Summary report

LATIN AMERICAN MEETING ON PRIVATE SECTOR RESPONSIBILITY IN THE FIGHT AGAINST CORRUPTION _¨´

7-8 March 2013

Bogotá, Colombia

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1 Introduction

Colombia participated in the drafting and adoption of both the regional Inter-American Convention Against Corruption (IACAC) and the international United Nations Convention Against Corruption (UNCAC), two treaties which seek to reinforce the mechanisms in each State party to prevent, detect and punish corruption, as well as enhance international cooperation in the investigation and prosecution of crimes of corruption. In January 2013, Colombia became the 40th State Party to the OECD Convention on combating Bribery of Foreign Public Officials in International Business Transactions (Anti-Bribery Convention).

The Government of Colombia, like governments in other countries in Latin America and the Caribbean, recognises the great importance of promoting and encouraging, from the perspective of the State, a greater commitment from the private sector in the fight against corruption, which is reflected in anti-corruption public policies in Colombia and various other Latin American countries. The Mechanism for Follow-Up on the Implementation of the Inter-American Convention against Corruption (MESICIC) and the OECD Working Group on Bribery in International Business Transactions (Working Group)[1] are two important forums for the sharing of experience and peer review, including matters connected with the role of the private sector in the fight against corruption.

Due to the fact that Colombia was selected to chair the meetings of the MESICIC's Committee of Experts in September 2012 and that it recently joined the OECD Working Group[2], the Colombian *Secretaría de Transparencia* (Transparency Secretariat), the advisory body to the President in the fight against corruption, convened the Latin American Meeting on Private Sector Responsibility in the Fight against Corruption on 7-8 March 2013. The event was organised in close cooperation with the OAS and the OECD Working Group with the aim of promoting the exchange of experience on matters of imminent importance for the effective implementation of the IACAC and the OECD Anti-Bribery Convention with regard to provisions concerning the private sector.[3]

The objective of the event was thus the sharing of experience and to identify success factors and challenges for public policies and public-private alliances that, from within the public sector, promote and encourage the private sector to develop a stronger engagement in the fight against corruption. In particular, the event focused on four main issues: i) the liability of legal persons, ii) whistle-blowing and whistleblower protection, particularly in the private sector; iii) international standards and instruments to promote corporate ethics and compliance programmes, and iv) listings and registers (ethical conduct and integrity).

The target audience was mainly experts in charge of promoting and/or coordinating anti-corruption work in public bodies in the respective countries in Latin America and the Caribbean. The event was attended by experts from 17 member countries of MESICIC as well as 23 experts from 12 countries as speakers and panellists. Experts from various public and private institutions and civil society in Colombia also participated.

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[1] The Working Group is the monitoring mechanism for the application and enforcement of the OECD Anti-Bribery Convention and related instruments. It also produces typologies on issues ranging from mutual legal assistance, to identifying and quantifying the proceeds of corruption and the role of intermediaries in international transactions to assist countries to implement the Convention.

[2] Law 1573 of 12 August 2012

[3] The OECD Anti-Bribery Convention requires States Parties to criminalize the bribery of foreign public officials by companies and individuals in international business transactions, and it provides for a host of related measures that make this effective.

The event received technical support from the EUROsociAL II programme, which provided comparative studies for several of the abovementioned matters (see Annex I) as well as the participation of experts from Europe and Latin America who spoke about their experience and provided technical input for the discussions. EUROsociAL II, the UNDP, APC and the IDB also funded the participation of those attending the event.

This document is organised as a summary report on the key points presented by the different experts from Latin America and Europe, together with the issues discussed in the workshops on various issues and concludes with some final comments. Annex I contains references to documents on the subjects examined in the event, Annex II gives the agenda for the event and Annex III the names and institutional contact information of the speakers.

2 Summary of the key points in each session

2.1 International standards for the responsibility of legal persons

Despite the widescale recognition by both governments and the public opinion that the fight against corruption is an issue which involves all actors in society, the change in emphasis in the fight against corruption over the past few decades to strengthening State institutions and targeting the private sector has only taken place slowly. In this regard international standards for the liability of legal persons represent an important step forward in that they go beyond the individual liability of employees and/or senior management for corrupt practices by attributing legal responsibility to the company as a subject of law.

International anti-corruption conventions provide the international legal framework on the basis of which States Parties must define an adequate system for establishing the responsibility of legal persons, taking into account the respective national system and legal framework. The OECD Anti-Bribery Convention, which came into force on 9 December 1999 and encompasses forty States Parties including Argentina, Brazil, Chile, Colombia and Mexico, stipulates in Article 2 and in the Recommendation of 2009 the standards for the legal responsibility of companies. The UNCAC, which came into force on 14 December 2006, defines the requirements in this respect in Article 26. The IACAC, on the other hand, which came into force on 6 March 1997 and is prior to the other conventions, does not define any explicit standards for the legal responsibility of companies, although Article VIII does call for States Parties to sanction persons with their habitual residence in their territory and businesses domiciled there for acts of corruption. The follow-up mechanisms of the three conventions allow for peer review, together with input from civil society, of the level of compliance by States Parties with these provisions, in both legal terms and in practice. Only 6 of the 34 States party to the IACAC have still not ratified the UNCAC, whereas 5 States party to the IACAC are also members of the OECD Anti-Bribery Convention, as mentioned above. In other words, there is a sound basis of binding international legal standards for the promotion of the liability of legal persons in Latin America and the Caribbean.

The ***main issues to take into account*** for an effective regime of liability of legal persons for corruption offences as identified by the OECD, the intergovernmental organisation with most experience to date in the field, include the following:

- *Common standards for the liability of legal persons*: States must establish, in accordance with their legal system and national context, the liability of legal persons for transnational bribery. This liability may be of a criminal, civil or administrative nature. Liability should not be limited to cases in which individuals who have committed corruption are being investigated or have been punished. Legal persons responsible for acts of corruption should be subject to effective, proportionate and dissuasive sanctions of either a criminal or non-criminal nature, including monetary sanctions.

- *Sanctions*: Sanctions that should be included in an effective system for corporate liability for corruption offences can include: monetary sanctions; confiscation of the bribe and the proceeds of bribery; loss of tax benefits; corporate monitoring; disqualification from public procurement processes and listing on publicly available debarment lists ; suspension of operating licences and permits; and dissolution of the company.

- *Practical considerations*: The liability of companies has to be separate from the liability of natural person(s) connected with the act of corruption. The design of a corporate liability system has to be flexible, although the liability of companies must be applied in the following conditions: if a company executive offers, promises or gives a bribe; if a company executive directs or authorises a lower level person to offer, promise or give a bribe; and if a company executive fails to prevent a lower level person from paying a bribe. It should also not be possible for companies to avoid liability by using intermediaries, including associated legal persons.

- *Additional considerations:* The responsibility of legal persons must include State-owned and State-controlled enterprises and not-for-profit organisations. States must define whether the liability of legal persons applies to all criminal offences or only to specific offences, i.e. all criminal offences covered by the criminal code or specific offences, such as corruption and bribery, false accounting, money laundering and embezzlement. As for the jurisdiction applied to legal persons, it is necessary to extend national and territorial jurisdiction accordingly. It is crucial to ensure that liability extends to acts of corruption committed by the subsidiaries and/or intermediaries of the respective companies. Lastly, the system for applying sanctions must allow for the legitimate defence of the accused companies and provide for mitigating factors.

To illustrate how *theory is put into practice*, figures from the OECD Working Group on Bribery show that 90 legal entities have been sanctioned through criminal proceedings in 14 States party to the Anti-Bribery Convention for charges of transnational bribery, and 55 other legal entities have been sanctioned in administrative and civil cases for transnational bribery. The highest fine in one specific case amounted to EUR 1.5 billion.

The presentations by government experts who shared their experiences and views on this subject from places as diverse as Italy and Spain in Europe and Argentina, Colombia, Brazil, Chile, Mexico and Peru in Latin America along with OAS and OECD experts, together with the presentation of the results of a comparative study on the matter, allow for a better understanding of what are the key points (see below) for consideration in the design and implementation in Latin America and the Caribbean of systems for corporate liability for corruption offences:

- *There are different approaches to the legal responsibility of companies:* the different experiences show that countries have chosen or are choosing different pathways to put corporate liability into practice. Some have either established or aspire to establish criminal liability, whereas others adopt the approach of applying civil and/or administrative sanctions, which often already exist in the national legal system. Some commentators believe the criminal liability approach to be the most desirable, amongst other things because civil and administrative sanctions are not considered to be sufficiently effective nor do they serve as a deterrent and also because companies are afforded all the procedural protections available to defendants in criminal cases. Other commentators consider civil and administrative sanctions to be a more effective approach in the Latin American context, where criminal justice systems are unfamiliar with the concept of legal persons as being subject to criminal law. There is no conclusive evidence however regarding these issues nor is it desirable for just one model or approach to be promoted.

  It was very clear from the discussions that: i) Countries are required, under international law, to be able to hold companies liable for corruption offences, ii) The system of penalties can be of either a criminal, civil or administrative nature, or a combination of these: and iii) The system for applying sanctions should also include additional sanctions such as debartment from public procurement

processes. The importance of being able to learn from experiences of other countries, both the good and the "bad" examples, and possibly in particular from the latter, was also made clear in the discussions.

- *The importance of putting into practice a system that is effective:* the experiences with different types of sanctions (criminal, administrative, civil) and combinations of these made it very clear that sanctions need to be effective, proportionate and dissuasive. For example, the issue was discussed of whether criminal sanctions could allow for harsher punishments as there could potentially be higher monetary fines. This type of criminal process can entail long delays and the results may not be immediately visible and communicable. This can in turn negatively affect public trust in the system for applying sanctions and in their deterrent effect. On the other hand, it was noted that available administrative and civil sanctions might not be proportionate to the amount paid in bribes in a corruption case and therefore they will also lack the desired deterrent effect. This fact led to the call, from practically all of the participants, for ***special emphasis to be put on the implementation of the system for applying sanctions***, no matter which approach is followed. It is essential to ensure that the ***sanctions imposed in corruption cases are effective, proportionate and dissuasive, and that they are made public where possible.***
- *Effective prevention (compliance) programmes:* For countries that have adopted the model for corporate liability that can hold a company liable for failing to prevent bribery, law enforcement authorities must consider the ffectiveness of a company's internal controls, ethics and compliance programme. These programmes should generally include: i) a clearly articulated and visible corporate policy that prohibits bribery and other corrupt practices; ii) programmes and measures for specific areas of risk management, applicable at all levels of the company, and applicable to all entities over which a company has effective control, including subsidiaries; iii) clearly articulated policies and instructions to ensure due diligence; and iv) clear and transparent financial and accounting procedures. In order for these measures to not just exist on paper, a strong and visible leadership is required at the highest level of managerial authority (tone from the top), permanent communication and training, the application of internal disciplinary measures, clearly defined and safe channels and procedures for internal whistle-blowing, together with monitoring and evaluation (see the OECD Good Practice Guidance on Internal Controls, Ethics and Compliance).

On the basis of the presentation of the different experiences, the following key points to be taken into account in the design of compliance programmes are: firstly, it is important to ensure that there is recognition of the importance of these programmes in preventing corruption and strengthening the culture of compliance in the private sector. Secondly, it is crucial to define recklessness by the company, as different countries have different definitions of this (compare, for example, the criminal law of Chile, Australia and Canada on this matter). In this context it is equally important to designate the competent government authority to determine whether prior controls have been effective or not, and the criteria used for this determination. Special emphasis also needs to be placed on ensuring that an independent structure exists within the company to ensure implementation of the programme, in order to prevent undue interference and ensure the credibility and confidence in the programme. Lastly, the participants were emphatic in pointing out that these programmes should not become a mere formality, especially for those who evaluate their practical application; for example, law enforcement officials need to be trained so they can evaluate the effectiveness of programmes during the course of an investigation instead of merely following a checklist of whether the abovementioned elements exist or not.

Lastly, various countries in Latin America and the Caribbean have either set up or are in the process of setting up systems for applying sanctions in cases of corporate liability for corruption offences, processes which in many cases have been motivated by the requirement to comply with anti-corruption conventions, in particular the OECD Anti-Bribery Convention (for example, Argentina, Brazil, Chile, Mexico and recently Colombia). These countries have valuable experience not only in terms of drafting legislation, but also in relation to legislative processes, political negotiations with the different actors in

society (especially the private sector), and in dealing with and overcoming political resistance. The countries in Latin America that wish to set up a system for corporate liability for corruption offences in the near future can also learn much from their peers in this respect.

2.2 Whistle-blowing and whistle-blower protection

Systems for whistle-blowing and whistle-blower protection, in both the public and private sectors as well as civil society, are an essential element in the fight against corruption as they help to detect the supply and demand of bribes, embezzlement, fraud and other corrupt practices. Encouraging and facilitating whistle-blowing requires not only an open and transparent organisational culture in which people know how and where they can report corrupt practices, but also that potential whistleblowers trust in the whistle-blowing system itself. In this context, effective mechanisms are needed to protect whistleblowers from acts of reprisal or retaliation for having reported in good faith suspected corrupt practices and/or other misconduct.

International anti-corruption conventions have recognised the importance of States Parties having whistleblower protection systems as a core element of their anti-corruption systems. The IACAC (article III-8), the UNCAC (articles 8, 13 and 33), the OECD's 2009 Anti-Bribery Recommendation, and the OECD Recommendation on Improving Ethical Conduct in the Public Service (1998) contain provisions on whistleblower protection. It is noteworthy that in 2010 the G20 identified whistleblower protection as one of the priority areas for its global anti-corruption agenda. The international legal framework therefore provides a sound basis for the States party to these conventions (almost all of the countries in Latin America and the Caribbean) to establish effective laws and mechanisms for whistle-blower protection.

In this context, mention is also made of the *OAS Model Law To Facilitate and Encourage the Reporting of Acts of Corruption and to Protect Whistle-blowers and Witnesses*[4] as it is an important reference point and contains the main characteristics of effective whistle-blower protection legislation, together with a model for dealing with whistle-blowing and disclosure in the public interest of corruption.

To date, however, the legal frameworks for whistle-blowing and whistle-blower protection either do not exist in an adequate manner or are poorly implemented in the majority of the countries in Latin America and the Caribbean.

Legislation on whistleblower protection in Latin America and the Caribbean	
Countries with specific legislation on whistleblower protection	Canada, US Peru (at the administrative level)
Countries with no specific laws, but with some protection in labour and criminal laws	Mexico, Central America and South America
Countries with no whistleblower protection system	Bahamas, Jamaica, Saint Vincent and the Grenadines, Surinam, Trinidad and Tobago, Nicaragua

[4] For text, see: http://www.oas.org/juridico/english/draft_model_reporting.pdf.

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Source: Presentation by Martha Silvestre, International Consultant, EuroSocial II (7 March 2013, Bogotá)

In their presentations the experts made the following observations regarding the design and implementation of effective whistleblower protection systems:

- *Whistleblower protection mechanisms must encompass*: protection against acts of reprisal or retaliation in the workplace; protection against civil or criminal liability; and the guarantee of anonymity and confidentiality (which is of particular importance where whistleblowers may fear for their physical wellbeing).
- *Procedures for whistle-blowing must include*: channels that are clearly defined, well known and accessible for whistle-blowing; hotlines; and appropriate incentives.
- *Implementation mechanisms*: authorities or bodies with the role of supervising, controlling and applying whistleblower protection mechanisms need to be established; whistle-blower protection mechanisms should be subject to to judicial review, where necessary; and there must be effective sanctions mechanisms in the case where whistleblowers suffer reprisals from their employers, whether public or private.
- *Awareness-raising mechanisms and evaluation*: whistle-blowing and whistleblower protection systems need to be communicated and promoted in the public and private sectors and in civil society organisations; one option is the legal obligation and responsibility of employers (public and private) to keep their employees informed about whistle-blowing mechanisms; there should be periodic evaluations of the efficacy of whistleblower protection mechanisms, which could include, for example, surveys, statistics on the number of reports received etc.
- *Challenges that are commonly encountered include*: insufficient awareness of the law and whistleblower protection mechanisms; the fear of reprisals at work and the consequences for the physical wellbeing of whistleblowers and their families; the lack of effective enforcement of the law and whistle-blowing mechanisms; poor implementation of safeguards for the confidentiality of the system; cultural, historical and social obstacles.

At the same time, the discussions in the workgroups on whistleblower protection shed light on important aspects to be taken into account in public policies and legal initiatives in Latin America and the Caribbean. The workgroups concentrated on the three issues listed below, and the participants talked about their experience of identifying the main challenges in ensuring the running of an effective system to promote whistle-blowing of *high-level corruption* *in the private sector*.

- *Adequate incentives that the State can provide for whistle-blowing in the private sector*: all of the workgroups identified the need to guarantee the anonymity of whistle-blowers and the confidentiality of their reports in the event that whistle-blowing is not anonymous and to ensure easy access to channels for whistle-blowing with clear and simple rules and protocols. Great emphasis was also placed on the importance of creating trust in the system's credibility in general and in particular the prescribed body where whistle-blowing disclosures are made. To this end, the workgroups emphasised that it is essential to ensure and demonstrate that whistle-blowing has legal consequences. It was also stressed that the agencies responsible for receiving reports and implementing whistle-blower protection mechanisms should be publicly and proactively accountable for reporting on the progress of disclosures made in the public interest, as well as the results of the investigations. It is this particular chain that often does not work properly, either due to the lack of institutional capabilities or political will. There was intense discussion in the workgroups as to whether different types of economic incentives for whistle-blowers are viable or not, although no consensus was reached regarding their efficacy or desirability. In any case, the workgroups cautioned that, as far as creating and applying incentives for whistle-blowing is concerned, it is absolutely imperative to forestall any potentially adverse effects of this, as it was recognised that the "bad guys" are always one step ahead.

Examples that were given included experiences in Colombia of false witnesses and testimonies, amongst others.

- *Effective measures to ensure the protection of whistleblowers in the private sector:* all of the workgroups concluded that it is important to offer and guarantee measures of protection both for individuals who disclose suspected corrupt practices and for their family members. Such protection would safeguard against pressure for the whistle-blower and his/her family and against withdrawal of the whistle-blowing disclosure and impunity of those committing the corrupt practice. The workgroups emphasised that the measures that exist in many countries to protect whistle-blowers in the public sector should be extended to the private sector. Several workgroups discussed the importance of offering physical protection measures to whistleblowers, which is particularly important in the countries of Latin America where there are high levels of violence. Several Colombian participants suggested that it is possible to learn from and build upon protection measures offered in Colombia for other serious crimes, especially those connected to drug trafficking, which have been successful and from which important lessons have been learned. The workgroups also emphasised that any protection system needs to be comprehensive, meaning that isolated or partial measures do not generate the desired effect.
- *Challenges in the implementation of the above two aspects:* The participants were particularly aware of the challenges in implementing both whistle-blowing and whistle-blower protection mechanisms. The most important points underlined by the workgroups include: the need for States to have sufficient financial resources, as well as human resources, to implement whistle-blowing and whistleblower protection policies and measures; the importance of achieving and sustaining over time a genuine political will at high level in the executive and in the control and oversight agencies charged with investigating the reports; the value of having inter-operable information systems that enable whistle-blowing disclosures to be easily received and channelled to the prescribed authorities (in this regard the “one-stop shop" project was mentioned as an example, although it is still in the process of being finalised). The workgroups also put particular emphasis on the fact that Latin American countries should avoid the temptation of applying “mere copies” of other experiences in their respective countries, for which it is essential for them to take into account their individual country's specific characteristics and institutional arrangements, together with the overarching political economy, in the design of whistle-blowing and whistleblower protection systems. Lastly, it is pointed out that there was consensus on the fact that, unless the results of investigations into cases reported by whistle-blowers are made visible and widely reported, whistle-blowing and whistleblower protection systems will not generate the necessary trust and credibility for their encouragement in the private sector.

2.3 International standards for corporate ethics and instruments

Alongside efforts to hold companies liable for corrupt practices as explained above, it is necessary to ensure that companies know how to prevent corruption and what is required of them in this respect in terms of minimum and/or common standards. This is all the more significant in a context in which efforts are made internationally to level the playing field for all companies and where there is greater emphasis on sanctioning transnational bribery. According to OECD information, 90 companies and 210 individuals in 14 States party to the Anti-Bribery Convention have so far been sanctioned for transnational bribery offences. In addition, there are 300 investigations under way in 26 countries. International standards for corporate ethics have different sources, with some that are voluntary and part of a commitment to business self-regulation (see the International Chamber of Commerce example below), some stem from within inter-governmental organisations (see the OECD example below), and others form part of multi-stakeholder initiatives, such as the Extractive Industry Transparency Initiative (EITI), although this was not dealt with at the meeting as it relates only to a specific sector.

- *International Chamber of Commerce (ICC):* the ICC was the first international business organisation to prepare and issue anti-corruption rules (1979), which were revised in 1996, 2005 and 2011. The ICC's anti-corruption rules are a method of self-regulation and , when adopted voluntarily by companies, the rules can help ensure compliance with legal obligations. The mechanism consists of three parts: Part I states the Rules; Part II deals with corporate policies to support compliance with the Rules; and Part III lists the suggested elements of an effective corporate compliance programme. Article 1 establishes the prohibited practices (bribery; extortion; trading in influence; and laundering the proceeds of corruption); article 2 defines third parties, together with their responsibilities; article 3 establishes the commitments that companies must agree to with business partners; article 4 stipulates the rules regarding political and charitable contributions and sponsorships; article 5 regulates the offer or receipt of gifts and hospitality; article 6, facilitation payments; article 7, conflicts of interest; article 8, aspects dealing with human resource management; article 9, financial and accounting; and article 10 provides the elements of a corporate (anti-corruption) compliance programme. It is important to mention that the success of the ICC's Rules depends mainly on the "*attitude taken by senior management*" toward their implementation. According to the ICC, the advantages of these rules are that they have been drawn up by a business organisation with the active participation of the member companies (irrespective of the industry), and they are based on international concerns and best practices. They are also free, which enables small and medium-sized enterprises to benefit from them.

- *OECD - Good Practice Guidance on Internal Controls, Ethics, and Compliance (2010)*: these guidelines for effective compliance programmes were the first to be developed and adopted by governments, at an international level. They are based on the principle that there is no one-size-fits-all approach and that each company is different and therefore has different compliance requirements. They are designed to be flexible and adapted to companies of different sizes and sectors and also outline the fundamental elements for any effective compliance programme, namely: the need for a clearly articulated and visible corporate policy explicitly prohibiting foreign bribery and other corrupt practices; policies and measures for specific areas of risk applicable at all levels of the company and to all entities over which it has effective control, including subsidiaries and intermediaries; clearly articulated policies and instructions to ensure due diligence; and clear and transparent financial and accounting procedures. In order for these measures to not just exist on paper, strong and visible leadership is required at the highest level of managerial authority (tone from the top), permanent communication and training, the application of internal disciplinary measures, clearly defined and safe channels and procedures for internal whistle-blowing, together with monitoring and evaluation.

- *Requirements for the effective implementation of international anti-corruption principles*: international experience with the design and implementation of compliance programmes has identified three key areas to ensure the effectiveness of these programmes in practice: firstly, *strong backing by management* is necessary. Corporate anti-corruption principles therefore need to be officially endorsed by the top level of management in the company (executive director/CEO, board of directors, etc.). A serious, and not just formal, commitment is required, and this should include an independent ethics and responsibility official with a rank at executive level, specific human and physical resources for this area, and formal and safe early-warning systems. In addition, the principles and mechanisms must be publicly accessible and readily available to all interested parties (via the website, annual reports, etc.). Secondly, the *principles must be adapted to the context and specific nature* of each company and included in the corporate standards and norms (policies, procedures, and processes and practices). The principles also need to be adapted to the company's particular sector of economic activity (for example, the mining sector is different to that of pharmaceuticals), together with the market and specific context of each country of operations. Thirdly, in order for them to be effective and credible, *compliance programmes need to be independently reviewed and evaluated.* Consideration should thus be given to performance evaluations by specialist third parties who are independent and can give an objective external point of view. It is also important for operational audits to be carried out, and not

just management reports, and these should be done regularly and continuously to evaluate the evolution of norms risks and the responses to these risks.

A summary of the main points from the panel and workgroup discussions is as follows:

- The international initiatives to promote, support and encourage companies to implement compliance programmes and other anti-corruption standards adopt a 'carrot and stick' approach: the "stick", increasing sanctions for companies, which, in response to the demands of companies themselves, promotes the "carrot" approach of self-regulation, which is important although its limitations are being increasingly recognised due to the absence of harsh penalties being applied in practice.
- In view of the above, there was widespread recognition of the fact that compliance programmes and self-regulation need to be coupled with the threat of effective, proportionate and dissuasive sanctions that can be both applied in practice and widely publicised. There was a clear awareness amongst the participants of the need to face up to the initial public distrust in a context (Latin America and the Caribbean) in which many anti-corruption initiatives by States and the private sector have been best intentions that have remained just that.
- Little is so far known about the effectiveness and results of self-regulation mechanisms and compliance programmes as they tend to lack evaluation mechanisms. Given this state of affairs, interested parties are invited to follow up and design methodologies to measure the effectiveness of such programs, which are of particular importance in the face of the risks of public distrust and/or cynicism towards these mechanisms.
- In Europe, and increasingly in the rest of the world, there has been a boom over the past 5-10 years in the number of business ethics and compliance programmes being implemented. Nonetheless, there were also some words of warning about care being taken that the emerging "market" of compliance programmes does not result in excessively high costs for companies.
- The key elements for an effective business ethics and compliance programme are: independent structures for the implementation of these programmes; direct senior management responsibility; companies need to be able to see the associated benefits (economic returns and enhanced reputation, amongst others), which at the same time was seen as being a great challenge given the absence of hard data on the subject. Companies should also disclose information on their compliance programmes, including in relation to implementation and independent evaluations. The workgroups also stressed that encouragement should be given to social sanctions in cases where companies fail to comply with the standards, for example, by involving consumers as occurs in cases of the violation of social or environmental standards. It was also suggested that information should be provided on the effectiveness of the programmes as well as non-compliance by company shareholders and investors.

2.3 Listings and registers (ethical conduct and integrity)

In the final session, speakers presented specific examples to illustrate certain aspects of the previous session drawing from specific lessons learned:

- *Examples for measuring business integrity*: a comparative study by ECODES highlighted certain important aspects for gauging business integrity, including the need for external evaluations, as was emphasised above. This should include a review of the existence and content of anti-corruption policies, an evaluation of the management and implementation systems (including communication, education, monitoring, channels for anonymous whistle-blowing and whistle-blower protection mechanisms), together with the transparency of information on the outcomes of management

investigations of specific instances of non-compliance. These measures can be used to gauge the robustness and effectiveness of business anti-corruption policies that have been set in place.

- *Cadastro Empresa Pró-Ética, Brazil*: This is a national public register for companies that are committed to ethical conduct and integrity, maintained by the Brazilian Office of the Comptroller-General (CGU). It is NOT a certificate, i.e. approval for being listed on the register does not constitute official certification for a company's compliance programme. Being listed on the register is more of a public and voluntary commitment that calls for the company to carry out a series of measures aimed at preventing and fighting corruption within the company and its supply chain. The overall aim is to promote an environment of business integrity in which there is recognition of the fact that tackling corruption involves not just the public sector but also the private sector and civil society. The Pro-ética register aspires to raise the profile of companies that invest in ethical conduct, integrity and the prevention of corruption. The benefits for the companies include a better public image – by virtue of the initiative being associated with the Office of the Comptroller General (CGU), Brazil – which, for example, they can exploit for marketing purposes. Other important benefits are potential improvements in their internal control framework, changes in the organisational culture, and the promotion of confidence in the supply chain, stemming from the prescribed measures to become eligible for listing. There are currently 15 companies listed on the Cadastro Empresa Pró-Ética.[5]
- *ACODAL sectoral covenant of ethical conduct*: In this case ACODAL (the Colombian Association of Sanitary and Environmental Engineering) launched the initiative to promote a covenant of ethical conduct in the piping sector in response to constant complaints from its members about problems with corruption and the high cost of supplies. Given the particular characteristics of the sector, ACODAL devoted its attention to identifying a niche in which a covenant of this type would give added value to the State's control mechanisms and so that it should be far more than just a formal pact. On the basis of an analysis of the problems of suspected corruption they identified, for example, that information on the price quotations for the procurement of supplies by the public authorities was essential, as they had detected that the prices could vary by more than ten times from one municipality to another. For this purpose, however, information from the State is necessary in order to be able to exercise social control over public procurement and the prices of piping in particular. The respective official information from the authorities was not available, nor was it possible to set up an ethics committee with the participation of the public sector. This experience underlined the importance of co-responsibility between the private sector and the public sector for certain business self-regulation tools.

One aspect that was stressed in all of the experiences is the importance of adequate measures and capabilities for ***social control*** over actions in the private sector and public sector.

3 Final comments

The Latin American meeting on the role of the private sector in the fight against corruption created a forum for the sharing of experiences and discussion on a subject that is becoming increasingly important in Latin America and the Caribbean. State-promoted and state-supported initiatives to encourage companies to fight corruption are nascent in most countries in the region. On the other hand, the experience of countries that have ratified and are required to fully implement the OECD Anti-Bribery Convention is valuable for other countries in Latin America and the Caribbean that must comply with similar standards that are applicable under the UNCAC and IACAC. Moreover, given that work with the

[5] See CGU website: http://www.cgu.gov.br/empresaproetica/cadastro-pro-etica/lista-empresas.asp.

private sector has been identified as being of "special interest" within the framework of the MESICIC, the issues dealt with in the event were also of great importance for those attending the meeting.

In terms of possible activities for the future as a result of the discussions at this event, the following ideas stand out:

- Experts with anti-corruption bodies in the respective countries could communicate the ideas from the discussions at this event in their own countries, for example, in conferences and forums in which they make known the main points of this summary report.
- Continue to realize activities in the framework of MESICIC in order to facilitate the exchange of information on the normative development, experiences and good practice which, as a result of this exchange, contribute to advance in the analysis and identification of basic or fundamental principles and rules that could be considered for inclusion into national laws or normative frameworks in order to promote and facilitate or ensure the responsibility of the private sector in the prevention and combat of corruption. The before would be in line with the methodology adopted by the Committee of Experts of MESICIC to deal with the "issue of collective interest" on this matter.
- Bearing in mind the particular importance of the liability of legal persons, and the challenges specific to criminal justice systems in the region, an event could be organised with the participation of countries that have already defined their systems for corporate liability for corruption and those that are in the process of doing so with the aim of familiarising themselves with the pros and cons of the different approaches and of learning from others' experiences with legislative processes. This event should primarily bring together legislative drafters and law enforcement officials who are responsible for elaborating and implementing corporate liability legislation. Such an event could also include the participation of key actors in the private sector and experts from relevant international organisations. A report and country-specific recommendations could also be produced and made public.
- Given the initiatives in various countries in Latin America and the Caribbean to encourage and support self-regulatory mechanisms in the private sector, evidence of the results and effectiveness of existing experiences is very important. The compilation of experiences promoted by EUROsociAL is a first step, although it is important for this to be complemented with a results and performance analysis.
- Bearing in mind that the problems and dynamics of corruption vary considerably from one sector to the next and recognising that the private sector may be subject to specific international standards and/or dynamics according to the sector or industry (companies in the mining sector are different to those in the pharmaceutical sector, e.g.), it may be worth developing opportunities for exchanges and dialogue between the anti-corruption bodies/authorities, the private sector and civil society at a sectoral level.

ANNEX I – Sources of information

1. Liability of legal persons (legal entities)

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- Bacigalupo, Dra. Silvina (2013), "Análisis comparado sobre las obligaciones derivadas de los convenios internacionales contra la corrupción. Responsabilidad penal y administrativa de las personas jurídicas. Delitos relacionados con la corrupción", EUROsociAL II, España.

Presentations

European perspectives

- Patrick Moulette, Head, Anti-Corruption Division, OECD / Leah Ambler, Legal Analyst, Anti-Corruption Division, OECD
- Lorenzo Salazar, Head of the Italian delegation to the OECD Working Group on Bribery (Italy)
- Jaime Requena, Office of the Secretary of State, Ministry of Justice (Spain)
- Dr. Silvina Bacigalupo, Professor of Criminal Law, Autonomous University of Madrid (Spain)
- Dra. Carmen Ruiz López, criminal lawyer attorney, Universidad Externado (Colombia)
- Héctor Hernández Basualto, Professor of Criminal Law. Universidad Diego Portales. (Chile)

Perspectives of countries in Latin America

- Juan García Elorrio, Investigations Coordinator, Anti-corruption Office (Argentina)
- Sergio Seabra, CGU (Brazil)
- Enzo Paredes, High Level Anti-corruption Commission (Peru)
- Ismael Camargo Mata, Director of Engagement with Government and Society (*Vinculación con Gobierno y Sociedad*), Ministry of Public Administration (Mexico)
- Jorge Vío Niemeyer, Auditor General's Office (*Consejo de Auditoría Interna General de Gobierno*) (Chile)

2. Whistle-blowing and whistleblower protection

- OAS (2011), "Texto del proyecto de Ley Modelo para facilitar e incentivar la denuncia de actos de corrupción y proteger a sus denunciantes y testigos", http://www.oas.org/juridico/ley_modelo_proteccion.pdf

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- OECD (2011), "Whistleblower protection: encouraging reporting", http://www.oecd.org/cleangovbiz/toolkit/50042935.pdf
- G20 Anti-Corruption Action Plan (2012), "Study on Whistleblower Protection Frameworks, Compendium of Best Practices and Guiding Principles for Legislation".

Presentations

- Martha Silvestre, Presentation of a comparative study on reporting mechanisms (EUROsociAL II)
- Tom Devine, Legal Director, Government Accountability Project (USA)
- John Devitt. Chief Executive, Chief Executive TI Ireland, Speak Up helpline/Whistleblower helpline (Ireland)
- Rosario López Wong, Senior Prosecutor, Head of Protection and Assistance to Victims and Witnesses, Office of the Public Prosecutor (Peru)
- Leah Ambler (Legal Analyst, OECD)

3. International standards for corporate ethics and instruments

- OECD (2010): Good Practice Guidance on Internal Controls, Ethics and Compliance: http://www.oecd.org/investment/anti-bribery/anti-briberyconvention/44884389.pdf.
- ICC (2011), "ICC Rules on combating corruption", http://www.google.de/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&ved=0CDwQFjAB&url=http%3A%2F%2Fwww.iccwbo.org%2FData%2FPolicies%2F2011%2FICC-Rules-on-Combating-Corruption-2011%2F&ei=bEdGUYunAeni4AO5yIDICA&usg=AFQjCNG_vKKniYByeOnvzDsKm8x5PVamtQ&bvm=bv.43828540,d.eWU

Presentations

- Roberto Hernández (Chair), President of the Anti-corruption Committee of the International Chamber of Commerce, Mexico (ICC Mexico)
- Morgan J. Miller, Partner Litigation Department, Paul Hastings (USA)
- Roberto Ballester. Director of the Fundación ETNOR. Paper on business ethics, European Business Ethics Network (http://www.eben-spain.org)/Fundación ETNOR (Spain)
- Hilaire Avril, Senior Consultant, Resource Consulting Services LTD (France)
- Patrick Moulette, OECD

4. Listings and registers (ethical conduct and integrity)

- ECODES (2012), "Programas y políticas públicas para la prevención de la corrupción en el ámbito privado. Buenas prácticas en América Latina y la Unión Europea", EUROsociAL II, España.

- Office of the Comptroller General (CGU), Brazil, "Cadastro Empresa Pro-Ética", http://www.cgu.gov.br/empresaproetica/cadastro-pro-etica/lista-empresas.asp
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Presentations

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- Sergio Seabra, Secretary of Anti-corruption and Strategic Information, Office of the Comptroller General (CGU), Brazil
- Mary Luz Mejia de Pumarejo, ACODAL