled them³⁸. Ukraine has taken steps to provide reports and analysis to the public, including with regards to the volume and nature of complaints and its responses thereto. The MoU signed in May 2014 expressly makes

38 See for example India's Public Grievance Redress Mechanism functions (<http://pgportal.gov.in/grm.aspx>).

provision for such communication³⁹.

Monitoring, evaluating and improving the Mechanism

Accountability is an essential condition for continuous trust in the HLRM. Regular monitoring is necessary to safeguard its credibility and sustainability. Accountability can be achieved through various means, including, as it is the case with Ukraine's Ombudsman, the publication of reports on agency performance and oversight by a multi-stakeholder supervisory committee. Credibility of the process and trust between companies and exposed public authorities will be enhanced if an oversight group with advisory authority, composed of business, civil society, and government representatives is set up to monitor and evaluate the performance of the HLRM. Clear evaluation criteria may include: general awareness of the HLRM; whether it is used and by whom; the types of issues addressed; its ability to resolve complaints early and constructively; and outcomes (impacts, benefits).

³⁹ Commitment 3, Memorandum of Understanding for the Ukrainian Anti-Corruption Initiative (Kiev, 12 May 2014).

Conclusion

Devised as a new tool to tackle the problems of extortion and bribe solicitation and other similar issues facing companies, HLRMs are rooted in the following assumptions: bribe demands by public officials are detrimental to the interests of national efforts to boost the country's competitiveness; reducing bribery solicitation is much needed to better the chances of countries to develop; the fight against it requires shared responsibility between public authorities and businesses since it is a problem for both and its reduction will be to everyone's benefit; concerted efforts made by governments and businesses through a HLRM may provide a platform for entrepreneurs and the state to work together to more effectively deal with these issues.

A HLRM allows for companies faced with bribery solicitation to report to a dedicated and high-level institution that is tasked with responding swiftly to reports. A HLRM aims at inducing gradual changes in the business environment and amongst public stakeholders. The lack of empirical data on Colombia's and Ukraine's HLRMs nevertheless precludes any conclusion being reached about the effectiveness of the approach. Ukraine's HLRM is in the early stages of being operational, and during its first year of operation Colombia's HLRM has been used only twice by individual firms. There is however no reason to suppose that HLRMs do not favourably create conditions governing business, diminishing the opportunities for solicitation and extortion of bribes and other entry barriers to be erected. Anecdotal evidence suggests that when the HLRM was established it helped to raise awareness of corruption amongst the pre-bidders in Colombia and also the wider business community, with a positive effect on the development of or improvements to internal corporate compliance programmes. In addition it appears to have had a positive effect on boosting foreign investment in the country.

As HLRMs intend to establish a healthier environment to conduct business, they primarily aim at unhealthy, corrupt environments, where rules governing bribery are shaky, incomplete, and unenforced. This is not however to suggest that every country where corruption occurs should necessarily devise its own HLRM. It is important to recognize that not all situations call for it. For example, it may be

redundant or excessive for some countries where reporting mechanisms are already in place to add yet a further layer of recourse. Although Colombia and Ukraine's mechanisms have both been conceived to complement, not supplant, other existing accountability mechanisms, other methods such as inspectors-generals in procurement or general auditors can play an effective role in deterring solicitation and extortion. HLRMs are most clearly of potential benefit in countries where companies are unwilling to complain to the agencies whose employees solicit bribes for fear of reprisal, or to refer to the judiciary or other existing accountability mechanisms because these institutions are weak or are themselves corrupt. The case for a HLRM is less compelling in countries where there are well-functioning reporting procedures and complainants have no reason for concern about reprisals⁴⁰.

Setting-up a HLRM may also be a daunting task in countries with deeply entrenched, top-down corruption. Establishing a functioning HLRM may be especially problematic in countries where policy-makers are risk averse and reluctant to enact reforms that might threaten domestic interests or constituents who profit from systemic corruption. In this type of environment, political leaders have few incentives to establish a HLRM that risks the alienation of key supporters or agents. This is not to say that incentives to adopt HLRMs are absent. Becoming associated with the promotion of mechanisms that allegedly promote cleaner interaction between businesses and public authorities may represent a political advantage for senior and elected officials. Low-ranking officials may nevertheless think differently. In such countries, the success of a HLRM is largely contingent on the capacity of those public officials who solicit or extort bribes to renege on rent-seeking.

Whilst it might be difficult to transfer a mechanism that operates efficiently in one country to another, the HLRM is nevertheless a promising institutional innovation. In summary, it is a collective effort to protect businesses against unfair and arbitrary pressures and to reduce corruption. Within

40 Fritz Heimann, "High-level reporting: overcoming extortion", *Collective Action: Innovative Strategies to Prevent Corruption*, Mark Pieth (ed.), Basel Institute on Governance, 2012, p. 214.

this context, it can be regarded as an important contribution to international requirements to preventing and combating bribery. Time will tell whether HLRMs are successful in this endeavour.

Basel Institute on Governance

The Basel Institute on Governance is an independent non-profit competence centre specialised in corruption prevention, public and global governance, corporate governance and compliance, anti-money laundering, criminal law enforcement and the recovery of stolen assets.

The Institute's multidisciplinary and international team works around the world with public and private organisations towards its mission of tangibly improving the quality of governance globally in line with relevant international standards and good practices.

International Centre for Collective Action

Building on more than 20 years of experience in anti-corruption and anti-money laundering standard setting, and on more than a decade of practical work in compliance and Collective Action, the Basel Institute has established the International Center for Collective Action (ICCA). The purpose of the ICCA is to assist companies and other concerned stakeholders in enhancing their ability to prevent corruption, with a particular focus on bribery solicitation.

Building on its network of intellectual partners, which include business organizations, international standard setters and influential non-state actors as members, the ICCA serves as a knowledge hub for information about worldwide Collective Action initiatives and research. Regular fora for policy dialogue as well as a web-based information platform enables members and interested parties to exchange information. The ICCA also acts as center of competence by conducting interdisciplinary and applied research on the functioning and impact of Collective Action. Finally, the ICCA's representatives and partners make their experience available for launching new and advancing existing Collective Action initiatives around the world.

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