(COE) EXPLANATORY REPORT

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EXPLANATORY REPORT ON THE

CRIMINAL LAW CONVENTION

ON CORRUPTION

I. INTRODUCTION

Corruption has existed ever since antiquity as one of the worst and, at the same time, most widespread forms of behavior, which is inimical to the administration of public affairs. Naturally, over time, customs as well as historical and geographical circumstances have greatly changed public sensitivity to such behavior, in terms of the significance and attention attached to it. As a result, its treatment in laws and regulations has likewise changed substantially. In some periods of history, certain "corrupt" practices were actually regarded as permissible, or else the penalties for them were either fairly light, or generally not applied. In Europe, the French Napoleonic Code of 1810 may be regarded as a landmark at which tough penalties were introduced to combat corruption in public life, comprising both acts which did not conflict with one's official duties and acts which did. Thus, the arrival of the modern State-administration in the 19th century made public officials' misuse of their offices a serious offence against public confidence in the administration's probity and impartiality.

Notwithstanding the long history and the apparent spread of the phenomenon of corruption in today's society, it seemed difficult to arrive at a common definition and it was rightly said "no definition of corruption will be equally accepted in every nation". Possible definitions have been discussed for a number of years in different fora but it has not been possible for the international community to agree to on a common definition. Instead international fora have preferred to concentrate on the definition of certain forms of corruption, e.g. "illicit payments" (UN), "bribery of foreign public officials in international business transactions" (OECD), "corruption involving officials of the European Communities or officials of Member States of the European Union" (EU).

Even if no common definition has yet been found by the international community to describe corruption as such, everyone seems at least to agree that certain political, social or commercial practices are corrupt. The qualification of some practices as "corrupt" and their eventual moral reprobation by public opinion vary however from country to country and do not necessarily imply that they are criminal offences under national criminal law.

More recently, the deepening interest and concern shown in such matters everywhere have produced national and international reactions. From the beginning of the 90s corruption has always been in the headlines of the press. Although it had always been present in the history of humanity, it does appear to have virtually exploded across the newspaper columns and law reports of a number of States from all corners of the world, irrespective of their economic or political regime. Countries of Western, Central and Eastern Europe have been literally shaken by huge corruption scandals and some consider that corruption now represents one of the most serious threats to the stability of democratic institutions and the functioning of the market economy.

This illustrates that corruption needs to be taken seriously by Governments and Parliaments. The fact that corruption is widely talked of in some States and not at all in others, is in no way indicative that corruption is not present in the latter because no system of government and administration is immune to corruption. In such countries corruption may be either non-existent (which seems in most cases rather improbable), or so efficiently organised as not to give rise to suspicion. In some cases silence over corrupt activities is merely the result of citizen's resignation in face of widespread corruption. In such situations corruption is seen no longer not as unacceptable criminal behavior, liable to severe

sanctions, but as a normal or at least necessary or tolerated practice. The survival of the State is at stake in such extreme cases of endemic corruption.

II. THE PREPARATORY WORK

At their 19th Conference held in Valletta in 1994, the European Ministers of Justice considered that corruption was a serious threat to democracy, to the rule of law and to human rights. The Council of Europe, being the pre-eminent European institution defending these fundamental values, was called upon to respond to that threat. The Ministers were convinced that the fight against corruption should take a multidisciplinary approach and that it was necessary to adopt appropriate legislation in this area as soon as possible. They expressed the belief that an effective fight against corruption required increased cross-border co-operation between States, as well as between States and international institutions, through the promotion of co-ordinated measures at European level and beyond, which in turn implied involving States which were not members of the Council of Europe. The Ministers of Justice recommended to the Committee of Ministers the setting up of a Multidisciplinary Group on Corruption, under the responsibility of the European Committee on Crime Problems (CDPC) and the European Committee on Legal Co-operation (CDC), with the task of examining what measures might be suitable to be included in a programme of action at international level as well as examining the possibility of drafting model laws or codes of conduct, including international conventions, on this subject. The Ministers expressly referred to the importance of elaborating a follow-up mechanism to implement the undertakings contained in such instruments.

In the light of these recommendations, the Committee of Ministers set up, in September 1994, the Multidisciplinary Group on Corruption (GMC) and gave it terms of reference to examine what measures might be suitable to be included in an international programme of action against corruption. The GMC was also invited to make proposals to the Committee of Ministers before the end of 1995 as to appropriate priorities and working structures, taking due account of the work of other international organizations. It was furthermore invited to examine the possibility of drafting model laws or codes of conduct in selected areas, including the elaboration of an international convention on this subject, as well as the possibility of elaborating a follow-up mechanism to implement undertakings contained in such instruments.

The GMC started work in March 1995 and prepared a draft Programme of Action against Corruption, an ambitious document covering all aspects of the international fight against this phenomenon. This draft Programme was submitted to the Committee of Ministers, which, in January 1996, took note of it, invited the European Committee on Crime Problems (CDPC) and the European Committee on Legal Co-operation (CDC) to express their opinions thereon and, in the meantime, gave interim terms of reference to the GMC, authorizing it to start some of the actions contained in the said Programme, such as work on one or several international instruments.

The Committee of Ministers finally adopted the Programme of Action in November 1996 and instructed the GMC to implement it before 31 December 2000. The Committee of Ministers welcomed in particular the GMC's intention to elaborate, as a matter of priority, one or more international Conventions to combat corruption and a follow-up mechanism to implement undertakings contained in such instruments or any other legal instrument in this area. According to the terms of reference given to the GMC, the CDPC and CDC were to be consulted on any draft legal text relating to corruption and their views taken into account.

The GMC's terms of reference are as follows:

"Under the responsibility of the European Committee on Crime Problems (CDPC) and the European Committee on Legal Co-operation (CDC),

- to elaborate as a matter of priority one or more international conventions to combat corruption, and a follow-up mechanism to implement undertakings contained in such instruments, or any other legal instrument in this area;

- to elaborate as a matter of priority a draft European Code of Conduct for Public Officials;

- after consultation of the appropriate Steering Committee(s) to initiate, organize or promote research projects, training programs and the exchange at national and international level of practical experiences of corruption and the fight against it;

- to implement the other parts of the Programme of Action against Corruption, taking into account the priorities set out therein;

- to take into account the work of other international organizations and bodies with a view to ensuring a coherent and co-ordinated approach;

- to consult the CDC and/or CDPC on any draft legal text relating to corruption and take into account its/their views."

The Ministers participating in the 21st Conference of European Ministers of Justice, held in Prague in June 1997, expressed their concern about the new trends in modern criminality and, in particular, by the organised, sophisticated and transnational character of certain criminal activities. They declared themselves persuaded that the fight against organised crime necessarily implies an adequate response to corruption and emphasized that corruption represents a major threat to the rule of law, democracy, human rights, fairness and social justice, that it hinders economic development and endangers the stability of democratic institutions and the moral foundations of society. Therefore, the Ministers recommended to speed up the implementation of the Programme of Action against Corruption and, with this in mind, to intensify the efforts with a view to an early adoption of, inter alia, a criminal law Convention providing for the co-ordinated criminalization of corruption offences and for enhanced co-operation in the prosecution of such offences. They further recommended the Committee of Ministers to ensure that the relevant international instruments would provide for an effective follow-up mechanism open to member-States and non-member States of the Council of Europe on an equal footing.

At their Second Summit, held in Strasbourg on 10-11 October 1997, the Heads of State and Government of the member States of the Council of Europe decided to seek common responses to the challenges posed by the growth in corruption and organised crime. The Heads of State and Government adopted an Action Plan in which, with a view to promoting co-operation in the fight against corruption, including its links with organised crime and money laundering, they instructed the Committee of Ministers, inter alia, to adopt guiding principles to be applied in the development of domestic legislation and practice, to secure the rapid completion of international legal instruments pursuant to the Programme of Action against Corruption and to establish without delay an appropriate and efficient mechanism, for monitoring observance of the guiding principles and the implementation of the said international instruments.

At its 101st Session on 6 November 1997 the Committee of Ministers of the Council of Europe adopted the 20 Guiding Principles for the Fight against Corruption. Firmly resolved to fight corruption by joining their countries' efforts, the Ministers agreed, inter alia, to ensure co-ordinated criminalization of national and international corruption (Principle 2), to ensure that those in charge of prevention, investigation, prosecution and adjudication of corruption offences enjoy the independence and autonomy appropriate to their functions, are free from improper influence and have effective means for gathering evidence, protecting the persons who help the authorities in combating corruption and preserving the confidentiality of investigations (Principle 3), to provide appropriate measures for the seizure and deprivation of the proceeds of corruption offences (Principle 4), to prevent legal persons being used to shield corruption offences (Principle 5), to promote the specialization of persons or bodies in charge of fighting corruption and to provide them with appropriate means and training to

perform their tasks (Principle 7) and to develop to the widest extent possible international co-operation in all areas of the fight against corruption (Principle 20).

Moreover, the Committee of Ministers instructed the GMC rapidly to complete the elaboration of international legal instrument pursuant to the Programme of Action against Corruption and to submit without delay a draft text proposing the establishment of an appropriate and efficient mechanism for monitoring the observance of the Guiding principles and the implementation of the international legal instruments to be adopted.

At its 102nd Session (5 May 1998), the Committee of Ministers adopted Resolution (98) 7 authorizing the establishment of the "Group of States against Corruption- GRECO" in the form of a partial and enlarged agreement. In this Resolution the Committee of Ministers invited member States and non-member States of the Council of Europe having participated in the elaboration of the Agreement to notify to the Secretary General their intention to join the GRECO, the agreement setting up the GRECO being considered as adopted as soon as fourteen member States of the Council of Europe made such a notification.

The agreement establishing the GRECO and containing its Statute was adopted on 5 May 1998. GRECO is a body called to monitor, through a process of mutual evaluation and peer pressure, the observance of the Guiding Principles in the Fight against Corruption and the implementation of international legal instruments adopted in pursuance of the Programme of Action against Corruption. Full membership of the GRECO is reserved to those who participate fully in the mutual evaluation process and accept to be evaluated.

The GRECO has been conceived as a flexible and efficient follow-up mechanism, which will contribute to the development of an effective and dynamic process for preventing and combating corruption. The agreement provides for the participation in the GRECO, on an equal footing, of member States, of those non-member States which have participated in the elaboration of the agreement, and of other non-member States that are invited to join.

In accordance with the objectives set by the Programme of Action and on the basis of the interim terms of reference referred in paragraph 8 above, the Criminal Law Working Group of the GMC (GMCP) started work on a draft criminal law convention in February 1996. Between February 1996 and November 1997, the GMCP held 10 meetings and completed two full readings of the draft Convention. In November 1997 it transmitted the text to the GMC for consideration.

The GMC started the examination of the draft submitted by the GMCP at its 11th (November 1997) plenary meeting. It pursued its work at its 12th (January 1998), 13th (March 1998) and 14th meetings (September 1998). In February 1998, the GMC consulted the CDPC on the first reading version of the draft Convention. The Bureau of the CDPC, having consulted in writing the heads of delegation to the CDPC, formulated an opinion on the draft in March 1998 (see Appendix II, document CDPC-BU (98) 3). The GMC took account of the views expressed by the CDPC at its 13th meeting (March 1998) and finalized the second reading on that occasion. In view of the wish expressed by the CDPC to be consulted again on the final version, the GMC agreed to transmit the second reading version of the draft Convention to the CDPC. Moreover, in view of the request made by the President of the Parliamentary Assembly on 11 February 1998 to the Chairman-in-office of the Minister's Deputies, the GMC transmitted the second reading text to the Committee of Ministers with a view to enabling it to accede to that request. At the 628th meeting of the Ministers' Deputies (April 1998), the Committee of Ministers agreed to consult the Parliamentary Assembly on the draft Convention and instructed the GMC to examine the opinions formulated by the Assembly and by the CDPC.

At its 40th Plenary Session, the CDPC formulated a formal opinion on the draft Convention. The Parliamentary Assembly, for its part, adopted its opinion in the third part of its 1998 Session in June 1998. In conformity with its terms of reference the GMC considered both opinions at its 14th plenary meeting in September 1998. On that occasion it approved the final draft and submitted it to the

Committee of Ministers. At its 103rd Session at ministerial level (November 1998) the Committee of Ministers adopted the Convention, decided to open it for signature on Y and authorized the publication of the present explanatory report.

III. THE CONVENTION

The Convention aims principally at developing common standards concerning certain corruption offences, though it does not provide a uniform definition of corruption. In addition, it deals with substantive and procedural law matters, which closely relate to these corruption offences and seeks to improve international co-operation. Recent practice shows that international co-operation meets two kinds of difficulties in the prosecution of transnational corruption cases, particularly that of bribery of foreign public officials: one relates to the definition of corruption offences, often diverging because of the meaning of "public official" in domestic laws; the other relates to means and channels of international co-operation, where procedural and sometimes political obstacles delay or prevent the prosecution of the offenders. By harmonizing the definition of corruption offences, the requirement of dual criminality will be met by the Parties to the Convention, while the provisions on international co-operation are designed to facilitate direct and swift communication between the relevant national authorities.

The European Union Convention on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union (Council Act of 26 May 1997) defines active corruption as "the deliberate action of whosoever promises or gives, directly or through an intermediary, an advantage of any kind whatsoever to an official for himself or for a third party for him to act or refrain from acting in accordance with his duty or in the exercise of his functions in breach of his official duties" (Article 3). Passive corruption is defined along the same lines.

The Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (adopted within the OECD on 17 December 1997) defines, for its part, active corruption, as the act by any person of "intentionally to offer, promise or give any undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign public official, for that official or for a third party, in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business".

The GMC started its work on the basis of the following provisional definition: "Corruption as dealt with by the Council of Europe's GMC is bribery and any other behavior in relation to persons entrusted with responsibilities in the public or private sector, which violates their duties that follow from their status as a public official, private employee, independent agent or other relationship of that kind and is aimed at obtaining undue advantages of any kind for themselves or for others".

The purpose of this definition was to ensure that no matter would be excluded from its work. While such a definition would not necessarily match the legal definition of corruption in most member States, in particular not the definition given by the criminal law, its advantage was that it would not restrict the discussion to excessively narrow confines. As the drafting of the Convention's text progressed, that general definition translated into several common operational definitions of corruption which could be transposed into national laws, albeit, in certain cases, with some amendment to those laws. It is worth underlining, in this respect, that the present Convention not only contains a commonly agreed definition of bribery, both from the passive and active side, which serves as the basis of various forms of criminalization but also defines other forms of corrupt behavior, such as private sector corruption and trading in influence, closely linked to bribery and commonly understood as specific forms of corruption. Thus, the present Convention has, as one of its main characteristics, its wide scope, which reflects the Council of Europe's comprehensive approach to the fight against corruption as a threat to democratic values, the rule of law, human rights and social and economic progress.

IV. COMMENTARY

CHAPTER I - USE OF TERMS

Article 1 - Use of terms

Only three terms are defined under Article 1, as all other notions are addressed at the appropriate place in the Explanatory Report.

The drafters of this Convention wanted to cover all possible categories of public officials in order to avoid, as much as possible, loopholes in the criminalization of public sector bribery. This, however, does not necessarily mean that States have to redefine their concept of "public official" in general. In reference to the "national law" it should be noted that it was the intention of the drafters of the Convention that Contracting parties assume obligations under this Convention only to the extent consistent with their Constitution and the fundamental principles of their legal system, including, where appropriate, the principles of federalism.

The term "public official" is used in Articles 2 and 3 as well as in Article 5. Littera a. of Article 1 defines the concept of "public official" in terms of an official or public officer, a mayor, a minister or judge as defined in the national law of the State, for the purposes of its own criminal law. The criminal law definition is therefore given priority. Where a public official of the prosecuting State is involved, this means that its national definition is applicable. However, the term "public official" should include "mayor" and "minister". In many countries mayors and ministers are assimilated to public officials for the purpose of criminal offences committed in the exercise of their powers. In order to avoid any loopholes that could have left such important public figures outside the scope of the present Convention, express reference is made to them in Article 1 littera a.

Also, the term "public official" encompasses, for the purpose of this Convention, "judges", who are included in point (b) as holders of judicial office, whether elected or appointed. This notion is to be interpreted to the widest extent possible: the decisive element being the functions performed by the person, which should be of a judicial nature, rather than his or her official title. Prosecutors are specifically mentioned as falling under this definition, although in some States they are not considered as members of the "judiciary". Members of the judiciary -Judges and, in some countries, prosecutors- are an independent and impartial authority separated from the executive branch of Government. It is obvious that the definition found in Article 1, littera a is solely for the purpose of the present Convention and only requires Contracting Parties to consider or treat judges or prosecutors as public officials for the purposes of the application of this Convention..

Where any of the offences under the Convention involves a public official of another State, Article 1 littera (c) applies. It means that the definition in the law of the latter State is not necessarily conclusive where the person concerned would not have had the status of public official under the law of the prosecuting State. This follows from point (c) of Article 1, according to which a State may determine that corruption offences involving public officials of another State refer only to such officials whose status is compatible with that of national public officials under the national law of the prosecuting State. This reference to the law of the public official's State means that due account can be taken of specific national situations regarding the status of persons exercising public functions.

The term "legal person" appears in Article 18 (Corporate liability). Again, the Convention does not provide an autonomous definition, but refers back to national laws. Littera d. of Article 1 thus permits States to use their own definition of "legal person", whether such definition is contained in company law or in criminal law. For the purpose of active corruption offences however, it expressly excludes from the scope of the definition the State or other public bodies exercising State authority, such as ministries or local government bodies as well as public international organizations such as the Council of Europe. The exception refers to the different levels of government: State, Regional or Local entities exercising public powers. The reason is that the responsibilities of public entities are subject to specific regulations or agreements/treaties, and in the case of public international organizations, are usually embodied in administrative law. It is not aimed at excluding the responsibility of public enterprises. A

contracting State may, however, go further as to allow the imposition of criminal law or administrative law sanctions on public bodies as well. It goes without saying that this provision does not restrict, in any manner, the responsibility of individuals employed by the different State organs for passive corruption offences under Articles 3 to 6 and 9 to 12 of the present Convention.

CHAPTER II - MEASURES TO BE TAKEN AT NATIONAL LEVEL

Article 2 - Active bribery of domestic public officials

Article 2 defines the elements of the active bribery of domestic public officials. It is intended to ensure in particular that public administration functions properly, i.e. in a transparent, fair and impartial manner and in pursuance of public interests, and to protect the confidence of citizens in their Administration and the officials themselves from possible maneuvers against them. The definition of active bribery in Article 2 draws its inspiration from national and international definitions of bribery/corruption e.g. the one contained in the Protocol to the European Union Convention on the protection of the European Communities' financial interests (Article 3). This offence, in current criminal law theory and practice and in the view of the drafters of the Convention, is mirrored by passive bribery, though they are considered to be separate offences for which prosecutions can be brought independently. It emerges that the two types of bribery are, in general, two sides of the same phenomenon, one perpetrator offering, promising or giving the advantage and the other perpetrator accepting the offer, promise or gift. Usually, however, the two perpetrators are not punished for complicity in the other one's offence.

The definition provided in Article 2 is referred to in subsequent provisions of the Convention, e.g. in Articles 4, 5, 6, 9 and, through a double reference, in Article 10. These provisions do not repeat the substantive elements but extend the criminalization of the active bribery to further categories of persons.

The offence of active bribery can only be committed intentionally under Article 2 and the intent has to cover all other substantive elements of the offence. Intent must relate to a future result: the public official acting or refraining from acting as the briber intends. It is, however, immaterial whether the public official actually acted or refrained from acting as intended.

The briber can be anyone, whatever his capacity (businessman, public official, private individual etc). If, however, the briber acts for the account or on behalf of a company, corporate liability may also apply in respect of the company in question (Article 18). Nevertheless, the liability of the company does not exclude in any manner criminal proceedings against the natural person (paragraph 3 of Article 18). The bribed person must be a public official, as defined under Article 1, irrespective of whether the undue advantage is actually for himself or for someone else.

The material components of the offence are promising, offering or giving an undue advantage, directly or indirectly for the official himself or for a third party. The three actions of the briber are slightly different. "Promising" may, for example, cover situations where the briber commits himself to give an undue advantage later (in most cases only once the public official has performed the act requested by the briber) or where there is an agreement between the briber and the bribee that the briber will give the undue advantage later. "Offering" may cover situations where the briber shows his readiness to give the undue advantage at any moment. Finally, "giving" may cover situations where the briber transfers the undue advantage. The undue advantage need not necessarily be given to the public official himself: it can be given also to a third party, such as a relative, an organization to which the official belongs, the political party of which he is a member. When the offer, promise or gift is addressed to a third party, the public official must at least have knowledge thereof at some point. Irrespective of whether the recipient or the beneficiary of the undue advantage is the public official himself or a third party, the transaction may be performed through intermediaries.

The undue advantages given are usually of an economic nature but may also be of a non-material nature. What is important is that the offender (or any other person, for instance a relative) is placed in a better position than he was before the commission of the offence and that he is not entitled to the benefit. Such advantages may consist in, for instance, money, holidays, loans, food and drink, a case handled within a swifter time, better career prospects, etc.

What constitutes "undue" advantage will be of central importance in the transposition of the Convention into national law. "Undue" for the purposes of the Convention should be interpreted as something that the recipient is not lawfully entitled to accept or receive. For the drafters of the Convention, the adjective "undue" aims at excluding advantages permitted by the law or by administrative rules as well as minimum gifts, gifts of very low value or socially acceptable gifts.

Bribery provisions of certain member States of the Council of Europe make some distinctions, as to whether the act, which is solicited, is a part of the official's duty or whether he is going beyond his duties. In this connection, attention should be drawn to the work currently carried out by the GMC to draft a European model code of conduct for public officials specifying professional duties and standards for public officials in order to prevent corruption. As far as criminal law is concerned, if an official receives a benefit in return for acting in accordance with his duties, this would already constitute a criminal offence. Should the official act in a manner, which is prohibited or arbitrary, he would be liable for a more serious offence. If he should not have handled the case at all, for instance a license should not have been given, the official would be liable to having committed a more serious form of bribery which usually carries a heavier penalty. Such an extra-element of 'breach of duty' was, however, not considered to be necessary for the purposes of this Convention. The drafters of the Convention considered that the decisive element of the offence was not whether the official had any discretion to act as requested by the briber, but whether he had been offered, given or promised a bribe in order to obtain something from him. The briber may not even have known whether the official had discretion or not, this element being, for the purpose of this provision, irrelevant. Thus, the Convention aims at safeguarding the confidence of citizens in the fairness of Public Administration which would be severely undermined, even if the official would have acted in the same way without the bribe. In a democratic State public servants are, as a general rule, remunerated from public budgets and not directly by the citizens or by private companies. In addition, the notion of "breach of duty" adds an element of ambiguity that makes more difficult the prosecution of this offence, by requiring to prove that the public official was expected to act against his duties or was expected to exercise his discretion for the benefit of the briber. States that require such an extra-element for bribery would therefore have to ensure that they could implement the definition of bribery under Article 2 of this Convention without hindering its objective.

Article 3 - Passive bribery of domestic public officials

Article 3 defines passive bribery of public officials. As this offence is closely linked with active bribery, some comments made thereon, e.g. in respect of the mental element and the undue advantage apply accordingly here as well. The "perpetrator" in Article 3 can only be a public official, in the meaning of Article 1. The material elements of his act include requesting or receiving an undue advantage or accepting the offer or the promise thereof.

"Requesting" may for example refer to a unilateral act whereby the public official lets another person know, explicitly or implicitly, that he will have to "pay" to have some official act done or abstained from. It is immaterial whether the request was actually acted upon, the request itself being the core of the offence. Likewise, it does not matter whether the public official requested the undue advantage for himself or for anyone else.

"Receiving" may for example mean the actual taking the benefit, whether by the public official himself or by someone else (spouse, colleague, organization, political party, etc) for himself or for someone else. The latter case supposes at least some kind of acceptance by the public official. Again, intermediaries can be involved: the fact that an intermediary is involved, which would extend the

scope of passive bribery to include indirect action by the official, necessarily entails identifying the criminal nature of the official's conduct, irrespective of the good or bad faith of the intermediary involved.

If there is a unilateral request or a corrupt pact, it is essential that the act or the omission of acting by the public official takes place after the request or the pact, whereas it is immaterial in such a case at what point in time the undue advantage is actually received. Thus, it is not a criminal offence under the Convention to receive a benefit after the act has been performed by the public official, without prior offer, request or acceptance. Moreover, the word "receipt" means keeping the advantage or gift at least for some time so that the official who, having not requested it, immediately returns the gift to the sender would not be committing an offence under Article 3. This provision is not applicable either to benefits unrelated to a specific subsequent act in the exercise of the public official's duties.

Article 4 - Bribery of members of domestic public assemblies

This Article extends the scope of the active and passive bribery offences defined in Articles 2 and 3 to members of domestic public assemblies, at local, regional and national level, whether elected or appointed. This category of persons is also vulnerable to bribery and recent corruption scandals, sometimes combined with illegal financing of political parties, showed that it was important to make it also criminally liable for bribery. Concerning the active bribery-side, the protected legal interest is the same as that protected by Article 2. However, it is different as regards the passive bribery-side, i.e. when a member of a domestic public assembly is bribed: here this provision protects the transparency, the fairness and impartiality of the decision-making process of domestic public assemblies and their members from corrupt maneuvers. Obviously, the financial support granted to political parties in accordance with national law falls outside the scope of this provision.

Since the definition of "public official" refers to the applicable national definition, it is understood that Contracting Parties would apply, in a similar manner, their own definition of "members of domestic public assemblies". This category of persons should primarily cover members of Parliament (where applicable, in both houses), members of local and regional assemblies and members of any other public body whose members are elected or appointed and which "exercise legislative or administrative powers" (Article 4, paragraph 1, in fine). As indicated in paragraph 21 above, this broad notion could cover, in some countries, also mayors, as members of local councils, or ministers, as members of Parliament. The expression "administrative powers" is aimed at bringing into the scope of this provision members of public assemblies which do not have legislative powers, as it could be the case with regional or provincial assemblies or local councils. Such public assemblies, although not competent to enact legislation, may have considerable powers, for instance in the planning, licensing or regulatory areas.

Apart from the persons who are bribed, i.e. members of domestic public assemblies, the substance of this bribery offence is identical to the one defined under Articles 2 and 3.

Article 5 - Bribery of foreign public officials

Corruption not only undermines good governance and destroys public trust in the fairness and impartiality of public administrations but it may also seriously distort competition and endanger economic development when foreign public officials are bribed, e.g. by corporations to obtain businesses. With the globalization of economic and financial structures and the integration of domestic markets into the world-market, decisions taken on capital movements or investments in one country may and do exert effects in others. Multinational corporations and international investors play a determining role in nowadays economy and know of no borders. It is both in their interest and the interest of the global economy in general to keep competition rules fair and transparent.

The international community has for long been considering the introduction of a specific criminal offence of bribery of foreign public officials, e.g. to ensure respect of competition rules in international business transactions. The protected legal interest is twofold in the case of this offence: transparency and fairness of the decision-making process of foreign public administrations, -this was traditionally

considered a domestic affair but the globalization has made this consideration obsolete -, and the protection of fair competition for businesses. The criminalization of corrupt behavior occurring outside national territories finds its justification in the common interest of States to protect these interests. The European Union was the first European organization which succeeded in adopting an international treaty criminalizing, inter alia, the corruption of foreign public officials: the Convention on the fight against corruption involving officials of the European Communities or officials of the member States of the EU (adopted on 26 May 1997). After several years, the OECD has also concluded, in November 1997 a landmark agreement on criminalizing, in a co-ordinated manner, the bribery of foreign public officials, i.e. to bribe such an official in order to obtain or retain business or other improper advantage.

This Article goes beyond the EU Convention in that it provides for the criminalization of bribery of foreign public officials of any foreign country. It also goes beyond the OECD provision in two respects. Firstly it deals with both the active and passive sides. Of course, the latter, for Contracting Parties to this Convention, will be already covered by Article 3. However, the inclusion of passive corruption of foreign officials in Article 5 seeks to demonstrate the solidarity of the community of States against corruption, wherever it occurs. The message is clear: corruption is a serious criminal offence that could be prosecuted by all Contracting Parties and not only by the corrupt official's own State. Secondly Article 5 contains no restriction as to the context in which the bribery of the foreign official occurs. Again, the aim is not only to protect free competition but the confidence of citizens in democratic institutions and the rule of law. As regards the definition of 'foreign public official', reference is made to paragraph 30 above concerning Article 1.

Apart from the persons who are bribed, i.e. foreign public officials, the substance of this bribery offence is identical to the one defined under Articles 2 and 3.

Article 6 - Bribery of members of foreign public assemblies

This Article criminalizes the active and passive bribery of members of foreign public assemblies. The reasons and the protected legal interests are identical to those described under Article 4, but in a foreign context, "in any other State". It is part of the common effort undertaken by States Parties to ensure respect for democratic institutions, independently of whether they are national or foreign in character. Apart from the persons who are bribed, i.e. members of foreign public assemblies, the substance of this bribery offence is identical to the one defined under Articles 2 and 3. The notion of "member of a public assembly" is to be interpreted in the light of the domestic law of the foreign State.

Article 7 - Active bribery in the private sector

This Article extends criminal responsibility for bribery to the private sector. Corruption in the private sector has, over the last century, been dealt with by civil (e.g. competition), or labour laws or general criminal law provisions. Criminalizing private corruption appeared as a pioneering but necessary effort to avoid gaps in a comprehensive strategy to combat corruption. The reasons for introducing criminal law sanctions for corruption in the private sphere are manifold. First of all, because corruption in the private sphere undermines values like trust, confidence or loyalty, which are necessary for the maintenance and development of social and economic relations. Even in the absence of a specific pecuniary damage to the victim, private corruption causes damage to society as a whole. In general, it can be said that there is an increasing tendency towards limiting the differences between the rules applicable to the public and private sectors. This requires redesigning the rules that protect the interests of the private sector and govern its relations with its employees and the public at large. Secondly, criminalization of private sector corruption was necessary to ensure respect for fair competition. Thirdly, it also has to do with the privatization process. Over the years important public functions have been privatized (education, health, transport, telecommunication etc). The transfer of such public functions to the private sector, often related to a massive privatization process, entails transfers of substantial budgetary allocations and of regulatory powers. It is therefore logical to protect the public from the damaging effects of corruption in businesses as well, particularly since the

financial or other powers concentrated in the private sector, necessary for their new functions, are of great social importance.

In general, the comments made on active bribery of public officials (Article 2) apply mutatis mutandis here as well, in particular as regards the corrupt acts performed, the mental element and the briber. There are, nevertheless, several important differences between the provisions on public and private sector bribery. First of all, Article 7 restricts the scope of private bribery to the domain of "business activity", thus deliberately excluding any non-profit oriented activities carried out by persons or organizations, e.g. by associations or other NGO's. This choice was made to focus on the most vulnerable sector, i.e. the business sector. Of course, this may leave some gaps, which Governments may wish to fill: nothing would prevent a signatory State from implementing this provision without the restriction to aid the course of business activities@. "Business activity" is to be interpreted in a broad sense: it means any kind of commercial activity, in particular trading in goods and delivering services, including services to the public (transport, telecommunication etc).

The second important difference concerns the scope of recipient persons in Article 7. This provision prohibits bribing any persons who "direct or work for, in any capacity, private sector entities". Again, this a sweeping notion to be interpreted broadly as it covers the employer-employee relationship but also other types of relationships such as partners, lawyer and client and others in which there is no contract of employment. Within private enterprises it should cover not only employees but also the management from the top to the bottom, including members of the board, but not the shareholders. It would also include persons who do not have the status of employee or do not work permanently for the company -for example consultants, commercial agents etc.- but can engage the responsibility of the company. "Private sector entities" refer to companies, enterprises, trusts and other entities, which are entirely or to a determining extent owned by private persons. This of course covers a whole range of entities, notably those engaged @in business activities@. They can be corporations but also entities with no legal personality. For the purpose of this provision, the word "entity" should be understood as meaning also, in this context, an individual. Public entities fall therefore outside the scope of this provision.

The third important difference relates to the behavior of the bribed person in the private sector. If, in the case of public officials, it was immaterial whether there had been a breach of his duties, given the general expectation of transparency, impartiality and loyalty in this regard, a breach of duty is required for private sector persons. Criminalization of bribery in the private sector seeks to protect the trust, the confidence and the loyalty that are indispensable for private relationships to exist. Rights and obligations related to those relationships are governed by private law and, to a great extent, determined by contracts. The employee, the agent, the lawyer is expected to perform his functions in accordance with his contract, which will include, expressly or implicitly, a general obligation of loyalty towards his principal, a general obligation not to act to the detriment of his interests. Such an obligation can be laid down, for example, in codes of conduct that private companies are increasingly developing. The expression, "in breach of their duties" does not aim only at ensuring respect for specific contractual obligations but rather to guarantee that there will be no breach of the general duty of loyalty in relation to the principal's affairs or business. The employee, partner, managing director who accepts a bribe to act or refrain from acting in a manner that is contrary to his principal's interest, will be betraying the trust placed upon him, the loyalty owed to his principal. This justifies the inclusion of private sector corruption as a criminal offence. The Convention, in Article 7, retained this philosophy and requires the additional element of "breach of duty" in order to criminalize private sector corruption. The notion of "breach of duty" can also be linked to that of "secrecy", that is the acceptance of the gift to the detriment of the employer or principal and without obtaining his authorization or approval. It is the secrecy of the benefit rather than the benefit itself that is the essence of the offence. Such a secret behavior threatens the interests of the private sector entity and makes it dangerous.

Article 8 - Passive bribery in the private sector

The comments made on passive bribery of domestic public officials (Article 3) apply accordingly here as far as the corrupt acts and the mental element are concerned. So do the comments on active

bribery in the private sector (Article 7), as far as the specific context, the persons involved and the extra-condition of "breach of duty" are concerned. The mirror-principle, already referred to in the context of public sector bribery, is also applicable here.

Article 9 - Bribery of officials of international organizations

The necessity of extending the criminalization of acts of bribery to the international sphere was already highlighted under Article 5 (Bribery of foreign public officials). Recent initiatives in the framework of the EU, which led to the adoption on 27 September 1996 (Official Journal of the European Communities No. C 313 of 23. 10. 96) of the Protocol (on corruption) to the EU Convention on the protection of the European Communities' financial interests and that of the Convention on the fight against corruption involving officials of the European Communities or officials of the member States of the EU (26 May 1997), are evidence that criminal law protection is needed against the corruption of officials of international institutions, which must have the same consequences as the one of national public officials. The need to criminalize bribery is even greater in the case of officials of public international organizations than in the case of foreign public officials, since, as already pointed out above, passive bribery of a foreign public official is already an offence under the officials' own domestic legislation, whereas the laws on bribery only exceptionally cover acts committed by their nationals abroad, in particular when they are permanently employed by public international organizations. The protected legal interest in general is the transparency and impartiality of the decision-making process of public international organizations which, according to their specific mandate, carry out activities on behalf or in the interest of their member States. Some of these organizations do handle large quantities of goods and services. Fair competition in their public procurement procedures is also worth protecting by criminal law.

Since this Article refers back to Articles 2 and 3 for the description of the bribery offences, the comments made thereon apply accordingly. The persons involved as recipients of the bribes are, however, different. It covers the corruption of "any official or other contracted employee within the meaning of the staff regulations, of any public international or supranational organization or body of which the Party is a member, and any person, whether seconded or not, carrying out functions corresponding to those performed by such officials or agents."

Two main categories are therefore involved: firstly, officials and other contracted employees who, under the staff regulations, can be either permanent or temporary members of the staff, but irrespective of the duration of their employment by the organization, have identical duties and responsibilities, governed by contract. Secondly, staff members who are seconded (put at the disposal of the organization by a government or any public or private body), to carry out functions equivalent to those performed by officials or contracted employees.

Article 9 restricts the obligation of signatories to criminalize only those cases of bribery involving the above-mentioned persons employed by international organizations of which they are members. This restriction is necessary for various practical reasons, for example to avoid problems related to immunity.

Article 9 mentions "public international or supranational organizations", which means that they are set up by governments and not individuals or private organizations. It also means that international non-governmental organizations (NGOs) fall outside its scope, although in some cases members of NGOs may be covered by other provisions like Articles 7 and 8. There are many regional or global public international organizations, for example the Council of Europe, whereas there's only one supranational, i.e. the European Union.

Article 10 - Bribery of members of international parliamentary assemblies

The comments made on the bribery of members of domestic public assemblies (Article 4) apply here as well, as far as the corrupt acts and the mental element are concerned. These assemblies perform legislative, administrative or advisory functions on the basis of the statute of the international organization which created them. As far as the specific international context and the restriction of membership of the organization are concerned, the comments on the bribery of officials of international organizations (Article 9) apply here as well. The persons involved on the passive side are, however, different: members of parliamentary assemblies of international (e.g. the Parliamentary Assembly of the Council of Europe) or supranational organizations (the European Parliament).

Article 11 - Bribery of judges and officials of international courts

The comments made on the bribery of domestic public official (Articles 2 and 3), whose definition, according to Article 1.a, includes "judges", apply here as well, as far as the corrupt acts and the mental element are concerned. Similarly, the above comments on the bribery of officials of international organizations (Article 9) should be extended to this provision as far as the specific international context and the restriction of membership of the organization are concerned. The persons involved are, however, different: "any holders of judicial office or officials of any international court". These persons include not only "judges" in international courts (e.g. at the European Court of Human Rights) but also other officials (for example the Prosecutors of the UN Tribunal on the former Yugoslavia) or members of the clerk's office. Arbitration courts are in principle not included in the notion of "international courts" because they do not perform judicial functions in respect of States. It will be for each Contracting Party to determine whether or not it accepts the jurisdiction of the court.

Article 12 - Trading in influence

This offence is somewhat different from the other - bribery-based - offences defined by the Convention, though the protected legal interests are the same: transparency and impartiality in the decision-making process of public administrations. Its inclusion in the present Convention illustrates the comprehensive approach of the Programme of Action against Corruption, which views corruption, in its various forms, as a threat to the rule of law and the stability of democratic institutions. Criminalizing trading in influence seeks to reach the close circle of the official or the political party to which he belongs and to tackle the corrupt behavior of those persons who are in the neighborhood of power and try to obtain advantages from their situation, contributing to the atmosphere of corruption. It permits Contracting Parties to tackle the so-called "background corruption", which undermines the trust placed by citizens on the fairness of public administration. The purpose of the present Convention being to improve the battery of criminal law measures against corruption it appeared essential to introduce this offence of trading in influence, which would be relatively new to some States.

This provision criminalizes a corrupt trilateral relationship where a person having real or supposed influence on persons referred to in Articles 2, 4, 5, and 9 B 11, trades this influence in exchange for an undue advantage from someone seeking this influence. The difference, therefore, between this offence and bribery is that the influence peddler is not required to "act or refrain from acting" as would a public official. The recipient of the undue advantage assists the person providing the undue advantage by exerting or proposing to exert an improper influence over the third person who may perform (or abstain from performing) the requested act. "Improper" influence must contain a corrupt intent by the influence peddler: acknowledged forms of lobbying do not fall under this notion. Article 12 describes both forms of this corrupt relationship: active and passive trading in influence. As has been explained (see document GMC (95) 46), "passive" trading in influence presupposes that a person, taking advantage of real or pretended influence with third persons, requests, receives or accepts the undue advantage, with a view to assisting the person who supplied the undue advantage by exerting the improper influence. "Active" trading in influence presupposes that a person promises, gives or offers an undue advantage to someone who asserts or confirms that he is able to exert an improper over third persons.

States might wish to break down the offence into two different parts: the active and the passive trading in influence. The offence on the active side is quite similar to active bribery, as described in

Article 2, with some differences: a person gives an undue advantage to a another person (the 'influence peddler') who claims, by virtue of his professional position or social status, to be able exert an improper influence over the decision-making of domestic or foreign public officials (Articles 2 and 5), members of domestic public assemblies (Article 4), officials of international organizations, members of international parliamentary assemblies or judges and officials of international courts (Articles 9-11). The passive trading in influence side resembles to passive bribery, as described in Article 3, but, again the influence peddler is the one who receives the undue advantage, not the public official. What is important to note is the outsider position of the influence peddler: he cannot take decisions himself, but misuses his real or alleged influence on other persons. It is immaterial whether the influence peddler actually exerted his influence on the above persons or not as is whether the influence leads to the intended result.

The comments made on active and passive bribery apply therefore here as well, with the above additions, in particular as regards the corrupt acts and the mental element.

Article 13 - Money laundering of proceeds from corruption offences

This Article provides for the criminalization of the laundering of proceeds deriving from corruption offences defined under Articles 2 - 12, i.e. all bribery offences and trading in influence. The technique used by this Article is to make a cross-reference to another Council of Europe Convention (ETS No. 141), which is the Convention on laundering, search, seizure and confiscation of the proceeds from crime (November 1990). The offence of laundering is defined in Article 6, paragraph 1 of the latter convention, whereas certain conditions of application are set out in paragraph 2. The laundering offence, whose objective is to disguise the illicit origin of proceeds, always requires a predicate offence from which they said proceeds originate. For a number of years anti-laundering efforts focused on drug-proceeds but recent international instruments, including above all the Council of Europe Convention No. 141 but also the revised 40 Recommendations of the Financial Action Task Force (FATF), recognize that virtually any offence can generate proceeds which may need to be laundered for subsequent recycling it in legitimate businesses (e.g. fraud, terrorism, trafficking in stolen goods, arms, etc). In principle, therefore, Convention No. 141 already applies to the proceeds of any kind of criminal activity, including corruption, unless a Party has entered a reservation to Article 6 whereby restricting its scope to proceeds form particular offences or categories of offences.

The authors of this Convention felt that given the close links that are proved to exist between corruption and money laundering, it was of primary importance that this Convention also criminalizes the laundering of corruption proceeds. Another reason to include this offence was the possibly different circles of States ratifying the two instruments: some non-member States which have participated in the elaboration of this Convention could only ratify Convention No. 141 with the authorization of the Committee of Ministers of the Council of Europe, while they can do so with the present Convention automatically by virtue of its Article 32, paragraph 1.

This provision lays down the principle that Contracting Parties are obliged to consider corruption offences as predicate offences for the purpose of anti-money laundering legislation. Exceptions to this principle are only allowed to the extent that the Party has made a reservation in relation to the relevant Articles of this Convention. Moreover, if a country does not consider some of these corruption offences as "serious" ones under its money laundering legislation, it will not be obliged to modify its definition of laundering.

Article 14 - Account offences

Account offences may have a twofold relationship to corruption offences: these offences are either preparatory acts to the latter or acts disguising the "predicate" corruption or other corruption-related offences. Article 16 covers both forms of this relationship and, in principle, all corruption-offences defined in Articles 2-12. These account offences do not apply to money laundering of corruption

proceeds (Article 13), since the main feature of laundering is precisely to disguise the origin of illicit funds. Disguising money laundering would, therefore, be redundant.

Given that these acts aim at committing, concealing or disguising corruption offences, either by act or by omission, they can also be qualified as preparatory-stage acts. Such acts are usually treated as administrative offences in certain domestic laws. Article 14 allows therefore the Contracting Parties to choose between criminal law or administrative law sanctions. Though the choice offered might facilitate the implementation of the Convention for certain countries it could hamper international co-operation in respect of the present offence.

Account offences can only be committed intentionally. Concerning the material elements of the offence, it is described in two different forms: one relates to a positive action, i.e. the creation or use of invoices or other kinds of accounting documents or records which contain false or incomplete information. This fraud-type behavior clearly aims at deceiving a person (e.g. an auditor) as to the genuine and reliable nature of the information contained therein, with a view to concealing a corruption offence. The second indent contains an omission-act, i.e. someone fails to record a payment, coupled with a specific qualifying element, i.e. "unlawfully". The latter indicates that only where a legal duty is placed upon the relevant persons (e.g. company accountants) to record payments, the omission thereof should become a punishable act.

If a Party has made a reservation in respect of any of the corruption offences defined in Articles 2 -12, it is not obliged to extend the application of the account offence to such corruption offence(s). The obligation arising out of this Article to establish certain acts as offences is to be implemented in the framework of the Party's laws and regulations regarding the maintenance of books and records, financial statement disclosures, and accounting and auditing standards. Moreover, this provision does not aim at the establishment of specific accounting offences related to corruption, since general accounting offences would be quite sufficient in this field. It should be further specified that Article 14 does not require a particular branch of the law (fiscal, administrative or criminal) to deal with this matter.

This provision requires Contracting Parties to establish offences "liable to criminal or other sanctions". The expression "other sanctions" means "non-criminal sanctions" imposed by the courts.

Article 15 - Participatory acts

The purpose of this provision is not the establishment of an additional offence but to criminalize participatory acts in the offences defined in Articles 2 to 14. It therefore provides for the liability of participants in intentional offences established in accordance with the Convention. Though it is not indicated specifically, it flows from the general principles of criminal law that any form of participation (aiding and abetting) needs to be committed intentionally.

Article 16 - Immunity

Article 16 provides that the Convention is without prejudice to provisions laid down in treaties, protocols or statutes governing the withdrawal of immunity. The acknowledgement of customary international law is not excluded in this field. Such provisions may, in particular, concern members of staff in public international or supranational organizations (Article 9), members of international parliamentary assemblies (Article 10) as well as judges and officials of international courts (Article 11). Withdrawal of immunity is thus a prior condition for exercising jurisdiction, according to the particular rules applying to each of the above-mentioned categories of persons. The Convention recognizes the obligation of each of the institutions concerned to give effect to the provisions governing privileges and immunities.

Article 17 - Jurisdiction

This Article establishes a series of criteria under which Contracting Parties have to establish their jurisdiction over the criminal offences enumerated in Articles 2-14 of the Convention.

Paragraph 1 littera a. lays down the principle of territoriality. It does not require that a corruption offence as a whole be committed exclusively on the territory of a State to enable it establishing jurisdiction. If only parts of the offence, e.g. the acceptance or the offer of a bribe, were committed on its territory, a State may still do so: the principle of territoriality should thus be interpreted broadly. In many member States, albeit not in all, for the purpose of allowing the exercise of jurisdiction in accordance with the principle of territoriality, the place of commission is determined on the basis of what is known as the doctrine of ubiquity: it means that an offence as a whole may be considered to have been committed in the place where a part of it has been committed. According to one form of the doctrine of ubiquity, an offence may be considered to have been also committed in the place where the consequences or effects of the offence become manifest. The doctrine of effects is accepted in several member states of the Council of Europe (Council of Europe Report on extraterritorial criminal jurisdiction, op. cit. page 8-9). It means that wherever a constituent element of an offence is committed or an effect occurs, that is usually considered as the place of perpetration. In this context, it may be noted that the intention of the offender is irrelevant and does not affect the jurisdiction based on the territorial principle. Likewise, it is immaterial which is the nationality of the briber or of the person who is bribed.

Paragraph 1, littera b. sets out the principle of nationality. The nationality theory is also based upon the State sovereignty: it provides that nationals of a State are obliged to comply with the domestic law even when they are outside its territory. Consequently, if a national commits an offence abroad, the Party has, in principle, to take jurisdiction, particularly if it does not extradite its nationals. The paragraph further specifies that jurisdiction has to be established not only if nationals commit one of the offences defined by the Convention but also when public officials and members of domestic assemblies of the Party commit such an offence. Naturally, in most cases the latter two categories are, at the same time, nationals as well (in some countries nationality is a pre-condition for qualifying for these positions), but exceptions do exist.

Paragraph 1, littera c. is also based on both the principle of protection (of national interests) and of nationality. The difference with the previous paragraph is that here jurisdiction is based on the bribed person's status: either he is a public official or a member of a domestic public assembly of the Party (therefore not necessarily a national) or he is a national who is at the same time an official of an international organization, a member of an international parliamentary assembly or a judge or an official of an international court.

Paragraph 2 allows States to enter a reservation to the jurisdiction grounds laid down in paragraph 1, litterae b and c. In such cases, however, it stems from the principle of "aut dedere aut iudicare", "extradite or punish" laid down in paragraph 3 that there is an obligation for the contracting party to establish jurisdiction over cases where extradition of the alleged offender was refused on the basis of his nationality and the offender is present on its territory.

Jurisdiction is traditionally based on territoriality or nationality. In the field of corruption these principles may, however, not always suffice to exercise jurisdiction, for example over cases occurring outside the territory of a Party, not involving its nationals, but still affecting its interests (e.g. national security). Paragraph 4 of this Article allows the Parties to establish, in conformity with their national law, other types of jurisdiction as well. Among them, the universality principle would permit States to establish jurisdiction over serious offences, regardless where and by whom they are committed, because they may be seen as threatening universal values and the interest of mankind. So far, this principle has not yet gained a general international recognition, although some international documents make reference to it.

Article 18 - Corporate liability

Article 18 deals with the liability of legal persons. It is a fact that legal persons are often involved in corruption offences, especially in business transactions, while practice reveals serious difficulties in prosecuting natural persons acting on behalf of these legal persons. For example, in view of the largeness of corporations and the complexity of structures of the organization, it becomes more and more difficult to identify a natural person who may be held responsible (in a criminal sense) for a bribery offence. Legal persons thus usually escape their liability due to their collective decision-making process. On the other hand, corrupt practices often continue after the arrest of individual members of management, because the company as such is not deterred by individual sanctions.

The international trend at present seems to support the general recognition of corporate liability, even in countries, which only a few years ago, were still applying the principle according to which corporations cannot commit criminal offences. Therefore, the present provision of the Convention is in harmony with these recent tendencies, e.g. in the area of international anti-corruption instruments, such as the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (Article 2).

Article 18, paragraph 1 does not stipulate the type of liability it requires for legal persons. Therefore this provision does not impose an obligation to establish that legal persons will be held criminally liable for the offences mentioned therein. On the other hand it should be made clear that by virtue of this provision Contracting Parties undertake to establish some form of liability for legal persons engaging in corrupt practices, liability that could be criminal, administrative or civil in nature. Thus, criminal and non-criminal administrative, civil- sanctions are suitable, provided that they are "effective, proportionate and dissuasive" as specified by paragraph 2 of Article 19. Legal persons shall be held liable if three conditions are met. The first condition is that an active bribery offence, an offence of trading in influence or a money laundering offence must have been committed, as defined in Articles 2, 4, 5, 6, 7, 9, 10, 11, 12 and 13. The second condition is that the offence must have been committed for the benefit or on behalf of the legal person. The third condition, which serves to limit the scope of this form of liability, requires the involvement of "any person who has a leading position". The leading position can be assumed to exist in the three situations described Ba power of representation or an authority to take decisions or to exercise control- which demonstrate that such a physical person is legally or in practice able to engage the liability of the legal person.

Paragraph 2 expressly mentions Parties' obligation to extend corporate liability to cases where the lack of supervision within the legal person makes it possible to commit the corruption offences. It aims at holding legal persons liable for the omission by persons in a leading position to exercise supervision over the acts committed by subordinate persons acting on behalf of the legal person. A similar provision also exists in the Second Protocol to the European Union Convention on the Protection of the financial interest of the European Communities. As paragraph 1, it does not impose an obligation to establish criminal liability in such cases but some form of liability to be decided by the Contracting Party itself.

Paragraph 3 clarifies that corporate liability does not exclude individual liability. In a concrete case, different spheres of liability may be established at the same time, for example the responsibility of an organ etc. separately from the liability of the legal person as a whole. Individual liability may be combined with any of these categories of liability.

Article 19 - Sanctions and measures

This Article is closely related to Articles 2B14, which define various corruption offences that should be made, according to this convention, punishable under criminal law. In accordance with the obligations imposed by those articles, this paragraph obliges explicitly the Contracting Parties to draw the consequence from the serious nature of these offences by providing for criminal sanctions that are "effective, proportionate and dissuasive", expression that can also be found in Article 5 of the European Union Convention of 26 May 1997 and in Article 3, paragraph 1 of the OECD Convention of 20 November 1997. This provision involves the obligation to attach to the commission of these offences by natural persons penalties of imprisonment of a certain duration ("which can give rise to extradition"). This provision does not mean that a prison sentence must be imposed every time that a

person is found guilty of having committed a corruption offence established in accordance with this Convention but that the Criminal Code should provide for the possibility of imposing prison sentences of a certain level in such cases.

Because the offences referred to in Article 14 shall be made punishable under either criminal or administrative law, this article is only applicable to those offences in so far as these offences have been established as criminal offences.

Legal persons, whose liability is to be established in accordance with Article 18 shall also be subject to sanctions that are "effective, proportionate and dissuasive", which can be penal, administrative or civil in nature. Paragraph 2 compels Contracting Parties to provide for the possibility of imposing monetary sanctions of a certain level to legal persons held liable of a corruption offence.

It is obvious that the obligation to make corruption offences punishable under criminal law would lose much of its effect if it was not supplemented by an obligation to provide for adequately severe sanctions. While prescribing that imprisonment and pecuniary sanctions should be the sanctions that can be imposed for the relevant offences, the Article leaves open the possibility that other sanctions reflecting the seriousness of the offences are provided for. It cannot, of course, be the aim of this Convention to give detailed provisions regarding the criminal sanctions to be linked to the different offences mentioned in article 2 - 14. On this point the Parties inevitably need the discretionary power to create a system of criminal offences and sanctions that is in coherence with their existing national legal systems.

Paragraph 3 of this Article prescribes a general obligation for Contracting Parties to provide for adequate legal instruments to ensure that confiscation, or other forms of legal deprivation (such as civil forfeiture) of instrumentalities and proceeds of corruption, related to the value of offences mentioned in Articles 2 - 14, is possible thereof. This paragraph must be examined in view of the background of the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (Strasbourg, 8 November 1990). The Convention is based on the idea that confiscation of the proceeds is one of the effective methods in combating crime. Taking into account that the undue advantage promised, given, received or accepted in most corruption offence is of material nature, it is clear that measures resulting in the deprivation of property related to or gained by the offence should, in principle, be available in this field too.

Article 1 of the Laundering Convention is instrumental in the interpretation of the terms "confiscate", "instrumentalities", "proceeds" and "property", used in this Article. By the word "confiscate" reference is made to any criminal sanction or measure ordered by a court following proceedings in relation to a criminal offence resulting in the final deprivation of property. "Instrumentalities" cover the broad range of objects that are used or intended to be used, in any way, wholly or in part, to commit the relevant criminal offences established in accordance with Articles 2 - 14. The term "proceeds" means any economic advantage as well as any savings by means of reduced expenditure derived from such an offence. It may consist of any "property" in the interpretation that the term is being given below. In the wording of this paragraph, it is taken into account that the national legal systems may show differences as to what property can be confiscated in relation to an offence. Confiscation may be possible of objects that (directly) form the proceeds of the offence or of other property belonging to the offender that - although not (directly) gained by the offence - equals the value of the directly gained illegal proceeds, the so called "substitute assets". "Property" therefore has to be interpreted, in this context, as including property of any description, whether corporal or incorporeal, movable or immovable, and legal documents or instruments evidencing title to or interest in such property. It is to be noted that Contracting Parties are under no obligation to provide for the criminal confiscation of substitute assets as the words "otherwise deprive" allow for their civil forfeiture also.

Article 20 - Specialized authorities

This Article requires States Parties to adopt the necessary measures to ensure that persons or entities be appropriately specialized in the fight against corruption. This provision is inspired, inter alia, by the need of improving both the specialization and independence of persons or entities in charge of the fight against corruption, which was stated in numerous Council of Europe documents. The requirement of specialization is not meant to apply to all levels of law enforcement. It does not require in particular that in each prosecutor's office or in each police station there is a special unit or expert for corruption offences. At the same time, this provision implies that wherever it is necessary for combating effectively corruption there are sufficiently trained law-enforcement units or personnel.

In this context, reference should firstly be made to the Conclusions and Recommendations of the 1st Conference for law-enforcement officers specialized in the fight against corruption, which took place in Strasbourg in April 1996. In the Recommendations, participants agreed, inter alia, that "corruption is a phenomenon the prevention, investigation and prosecution of which need to be approached on numerous levels, using specific knowledge and skills from a variety of fields (law, finance, economics, accounting, civil engineers, etc.). Each State should therefore have experts specialized in the fight against corruption. They should be of a sufficient number and be given appropriate material resources. Specialization may take different forms: the specialization of a number of police officers, judges, prosecutors and administrators or of the bodies or units specially entrusted with (several aspects of) the fight against corruption. The power available to the specialized units or individuals must be relatively broad and include right of access to all information and files which could be of values to the fight against corruption."

Secondly, it should be noted that the Conclusions and Recommendations of the 2nd European Conference of specialized services in the fight against corruption, which took place in Tallinn in October 1997, also recommended that "judges and prosecutors enjoy independence and impartiality in the exercise of their functions, are properly trained in combating this type of criminal behavior and have sufficient means and resources to achieve the objective".

Thirdly, Resolution (97)24 on the 20 Guiding Principles for the fight against corruption, in its Principle new 3, provides that States should "ensure that those in charge of the prevention, investigation, prosecution and adjudication of corruption offences, enjoy the independence and autonomy appropriate to their functions, are free from improper influence and have effective means for gathering evidence, protecting the persons who help the authorities in combating corruption and preserving the confidentiality of investigations".

It should be noted that the independence of specialized authorities for the fight against corruption, referred to in this Article, should not be an absolute one. Indeed, their activities should be, as far as possible, integrated and co-ordinated with the work carried out by the police, the administration or the public prosecutor’s office. The level of independence required for these specialized services is the one that is necessary to perform properly their functions.

Moreover, the entities referred to in Article 20 can either be special bodies created for the purposes of combating corruption, or specialized entities within existing bodies. These entities should have the adequate know-how and legal and material means at least to receive and centralize all information necessary for the prevention of corruption and for the revealing of corruption. In addition, and without prejudice to the role of other national bodies dealing with international co-operation, one of the tasks of such specialized authorities could also be to serve as counterparts for foreign entities in charge of fighting corruption.

Article 21 B Co-operation between authorities

The responsibility for fighting corruption does not lie exclusively with law-enforcement authorities. The 20 Guiding Principles on the fight against corruption already recognized the role that tax authorities can perform in this field (see Principle 8). The drafters of this Convention considered that co-operation with the authorities in charge of investigating and prosecuting criminal offences was an important aspect of a coherent an efficient action against those committing the corruption offences defined therein. This provision introduces a general obligation to ensure co-operation of all public authorities

with those investigating and prosecuting criminal offences. Obviously the purpose of this provision can not be to guarantee that a sufficient level of co-operation will be achieved in all cases but to impose on Contracting Parties the adoption of the steps that are necessary to try and ensure an adequate level of co-operation between the national authorities. The authorities responsible for reporting corruption offences are not defined but national legislatures should adopt a broad approach. It could be tax authorities, administrative authorities, public auditors, labour inspectors... whoever in the exercise of his functions comes across information regarding potential corruption offences. Such information, necessary for the law enforcement authorities, is likely to be available, primarily, from those authorities that have a supervisory and controlling competence over the functioning of different aspects of public administration.

This Article provides that the general duty to co-operate with law-enforcement authorities in the investigation and prosecution of corruption offences is to be carried out Ain accordance with national law@. The reference to national law means that the extent of the duty to co-operate with law enforcement is to be defined by the provisions of national law applicable to the official or authority concerned (e.g. an authorization procedure). This provision does not carry an obligation to modify those legal systems, in existence in some Contracting Parties, which do not provide for a general obligation of public officials to report crimes or have established specific procedures for so doing.

This is confirmed by the fact that the means of co-operation, specified in litteras a) and b) are not cumulative but alternative. As a result the obligation to co-operate with the authorities responsible for investigating and prosecuting criminal offences can be fulfilled either by informing them, on the authority's own initiative, of the existence of reasonable grounds to believe that an offence has been committed or by providing them with the information they request. Contracting Parties will be entitled to choose between the available options

Littera a)

The first option is to allow or even compel the authority or official in question to inform law-enforcement authorities whenever it comes across a possible corruption offence. The terms "reasonable grounds" mean that the obligation to inform has to be observed as soon as the authority considers that there is a likelihood that a corruption offence has been committed. The level of likelihood should be the same as the one that is required for starting a police investigation or a prosecutorial investigation.

Littera b)

This paragraph concerns the obligation to inform on request. It lays down that the fundamental principle that authorities must provide the investigating and prosecuting authorities with all necessary information, in accordance with safeguards and procedures established by national law. What is considered as "necessary information" will also be decided in accordance with national law.

Of course, national law might provide for some exceptions to the general principle of providing information, for instance, where the information touches upon secrets relating to the protection of national or other essential interests.

Article 22 - Protection of collaborators of justice and witnesses

Article 22 of the Convention requires States to take the necessary measures to provide for an effective and appropriate protection of collaborators of justice and witnesses.

In this context, it should be noted that already in the Conclusions and Recommendations of the 2nd European Conference of specialized services in the fight against corruption (Tallinn, October 1997), participants agreed that, in order to fight corruption effectively, Aan appropriate system of protection

for witnesses and other persons co-operating with the judicial authorities should be introduced, including not only an appropriate legal framework, but also the financial resources needed to achieve the result.@ Moreover, "provisions should be made for the granting of immunity or the adequate reduction of penalties in respect of persons charged with corruption offences who contribute to the investigation, disclosure or prevention of crime".

However, it is in Recommendation NE R(97)13 on the intimidation of witnesses and the rights of the defence, which has been adopted by the Committee of Ministers of the Council of Europe on 10 September 1997, that the question of the protection of collaborators of justice and witnesses has been addressed in a comprehensive way in the framework of the Council of Europe. This Recommendation establishes a set of principles which could guide national legislation when addressing the problems of witness-intimidation, either in the framework of criminal procedure law or when designing out-of-court protection measures. The Recommendation suggests to Member States a list of measures which may contribute to ensuring efficiently the protection of both the interests of witnesses and that of the criminal justice system, while maintaining appropriate opportunities for the defence to exercise its right in criminal proceedings.

The drafters of this Convention, inspired, inter alia, by the above-mentioned Recommendation, considered that the words "collaborators of justice" refer to persons who face criminal charges, or are convicted, of having taken part in corruption offences, as contained in Articles 2 - 14 of the Convention, but agree to co-operate with criminal justice authorities, particularly by giving information concerning those corruption offences in which they were involved, in order for the competent law-enforcement authorities to investigate and prosecute them.

Moreover, the word "witnesses" refers to persons who possess information relevant to criminal proceedings concerning corruption offences as contained in Articles 2 - 14 of the Convention and includes whistleblowers.

Intimidation of witnesses, which may be carried out either directly or indirectly, may occur in a number of ways, but its purpose is the same, i.e. to eliminate evidence against defendants with a view to their acquittal for lack of sufficient evidence, or exceptionally, to provide evidence against defendants with a view to have them convicted.

The terms "effective and appropriate" protection in Article 20, refer to the need to adapt the level of protection granted to the risks that exist for collaborators of justice, witnesses or whistleblowers. In some cases it could be sufficient, for instance, to maintain their name undisclosed during the proceedings, in other cases they would need bodyguards, in extreme cases more far-reaching witnesses' protection measures such as change of identity, work, domicile, etc. might be necessary.

Article 23 - Measures to facilitate the gathering of evidence and the confiscation of proceeds

This provision acknowledges the difficulties that exist to obtain evidence that may lead to the prosecution and punishment of persons having committed those corruption offences defined in accordance with the present Convention. Behind almost every corruption offence lies a pact of silence between the person who pays the bribe and the person who receives it. In normal circumstances none of them will have any interest in disclosing the existence or the modalities of the corrupt agreement concluded between them. In conformity with paragraph 1, States Parties are therefore required to adopt measures, which will facilitate the gathering of evidence in cases related to the commission of one of the offences defined in Articles 2-14. In view of the already mentioned difficulties to obtain evidence, this provision includes an obligation for the Parties to permit the use of "special investigative techniques". No list of these techniques is included but the drafters of the Convention were referring in particular to the use of under-cover agents, wire-tapping, bugging, interception of telecommunications, access to computer systems and so on. Reference to these special investigative techniques can also be found in previous instruments such as the United Nations Convention of 1988, the Council of Europe Convention on the Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (ITS No. 141, Article 4) or the Forty Recommendations adopted by the Financial Action Task Force (FATF). Most of these techniques are highly intrusive and may give rise to constitutional

difficulties as regards their compatibility with fundamental rights and freedoms. Therefore, the Parties are free to decide that some of these techniques will not be admitted in their domestic legal system. Also the reference made by paragraph 1 to "national law" should enable Parties to surround the use of these special investigative techniques with as many safeguards and guarantees as may be required by the imperative of protecting human rights and fundamental freedoms.

The second part of paragraph 1 of this Article is closely related to paragraph 3 of Article 19. It requires, for the implementation of the latter Article, the adoption of legal instruments allowing the Contracting Parties to take the necessary provisional steps, before measures leading to confiscation can be imposed. The effectiveness of confiscation measures depends in practice on the possibilities to carry out the necessary investigations as to the quantity of the proceeds gained or the expenses saved and the way in which profits (openly or not) are deposited. In combination with these investigations, it is necessary to ensure that the investigating authorities have the power to freeze located tangible and intangible property in order to prevent that it disappears before a decision on confiscation has been taken or executed (cf. Articles 3 and 4 in the Money Laundering Convention).

CHAPTER III - MONITORING OF IMPLEMENTATION

Article 24 B Monitoring

The implementation of the Convention will be monitored by the "Group of States against Corruption BGRECO". The establishment of an efficient and appropriate mechanism to monitor the implementation of international legal instruments against corruption was considered, from the outset, as an essential element for the effectiveness and credibility of the Council of Europe initiative in this field (see, inter alia, the Resolutions adopted at the 19th and 21st Conferences of the European Ministers of Justice, the terms of reference of the Multidisciplinary Group on Corruption, the Programme of Action against Corruption, the Final Declaration and Action Plan of the Second Summit of Heads of State and Government). In Resolution (98) 7 adopted at its 102nd Session (5 May 1998), the Committee of Ministers authorized the establishment of a monitoring body, the GRECO, in the form of a partial and enlarged Agreement under Statutory Resolution (93) 28 (as completed by Resolution (96) 36). Member States and non-member States having participated in the elaboration of the Agreement were invited to notify their intention to participate in GRECO, which would start functioning on the first day of the month following the date on which the 14th notification by a member State would reach the Secretary General of the Council of Europe. Consequently, on .. .... 1998, ..[member-States], joined in by [non-member-States included in the constituent Resolution] adopted Resolution (98).. establishing the GRECO and containing its Statute.

The GRECO will monitor the implementation of this Convention in accordance with its Statute, appended to Resolution (98)... The aim of GRECO is to improve the capacity of its members to fight corruption by following up, through a dynamic process of mutual evaluation and peer pressure, compliance with their undertakings in this field. (Article 1 of the Statute). The functions, composition, operation and procedures of GRECO are described in its Statute.

If a State is already a member of GRECO at the time the present Convention enters into force or, subsequently, at the time of ratifying it the consequence will be that the scope of the monitoring carried out by GRECO will be extended to cover the implementation of the present Convention. If a State is not a member of GRECO at the time of entry into force or subsequent ratification of this Convention, this provision combined with Articles 32, paragraphs 3 and 4 or with Article 33, paragraph 2 imposes a compulsory and automatic membership of GRECO. It consequently implies, in particular, an obligation to accept to be monitored in accordance with the procedures detailed in its Statute, as from the date in which the Convention enters into force in respect of that State.

CHAPTER IV - INTERNATIONAL CO-OPERATION

Article 25 - General principles and measures for international co-operation

The Guiding principles for the fight against corruption (Principle 20) contain an undertaking to develop to the widest extent possible international co-operation in all areas of the fight against corruption. The present Chapter IV on measures to be taken at international level was the subject of lengthy and thorough discussions within the Group, which drafted the Convention. These deliberations concentrated upon the question of whether or not the Convention should include a free-standing, substantial and rather detailed section covering several topics in the field of international co-operation in criminal matters, or, whether it should simply make a cross-reference to existing multilateral or bilateral treaties in that field. Some arguments militated in favor of this latter option, such as the risk of confusing practitioners with the multiplication of co-operation rules in conventions dealing with specific offences or a possible reduction in the willingness to accede to general conventions. The usefulness of inserting a chapter that could serve as the legal basis for co-operating in the area of corruption was justified by the particular difficulties encountered to obtain the co-operation required for the prosecution of corruption offences B a problem widely recognized and eloquently stated, inter alia, by the *Appel de Geneve+-. Also by the fact that this Convention is an open Convention and some of the Contracting Parties to it would not be Bin some cases could not be- Parties to Council of Europe treaties on international co-operation in criminal matters or would not be parties to bilateral treaties in this field with many of the other Contracting Parties. In the absence of treaty provisions, some Parties non-members of the Council of Europe would experience difficulties in co-operating with the other Parties. Thus, non-member countries, which could potentially become Parties to this Convention, underlined that co-operation would be facilitated if the present Convention was self-contained and included provisions on international co-operation that could serve as a legal basis for affording the co-operation demanded by other Contracting Parties. The drafters of the Convention finally agreed to insert this Chapter in the Convention, as a set of subsidiary rules that would be applied in the absence of multilateral or bilateral treaties containing more favorable provisions.

Article 25 has been conceived, therefore, as an introductory provision to the whole Chapter IV. It aims at conciliating the respect for treaties or arrangements on international co-operation in criminal matters with the need to establish a specific legal basis for co-operating under the present Convention. According to paragraph 1, the Parties undertake to grant to each other the widest possible co-operation on the basis of existing international instruments, arrangements agreed on the basis of uniform or reciprocal legislation and their national law for the purpose of investigations and proceedings related to criminal offences established in accordance with the present Convention. The reference made to instruments on international co-operation in criminal matters is formulated in a general way. It includes, of course, the Council of Europe Conventions on Extradition (ITS 24) and its additional Protocols (ITS No. 86 and 98), on Mutual Assistance in Criminal Matters (ITS No. 30) and its Protocol (ITS No. 99), on the Supervision of Conditionally Sentenced or Conditionally Released offenders (ITS No. 51), on the International Validity of Criminal Judgments (ITS 70), on the Transfer of Proceedings in Criminal Matters (ITS No. 73), on the Transfer of Sentenced Persons (ITS No. 112), on the Laundering, Search, Seizure and Confiscation of the Proceeds of Crime (ITS No. 141). It also covers multilateral agreements concluded within other supranational or international organizations as well as bilateral agreements entered upon by the Parties. The reference to international instruments on international co-operation in criminal matters is not limited to those instruments in force at the time of entry into force of the present Convention but also covers instruments that may be adopted in the future.

According to paragraph 1 the co-operation can also be based on "arrangements agreed on the basis of uniform or reciprocal legislation". This refers, inter alia, to the system of co-operation developed among the Nordic countries, which is also admitted by the European Convention on Extradition (ITS No. 24, Article 28, paragraph 3) and by the European Convention on Mutual Assistance in Criminal Matters (ITS No. 30, Article 26, paragraph 4). Of course, co-operation can also be granted on the basis of the Parties' own national law.

The second paragraph enshrines the subsidiary nature of Chapter IV by providing that Articles 26 to 31 shall apply in the absence of the international instruments or arrangements referred to in the previous paragraph. Obviously no reference is made here to national law, since the Parties can always apply their own law in the absence of international instruments. The purpose of this provision is to provide a legal basis for granting the co-operation required to those Parties which are prevented from so doing in the absence of an international treaty.

Paragraph 3 embodies a derogation to the subsidiary nature of Chapter IV, by providing that in spite of the existence of international instruments or arrangements in force, Articles 26 to 31 shall also apply when they are more favorable. "More favorable" refers to international co-operation. It means that these provisions must be applied if thanks to their application it will be possible to afford a form of co-operation that it would not have been possible to afford otherwise. This will be the case, for instance, with the provisions contained in Articles 26, paragraph 3, Article 27, paragraphs 1 and 3 or with Article 28. It also means that the granting of the co-operation required will be simplified, facilitated or speeded up through the application of Articles 26-31.

Article 26 B Mutual assistance

This provision translates into the specific area of mutual legal assistance the obligation to co-operate to the widest possible extent that is contained in Article 25, paragraph 1. Requests for mutual legal assistance need not be restricted to the gathering of evidence in corruption cases, as they could cover other aspects, such as notifications, restitution of proceeds, transmission of files. This provision incorporates an additional requirement: that the request be processed "promptly". Experience shows that very often acts that need to be performed outside the territory of the State where the investigation is being conducted require lengthy delays, which become an obstacle to the good course of the investigation and may even jeopardize it.

Paragraph 2 provides for the possibility of refusing requests of mutual legal assistance made on the basis of the present Convention. Refusal of such requests may be based on grounds of prejudice to the sovereignty of the State, security, ordre public and other essential interests of the requested country. The expression "fundamental interests of the country" may be interpreted as allowing the requested state to refuse mutual legal assistance in cases where the fundamental principles of its legal system are at stake, where human rights' consideration should prevail and, more generally, in cases where the requested State has reasonable grounds to believe that the criminal proceedings instituted in the requesting State have been distorted or misused for purposes other than combating corruption.

Paragraph 3 of this provision is drafted along the lines of that of Article 18, paragraph 7 of the Convention on the Laundering, Search, Seizure and Confiscation of the Proceeds of Crime (ITS 141). A similar provision is also to be found in the OECD Convention on Combating Bribery of Foreign Public Officials (Article 9, paragraph 3). Before affording the assistance required involving the lifting of bank secrecy, the requested Party may, if its domestic law so provides, require the authorization of a judicial authority competent in relation to criminal offences.

Article 27 B Extradition

Drawing all the consequences from their serious nature, paragraphs 1 and 3 provide that corruption offences falling within the scope of the present Convention shall be deemed as extraditable offences. Such an obligation also stems from Article 19, paragraph 1, according to which these offences should have attached a penalty of deprivation of liberty, which can give rise to extradition. This does not mean that extradition must be granted on every occasion that a request is made but rather that the possibility must be available of granting the extradition of persons having committed one of the offences established in accordance with the present Convention. Pursuant to paragraph 1, there is an obligation to include corruption offences in the list of those that can give rise to extradition both in existing or in future extradition treaties. Pursuant to paragraph 3 the extraditable nature of these offences must be recognized among Parties which do not make extradition conditional upon the existence of a treaty.

In accordance with paragraph 2, the Convention can serve as a legal basis for extradition for those Parties that make extradition conditional upon the existence of a treaty. A Party that would not grant the extradition either because it has no extradition treaty with the requesting Party or because the existing treaties would not cover a request made in respect of a corruption offence established in

accordance with this Convention, may use the Convention itself as basis for surrendering the person requested.

Paragraph 4 provides for the possibility of refusing an extradition request, because the conditions set up in applicable treaties are not fulfilled. The requested Party can also refuse on the grounds allowed by those treaties. It should be noted in particular that the Convention does not deprive Contracting Parties from the right of refusing extradition if the offence in respect of which it is requested is regarded as a political offence.

Paragraph 5 contains the principle of "aut dedere aut iudicare", extradite or punish. It is inspired by Article 6, paragraph 2 of the European Convention on Extradition (ITS No. 24). The purpose of this provision is to avoid impunity of corruption offenders. The Party that refuses extradition and institutes proceedings against the offender is under the specific obligations to institute criminal proceedings against him and to inform the requesting Party of the result of such proceedings.

Article 28 B Spontaneous information

It happens more and more frequently, in view of the transnational character of many corruption offences, that an authority investigating a corruption offence in their own territory comes across information showing that an offence might have been committed in the territory of another State. This provision, drafted along the lines of Article 10 of the Convention on the Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (ITS No. 141), eliminates the need of a prior request for the transmission of information that may assist the receiving Party to investigate or institute proceedings concerning criminal offences established in accordance with this Convention. However, the spontaneous disclosure of such an information does not prevent the disclosing Party, if it has jurisdiction, from investigating or instituting proceedings in relation to the facts disclosed.

Article 29 B Central authority

The institution of Central authorities responsible for sending and answering requests is a common feature of modern instruments dealing with international co-operation in criminal matters. It is a means to ensure that such requests are properly and swiftly channeled. In the case of federal or confederal States, the competent authorities of the States, Cantons or entities forming the Federation are sometimes in a better position to deal more swiftly with co-operation requests emanating from other Parties. The reference to the possibility of designating "several central authorities" addresses such particular issue. The Contracting Parties are not obliged, under this provision, to designate a specific central authority for the purpose of international co-operation against offences established in accordance with this Convention. They could designate already existing authorities that are generally competent for dealing with international co-operation.

Each Party is called to provide the Secretary General of the Council of Europe with relevant details on the Central authority or authorities designated under paragraph 1. In accordance with Article 40, the Secretary General will put that information at the disposal of the other Contracting Parties.

Article 30 B Direct Communication

Central authorities designated in accordance with the previous Article shall communicate directly with one another. However, if there is urgency, requests for mutual legal assistance may be sent directly by judges and prosecutors of the Requesting State to the judges and prosecutors of the Requested State. The urgency is to be appreciated by the judge or prosecutor sending the request. The judge or prosecutor following this procedure must address a copy of the request made to his own central authority with a view to its transmission to the central authority of the Requested State. According to paragraph 3 of this Article requests may be channeled through Interpol. In accordance with paragraph 5, they may also be transmitted directly -that is, without channeling them through central authorities - even if there is no urgency, when the authority of the Requested State is able to comply with the request without making use of coercive action. The authorities of the Requested State, which receive a

request falling outside their field of competence, are, according to paragraph 4, under a two-fold obligation. Firstly they must transfer the request to the competent authority of the requested State. Secondly they must inform the authorities of the Requesting State of the transfer made. Paragraph 6 of this Article enables a Party to inform the others, through the Secretary General of the Council of Europe, that, for reasons of efficiency, direct communications are to be addressed to the central authority. Indeed, in some countries direct communications between judicial authorities could be the source of longer delays and greater difficulties for providing the co-operation required.

Article 31 - Information

This provision embodies an obligation for the Requested Party to inform the Requesting Party of the result of actions undertaken in pursuance of the request of international co-operation. There is a further requirement that the information be addressed promptly if there are circumstances that make it impossible to carry out the request made or are likely to delay it significantly.

CHAPTER V - FINAL PROVISIONS

With some exceptions, the provisions contained in this Section are, for the most part, based on the "Model final clauses for conventions and agreements concluded within the Council of Europe" which were approved by the Committee of Ministers of the Council of Europe at the 315th meeting of their Deputies in February 1980. Most of these articles do not therefore call for specific comments, but the following points require some explanation.

Article 32, paragraph 1 has been drafted on several precedents established in other Conventions elaborated within the framework of the Council of Europe, for instance the Convention on the Transfer of Sentenced Persons (ITS No. 112) and the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (ITS No. 141), which allow for signature, before the Convention's entry into force, not only by member States of the Council of Europe, but also by non-member States which have participated in the elaboration of the Convention. These States are Belarus, Bosnia and Herzegovina, Canada, Georgia, Holy See, Japan, Mexico and the United States of America. Once the Convention enters into force, in accordance with paragraph 3 of this Article, other non-member States not covered by this provision may be invited to accede to the Convention in conformity with Article 33, paragraph 1.

Article 32, paragraph 3, requires 14 ratifications for the entry into force of the Convention. This is an unusually high number of ratifications for a criminal law Convention drafted within the Council of Europe. The reason is that criminalization of corruption, particularly of international corruption, can only be effective if a high number of States undertake to take the necessary measures at the same time. It is widely recognized that corrupt practices bear an impact on international trade because they hinder the application of competition rules and modify the proper functioning of the market economy. Some countries considered that they would penalize their national companies if they entered into international commitments to criminalize corruption without other countries having assumed similar obligations. In order to avoid becoming a handicap for the national companies of a few Contracting Parties, the present Convention requires that a large number of States undertake to implement it at the same time.

The second sentence of paragraphs 3 and 4 of Article 32 as well as of Article 33, paragraph 2, combined with Article 24, entail an automatic and compulsory membership of GRECO for Contracting Parties, which were not already members of this monitoring body at the time of ratification.

Article 33 has also been drafted on several precedents established in other conventions elaborated within the framework of the Council of Europe. The Committee of Ministers may, on its own initiative or upon request, and after consulting the Parties, invite any non-member State to accede to the

Convention. This provision refers only to non-member States not having participated in the elaboration of the Convention.

In conformity with the 1969 Vienna Convention on the law of treaties, Article 35 is intended to ensure the co-existence of the Convention with other treaties - multilateral or bilateral - dealing with matters which are also dealt with in the present Convention. Such matters are characterized in paragraph 1 of Article 35 as "special matters". Paragraph 2 of Article 35 expresses in a positive way that Parties may, for certain purposes, conclude bilateral or multilateral agreements relating to matters dealt with in the Convention. The drafting permits to deduct, a contrail, that Parties may not conclude agreements which derogate from the Convention. Paragraph 3 of Article 35 safeguards the continued application of agreements, treaties or relations relating to subjects which are dealt with in the present Convention, for instance in the Nordic co-operation.

Article 36 provides Parties with the possibility of declaring that they shall criminalize active bribery of foreign public officials, of officials of international organizations or of judges and officials of international courts only to the extent that the undue advantage offered, promised or given to the bribee induces him or is intended to induce him to act or refrain from acting in breach of his duties as an official or judge. For the drafters of the Convention the notion of "breach of duties" is to be understood in a broad sense and therefore also implies that the public official had a duty to exercise judgment or discretion impartially. In particular this notion does not require a proof of the law allegedly violated by the official.

Article 37 contains, in its paragraphs 1 and 2, for a large number of reservation possibilities. This stems from the fact the present Convention is an ambitious document, which provides for the criminalization of a broad range of corruption offences, including some which are relatively new to many States. In addition, it provides for far reaching rules on grounds of jurisdiction. It seemed, therefore, appropriate to the drafters of the Convention to include reservation possibilities that may allow future Contracting Parties to bring their anti-corruption legislation progressively in line with the requirements of the Convention. Furthermore, these reservations aim at enabling the largest possible ratification of the Convention, whilst permitting Contracting Parties to preserve some of their fundamental legal concepts. Of course, it appeared necessary to strike a balance between, on the one hand, the interest of Contracting Parties to enjoy as much flexibility as possible in the process of adapting to conventional obligations with the need, on the other hand, to ensure the progressive implementation of this instrument.

Of course, the drafters endeavored to restrict the possibilities of making reservations in order to secure to the largest possible extent a uniform application of the Convention by the Contracting Parties. Thus, Article 37 contains a number of restrictions to the making of reservations. It indicates, first of all, that reservations or declarations can only be made at the time of ratification in respect of the provisions mentioned in paragraphs 1 and 2, which contain, therefore, a numerous clauses. More importantly paragraph 4 of this provision limits the number of reservations that each Contracting Party may enter.

In addition, in accordance with Article 38, paragraph 1 reservations and declarations have a limited validity of 3 years. After this deadline, they will lapse unless they are expressly renewed. Paragraph 2 of Article 38 contains a procedure for the automatic lapsing of non-renewed reservations or declarations. Finally, pursuant to Article 38, paragraph 3, Contracting Parties will be obliged to justify before the GRECO the continuation of a reservation or reservation. The Parties will have to provide to GRECO, at its request, an explanation on the grounds justifying the continuation of a reservation or declaration made. The GRECO may require such an explanation during the initial or during the subsequent periods of validity of reservations or declarations. In cases of renewal of a reservation or declaration, there shall be no need of a prior request by GRECO, Contracting Parties being under an automatic obligation to provide explanations before the renewal is made. In all cases GRECO will have the possibility of examining the explanations provided by the Party to justify the continuance of its reservations or declarations. The drafters of the Convention expected that the peer-pressure system followed by GRECO would have an influence on decisions by Contracting Parties to maintain or withdraw reservations or declarations.

The amendment procedure provided for by Article 39 is mostly thought to be for minor changes of a procedural character. Indeed, major changes to the Convention could be made in the form of additional protocols. Moreover, in accordance with paragraph 5 of Article 37, any amendment adopted would come into force only when all Parties had informed the Secretary General of their acceptance. The procedure for amending the present Convention involves the consultation of non-member States Parties to it, who are not members of the Committee of Ministers or the CDPC.

Article 40, paragraph 1, provides that the CDPC should be kept informed about the interpretation and application of the provisions of the Convention. Paragraph 2 of this Article imposes an obligation on the Parties to seek a peaceful settlement of any dispute concerning the interpretation or the application of the Convention. Any procedure for solving disputes should be agreed upon by the Parties concerned.

APPEAL

BY THE COMMITTEE OF MINISTERS

TO STATES TO LIMIT AS FAR AS POSSIBLE THEIR RESERVATIONS

TO THE CRIMINAL LAW CONVENTION ON CORRUPTION

At this, its 103rd Ministerial Session (4 November 1998), the Committee of Ministers has adopted the Criminal Law Convention on Corruption. In the Committee's view, this is an ambitious text with a broad legal scope which will have a considerable impact on the fight against this phenomenon in Europe.

The text of the Convention provides for a certain number of possible reservations. It has transpired that this is necessary so that Parties can make a progressive adaptation to the undertakings enshrined in this instrument. The Committee of Ministers is convinced that regular examination of reservations by the "Group of States against corruption B GRECO" will make it possible to bring about a rapid reduction of reservations made upon ratification or accession to the Convention.

Nonetheless, in order to maintain the greatest possible uniformity with regard to the undertakings enshrined in the Convention, and to allow full advantage to be taken of this text from the moment it enters into force, the Committee of Ministers appeals to all States wishing to become party to the Convention to reduce as far as possible the number of reservations that they declare, when expressing their consent to be bound by this treaty, and to States which nevertheless find themselves obliged to declare reservations, to use their best endeavors to withdraw them as soon as possible.