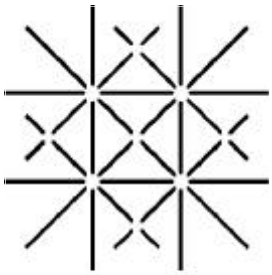

Law Faculty

Maiengasse 51
CH-4056 Basel
Switzerland

Tel: +41612672536
Fax: +41612672549
Email: daams@ubaclu.unibas.ch

Regional Initiatives:
European Union against Corruption

Claire A. Daams

Paper prepared for the
9th International Anti-Corruption Conference
Durban, South Africa, October 10-15, 1999

Contents

I. Introduction •

That corruption is not a new phenomenon is an idea upon which probably common agreement troughout the world can be reached. It is considered as one of the most widespread forms of behaviour and certain "corrupt" practices were long regarded as permissible. During the past centuries customs, historical and geographical factors have influenced the publics sensitivity and opinion towards corruption. Nevertheless it still remains for many a "taboo topic" in spite of all the intention this subject is getting nowadays.

Various possibilities for a definition on corruption have been discussed over the past years in different fora, but so far it was not possible for the international community to come to a common agreement. Instead the international fora have focused on defining certain forms of corruption. Examples can be found in the UN context "illicit payments", within the OECD "bribery of foreign public officials in international business transactions" and within the EU "corruption involving officials of the European Communities or officials of Member States of the EU."

Within the European context, countries in all directions have been shaken by huge corruption scandals and some consider corruption as one of the most serious threats to democracy and economic stability. Therefore international instruments for the fight against corruption needed to be developed within Europe. The aim of this paper is to present the main instruments developed by the European Union, considering them as "regional initiative".

• The author is researcher at the Law Faculty of Basle University and consultant expert in the PC-CO committee of the Council of Europe.

II. The EU framework

It should be noticed that the European Union is not an international organisation such as the Council of Europe, nor that it is a federation. The most important feature of the EU is its strong supranational character.[1] States have limited their sovereign rights, albeit in limited areas, to reach the objective of the EEC Treaty[2], which is to establish a Common Market. Purpose of this Common Market is to guarantee free competition and the freedom of movement of persons, capital, goods and services. The European Union has developed into an organisation of States with a relatively autonomous legal system. This system of norms bind each State and have to be translated into the domestic systems of the different member States.[3] Unfortunately is goes beyond the scope of this contribution to go into the details of how and by which EU bodies the respective norms are created.

In this decade important changes to the EC Treaty took place. The first to be mentioned was the Treaty of Maastricht.[4] Within the context of this paper the most important change this brought about is the creation of two new, intergovernmental areas of co-operation next to the Communities. These are the common foreign and security policy and co-operation in the area of justice and home affairs.

The second is the Treaty of Amsterdam. This Treaty brings about major substantive changes such as the incorporation of a large part of the third pillar, which under the Maastricht treaty had covered Justice and Home affairs, into the body of the EC Treaty, the first pillar. The amended third pillar now covers only police and judicial co-operation in criminal matters, being intended to establish an area of freedom,

1 Böhringer/Jacob; „Die Europäiche Union, Wesen, Struktur, Dynamik“, Zürich 1997.
2 EC Treaty of March 25, 1957, which entered into force on January 1, 1958.
3 Craig/deBúrca; „EU Law, text, cases and materials“, Oxford, 1998.
4 The „Treaty of Maastricht“, was adopted on February 7, 1992. It entered into force on November 11, 1993.

justice and security.[5] To achieve this purpose the prevention and combating of organised (and non organised) crime is considered as most important. Especially the fight against active and passive corruption is mentioned in this context. The pillar sets out three methods of addressing her aims: first through closer co-operation between police forces, customs and other Member State authorities with the help of Europol, secondly through closer co-operation between judicial and other relevant Member State authorities and thirdly through the approximation of certain criminal laws in the Member States. All measures are to be adopted by the Council on an initiative from the Commission or a Member State.

III. The European Union initiatives

Whereas the CoE focussed on the protection of the rule of law, stability of democratic institutions, human rights and social and economic progress, the EU's main starting point was the protection of its financial interests. Not having the power to enact criminal law directly, the EU is developing its legislation on matters of "justice and home affairs" under the "third pillar" via international treaties. These have to be adopted and then ratified and implemented on national level.

1. The Treaty on the Protection of the EU's financial interests.

The first step to combat corruption within the EU was taken in the context of the Convention on the Protection of the EU's financial interests[6] on the one hand and the fight against organised crime on the other.

---

5 Craig/deBúrca; „EU Law, text, cases and materials", Oxford, 1998, Bergmann/Lenz; „Der Amsterdammer Vertrag, eine Kommentierung der Neuerungen des EU- und EG Vertrages". 1998.

6 The Convention of the European Union on the Protection of Financial Interests of the Communities

Each of the member States is obliged to take effective, proportionate and dissuasive measures.[7] These should include, at least in cases of serious fraud, the possibility of deprivation of liberty. It is left to the member States to set a criterium for what is considered as serious fraud. However the minimum amount may not exceed ECU 50.000.[8]

Furthermore this convention deals with:

- Criminal liability of heads of businesses, but the convention leaves the Member States considerable freedom to establish the basis for this criminal liability[9]
- Jurisdiction; the convention requires each Member State to establish jurisdiction in three situations.[10]. In order to establish jurisdiction Member States may require that the condition of dual criminality is fulfilled. Furthermore it should be noted that not all Member States' legal tradition permit extra-territorial jurisdiction. Article 4 paragraph 2 therefore permits Member States to declare that they will not apply this provision.
- Extradition; the extradition rules supplement the provisions on the extradition of nationals and tax offences under bilateral or multilateral agreements between Member States.[11]
- Mutual co-operation which is considered as a matter of fundamental importance due to the international ramifications of complex fraud cases. States are required to co-operate effectively at every stage of the procedure and specifically in the investigation, prosecution and enforcement of the sentence. The forms of co-operation given in this convention are used as examples.[12]
- The rule of ne bis in idem is laid down in article 7 of this convention.

2. The First Protocol.

---

was adopted by the Council on July 26 1995 (95/C 316/03).

7 According to Article 1 paragraph 2 of the EU convention 1995.

8 According to article 2 of the EU convention 1995.

9 Article 3 of the EU convention 1995.

10 These are given in article 4, paragraph 1 of the EU convention 1995.

11 Article 5 of the EU convention 1995.

12 Article 6 of the EU convention 1995.

Based on the treaty mentioned above the First Protocol of 1996[13] focussed for the first time in Europe on the criminalisation of transnational bribery. It directs in particular, acts of corruption involving national and Community officials and damage or likely damage to the EU's financial interests.

To ensure a broad and homogeneous application of the provisions of this protocol, *official* means any person of a variety of categories of persons; Community officials, national officials, or officials of another Member State.[14] The rules apply to both permanent and various categories of staff on contract. For members of the Community institutions, the Commission, the European Parliament, the Court of Justice and the European Court of Auditors the First Protocol contains a separate provision in article 4.

The First Protocol criminalises both passive and active bribery, damaging or potentially damaging the Communities financial interests.[15] Member States are furthermore required to adjust their criminal law relating to relevant conduct of their national officials so as to cover similar conduct committed by Community officials.[16]

As far as penalties are concerned the Member States are required to ensure that passive and active bribery as described in articles 2 and 3 (including participation in and instigation of these offences) of this protocol are punishable by effective, proportionate and dissuasive[17] *criminal* penalties, including, at least in serious cases, penalties involving deprivation of liberty. This means that these cases shall always be triable by criminal courts.

---

13 The First Protocol to the Convention on the Protection of Financial Interests of the Communities, was adopted by the Council on September 27, 1996 ((96/C 313/01).

14 Article 1 of the First Protocol.

15 Passive bribery in article 2 and active bribery in article 3 of the First Protocol.

16 Article 4 of the First Protocol.

17 This expression is taken from the judgement of the Court of Justice of the European Communities in the case 68/88 of September 21, 1989.

3. The Second Protocol

The 1995 Convention needed to be further supplemented. The liability of legal persons, confiscation, money laundering and the co-operation between the Member States and the Commission for the purpose of protecting the European Communities' financial interests were not yet established. This has been done in the Second Protocol to the Convention on the protection of the European Communities' financial interests.[18]

Member States are required to take necessary measures to criminalise money laundering.[19] Criminal liability is established for legal persons in cases of fraud, active corruption and money laundering.[20] Legal persons shall be punishable by effective, proportionate and dissuasive sanctions, which include criminal, or non-criminal fines and may include other sanctions, such as mentioned in article 4 of the Second Protocol. Member States have furthermore the obligation to enable seizure and confiscation or removal of the instruments and proceeds of fraud, active and passive corruption and money laundering, or of property of which the value corresponds to such proceeds.

4. The Convention on the fight against Corruption involving officials of the European Communities or officials of Member States of the European Union.

The improvement of judicial co-operation in the fight against corruption was considered by the Member States as a matter of common interest. Having the First Protocol 1996 as a basis the Member States found that it was necessary to go beyond this protocol and to draw up a Convention directed at acts of corruption in-

18 This protocol was adopted by the Council on June 19 1997 (97/C 221/02).
19 Article 2 of the Second Protocol.
20 Article 3 of the Second Protocol.

volving officials of the European Communities or officials of the Member States in general.[21] The Convention is structured in a comparable way as the First Protocol and many of the provisions show similarities to, or derive from the First Protocol and/or the 1995 Convention.

As far as the offences of passive and active bribery are concerned, the 1997 Convention no longer mentions the damage or likely damage of the EU's financial interests and therefore now has a wider scope.[22]

The Convention 1997 establishes criminal liability for heads of businesses in a comparable way as has been done under the 1995 Convention. The rules on extradition, co-operation and ne bis in idem are also comparable with the 1995 Convention.

IV. Joint Council of Europe / European Commission Initiative The Octopus Project

This project[23] was a joint initiative for the years 1996-1998, between the Council of Europe and the European Commission. It aims at the fight against corruption and organised crime in sixteen countries in transition.[24] The problem of corruption and organised crime and the efficiency of counter-measures already taken by the Governments of these countries were evaluated. Provisional recommendations and guidelines for each State involved were formulated by CoE experts. After that missions were carried out by the experts to determine to what extend the proposed

21 The Convention on the Fight against Corruption involving officials of the European Communities or officials of Member States of the European Union, was adopted by the Council on May 26 1997 (97/C 195/01).

22 See articles 2 and 3 of the Convention 1997.

23 The project started in June 1996.

24 The countries that were invited to participate in this project were: Albania, Bulgaria, Croatia, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Moldova, Poland, Romania, Russian Federation, Slo-

measures were appropriate to the country specific circumstances, their feasibility and possible obstacles for their implementation. After a presentation of the results final recommendations and guidelines were formulated for each country.

It has been agreed to continue the Octopus Programme (Octopus II) for the years 1999-2000. The EU intends in particular to help the associated countries of Central and Eastern Europe to prepare their accession to the EU. The CoE views Octopus II as an important contribution to the strengthening of legal and constitutional reforms, the rule of law and democratic security.

V. Conclusion

Over the past five years a framework of instruments against corruption has been drawn up in the European Union. The instruments have a strong criminal law character. In fact, each time a new, a stronger and more severe input was given to the criminal law side.

Although one could say from a criminal law point of view that these instruments are getting more refined, this does not necessarily mean that it really contributes to the effectiveness of the fight against organised crime in general and corruption more specifically, especially since many of the provisions are formulated in a rather vague way. The criminal law approach brings about the disadvantage of a rather single sided approach of the multiple problems caused by corruption. To me it seems that this does not make much sense, since in certain cases non criminal instruments might be more effective. To achieve a “multidisciplinary” approach it is therefore inevitable to integrate also measures with an administrative law and /or civil law character in the legal framework.

---

vakia, Slovenia, „the former Yugoslav Republic of Macedonia“ and Ukraine.

The latter on the other hand bears the danger that a very complicated set of rules will be created, which on its part might cause the problem of a loss of overview which provisions apply under which circumstances. Since this would only increase counter effectiveness, a clear, well-balanced but also compact set of provisions which are internally consistent with each other, should be further developed.

Neither the phenomenon as such nor the legal framework are a myth, but we need to be careful not to create a myth, or quasi solution by enlarging only the criminal law framework.