

## High-level reporting: overcoming extortion

### The need for action against extortion

To overcome corruption it is essential to combat extortion as well as bribery. There has been steady progress in curbing bribery through national laws implementing the OECD Anti-Bribery Convention<sup>1</sup>. Extortion has not received comparable attention<sup>2</sup>. Neither the OECD Anti-Bribery Convention nor the US Foreign Corrupt Practices Act<sup>3</sup>, the most widely enforced anti-corruption law, covers extortion. Extortion is covered by the UN Convention against Corruption<sup>4</sup>, but implementation of that convention is still at an early stage.

Lack of effective action against extortion impairs the whole fight against corruption. Extortion and bribery are intimately connected, representing the two sides of every corrupt transaction. Where extortion is practiced with impunity, more bribe-payers will appear. Just as increased bribe-paying will attract more bribe-takers. The fight against corruption will not succeed until both extortion and bribery are overcome.

The business community has long been concerned about inadequate efforts to combat extortion. Extortion is widespread in many countries,

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<sup>1</sup> Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Paris, December 17, 1997, in force February 15, 1999 (1998) 37 ILM 1.

<sup>2</sup> Extortion and solicitation are commonly used interchangeably. Extortion involves an accompanying threat. Solicitation can be a request unaccompanied by a threat. However, solicitation by a public official usually carries with it an implied threat. Thus, it makes sense to use extortion and solicitation interchangeably.

<sup>3</sup> Pub. L. No. 95-213, 21, 91 Stat. 1494 (FCPA 1977); Pub. L. No. 100-148, 102 Stat. 1107 (FCPA 1988); Pub. L. No. 105-366, 112 Stat. 3302 (FCPA 1998).

<sup>4</sup> United Nations Convention against Corruption (UNCAC), New York, October 31, 2003, in force December 14, 2005, 2349 UNTS 41 (2004) 43 ILM 37.

particularly in connection with public procurement and government regulation. Among the most susceptible sectors are the extractive industries, infrastructure construction, and aerospace and defense.

Companies are placed in a difficult situation when government officials solicit bribes. Failure to pay is likely to mean that the company's proposals will not be considered. But paying bribes creates the risk of prosecution under their home country's laws against foreign bribery. As Commentary 7 to the OECD Anti-Bribery Convention makes clear, solicitation is not a defense<sup>5</sup>. Companies also know that submitting to extortion will lead to a vicious cycle of further demands for bribes, and that their corporate integrity policies will become worthless if they are not consistently applied.

Companies are commonly advised to deal with extortion by reporting demands to the agencies whose employees are soliciting bribes. A 2009–2010 study, entitled “RESIST”<sup>6</sup>, was conducted by the UN Global Compact, the International Chamber of Commerce, Transparency International (TI), and the World Economic Forum. They examined more than two dozen extortion scenarios and recommended that companies report extortion demands to the agencies whose employees were soliciting bribes. However, in many countries, companies are unwilling to do so. They fear that the retribution for whistle-blowing will be even worse than the consequences of refusing to pay: refusing to pay a bribe is likely to result in the loss of a single order; whistle-blowing can result in removal from the agency's bidders list for all future orders.

## **Development of high-level reporting mechanisms**

Raising reporting channels to high government levels provides a way to overcome the reluctance of companies to report extortion demands to the agencies where solicitation occurs. The concept of “high-level reporting mechanisms”, sometimes called HLRMs, was developed under the auspices of the OECD by Nicola Bonucci, the OECD's Director of Legal

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<sup>5</sup> Commentaries on the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions adopted by the Negotiating Conference on 21 November 1997, (1998) 37 ILM 8.

<sup>6</sup> RESIST: Resisting Extortion and Solicitation in International Transactions. A Company Tool for Employee Training, 2011, available at <http://archive.Transparency.org/publications/publications/resist>.

Affairs, Mark Pieth, Professor of Criminal Law and Criminology at the University of Basel and Chair of the OECD's Working Group on Bribery, and the author, Fritz Heimann, of TI.

Reporting mechanisms at high levels of government serve several important purposes. First, they help to ensure cooperation from the agencies where solicitation occurs. For example, if the reporting mechanism is established in the president's office, officials in the oil ministry will be responsive to requests for information and to proposals for corrective action. Second, they address companies' concerns about retribution because the reporting channel is independent of the agencies whose employees are soliciting bribes. Third, an independent channel makes it more likely that allegations will be objectively considered. Finally, raising complaints to a high level provides increased assurance that effective action will be taken. These factors provide strong incentives for companies to use high-level reporting mechanisms.

Establishing high-level reporting mechanisms requires action by national governments. There is no standard model. Mechanisms must be adapted to each country's political structure and administrative procedures. The use of reporting mechanisms will be at the discretion of interested whistle-blowers, including companies, civil society organizations, and individuals.

High-level reporting mechanisms were discussed by the OECD with the Russian government during the 2011–2012 negotiations for Russia's accession to the OECD Anti-Bribery Convention. Russian officials expressed considerable interest in the idea but were reluctant to be singled out by becoming the first to use high-level reporting. Consideration then shifted to the G20/B20 process under the French presidency. The Cannes communiqué of November 2011 recommended that the parties give serious consideration to adopting high-level reporting mechanisms. Further G20/B20 discussions were carried on under the Mexican presidency in the spring of 2012. The B20 Working Group called on the G20 “to establish appropriate forms of ‘High Level Reporting Mechanism’ to address allegations of solicitation of bribers by public officials, and endorse the setting up of a pilot project in a country willing to test such mechanisms”<sup>7</sup>.

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<sup>7</sup> Letter of the B20 Working Group on Improving Transparency and Anti-Corruption to President of Mexico, Felipe Calderón Hinojosa, Chair of the G20 Nations for the Los Cabos Summit, June 2012, available at [www.iccwbo.org](http://www.iccwbo.org).

The government of Colombia has expressed interest in establishing such a pilot project utilizing its Ministry for Integrity. This is very encouraging because the Ministry for Integrity has extensive experience in dealing with complaints of bribery. In addition, the Secretary for Integrity reports directly to the President and therefore functions at the appropriate high level.

## **Prevention as the key objective**

Prevention should be regarded as a key objective of any reporting mechanism. Speedy intervention from a high-level agency can result in extortion demands being dropped, thereby allowing government procurement and regulation to proceed without prolonged delays and without lingering suspicions of impropriety. This would be greatly beneficial for governments and for companies.

It is realistic to expect that speedy intervention by the reporting mechanism would achieve these results. Informal means could be used to determine whether there is a reasonable basis for a complaint. Because bribes are commonly solicited from more than one bidder, contacting other bidders provides a simple way to confirm the validity of allegations. Also, because bribes are often solicited through intermediaries or by ambiguous requests, inquiries by the high-level mechanism may be sufficient to cause bribe demands to be dropped.

## **Government actions**

Reporting mechanisms should be designed to fit properly into a country's governmental structure and legal procedures. Existing anti-corruption agencies may be the appropriate place for reporting bribe solicitation, provided they are located at a sufficiently high level in the government structure. Key factors for success are likely to include:

- Public trust and credibility: Complainants must feel confident that there will be no retaliation against whistle-blowers and that their complaints will be dealt with effectively.

- Political support: Statements of support from presidents or prime ministers will be important to establishing the credibility of the reporting mechanism.
- Investigative capability: The reporting mechanism should have sufficient investigative capability to make speedy determinations of the credibility and seriousness of allegations.
- Corrective action: The mechanism should be able to prescribe corrective actions, including suspension or discharge of employees and disqualification of companies.

Because it operates at a high level, the agency operating the reporting mechanism should be in a position to strike a proper balance between the objectives of preventive action and the need to punish serious crimes. To achieve preventive objectives requires using speedy, informal methods. From a legal standpoint, solicitation of bribes may be a crime even when no bribe is paid, though as a matter of prosecutorial discretion, un consummated solicitation is extremely unlikely to be prosecuted. So, a speedy, informal method of complaints management would serve the public interest. Dealing with serious crimes still requires the formal and time-consuming methods of prosecutors. When the reporting mechanism's investigation reveals serious criminal violations, these should be referred to prosecutors.

## **Guidance to companies and confidentiality of complainants**

Companies should submit complaints to the reporting mechanism as soon as possible after they become aware that bribes are being solicited. Decisions to submit complaints should be approved by senior management after serious internal investigations. Complaints should be submitted with adequate information to support their allegations.

The reporting mechanisms should be available to domestic and foreign companies, to individuals, and to organizations interested in combating extortion.

The reporting mechanism should accept anonymous complaints. However, because it is difficult to assess the credibility of anonymous allegations, complainants should be encouraged to provide their names. The reporting mechanism should provide adequate assurances that the names

of complainants will be kept confidential. The assurance of confidentiality is important to encourage whistle-blowers to report.

Getting whistle-blowers to come forward is absolutely crucial to uncovering extortion and bribery. The parties to corrupt acts cover their tracks through money laundering, the use of intermediaries, and other techniques of subterfuge. Unless persons “in the know” are willing to “blow the whistle”, there is no real chance of overcoming corruption.

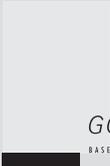
### **Not an exclusive process**

High-level reporting mechanisms should not be regarded as the only way to deal with the solicitation of bribes. Governments should remain free to use other methods, such as ombudsmen or inspector-generals in procurement and regulatory agencies or commercial attaches stationed abroad.

High-level reporting mechanisms are most clearly needed in countries where companies and individuals are unwilling to complain to the agencies whose employees solicit bribes. The case for a high-level mechanism is less compelling in countries where there are well-functioning reporting procedures and complainants are not concerned about retaliation. In countries with deeply entrenched, top-down corruption, it will be more difficult to develop sufficient trust to encourage complainants to use even high-level reporting mechanisms.

### **Review of experience**

The concept of high-level reporting mechanisms represents an innovative approach to dealing with the demand side of bribery. Pilot projects are important for demonstrating how well such mechanisms work in practice. After two years of experiences has been obtained, a review should be conducted, including identification of best practices. The OECD is well-placed to conduct such a review.



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11.08.2011

### REPORTING MECHANISM TO DEAL WITH SOLICITATION OF BRIBES

The establishment of a high-level reporting mechanism to deal with allegations of solicitation of bribes is proposed in response to longstanding business concerns about the lack of effective methods to address the demand side of bribery. The objective would be to resolve concerns about bribe solicitation in a speedy manner, so that government procurement can proceed without prolonged delays and without lingering suspicions of impropriety. This would be very beneficial for companies and for government agencies.

#### Process

- A reporting mechanism (hereafter the Mechanism) should be established by governments at a sufficiently high level to ensure cooperation by government agencies engaged in procurement and regulation of business. Separating the reporting mechanism from the procurement agencies should also alleviate concerns about retaliation against whistleblowers.
- The Mechanism should be available to domestic and foreign companies to present allegations of solicitation of bribes by government officials and intermediaries.
- Governments should design their mechanisms, consistent with applicable legal requirements, with the objective of facilitating speedy resolution of allegations.
  - Whenever practical, informal means should be used to determine whether there is reasonable basis for the allegations and whether improprieties can be effectively eliminated. For example, because bribe solicitation is commonly directed to more than one bidder, contacting other bidders can provide a simple way to confirm the validity of allegations.
  - Bribe solicitation is often conducted through intermediaries or by ambiguous requests. Inquiries by the high-level Mechanism may be sufficient to cause bribe requests to be dropped.

- Even though the primary objective of the Mechanism is preventive, governments have full discretion to take disciplinary action, including discharging or suspending employees, disqualifying companies, or undertaking criminal proceedings.
- The Mechanism should not be regarded as the exclusive way to deal with solicitation of bribes. For example, governments that use their commercial attaches to help companies deal with bribe solicitation by foreign officials, should be free to continue to do so.

#### **Guidance to Companies**

- Use of the Mechanism by companies is voluntary. Companies would be expected to submit adequate information to support their allegations. The decision to submit an allegation should be approved by senior company management after a serious internal investigation.
- The name of the company submitting the allegation would have to be disclosed. It would be difficult for the Mechanism to assess the credibility of anonymous allegations.
- The Mechanism should be used when it becomes apparent that a bribe is being solicited.
- The Mechanism is most likely to function successfully in countries where there is a high-level government commitment to curb corruption.

#### **Review of Experience**

The Mechanism represents an innovative approach to dealing with the demand side of bribery, an important field in which there is as yet little experience. For that reason, it would be useful to arrange for a review of experience in different countries, including identification of best practices, after two years. The OECD would be well placed to conduct such a review.

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