The Council of Europe's anti-corruption treaties

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Ladies and Gentlemen,

The privilege of addressing you today could hardly be explained by any personal merits of mine. I rather dare to believe that it witnesses the recognition of the role the Council of Europe is playing in the international fight against corruption. In the last couple of years our organisation has managed to achieve significant results in this field. which, to my mind, justify retrospectively its deep involvement since 1994 in the general struggle against corruption and explain our strong confidence in the ability of our organisation to remain a reference in this field.

I hope you will allow me a brief introduction, just a few words, of the Council of Europe to you. We are the oldest - should I say the most experienced?- organisation of European co-operation. In 1999, the Council of Europe is commemorating its 50th Anniversary. Our headquarters were established in Strasbourg, on the banks of the Rhine river, as a symbol of Franco-German reconciliation after World War II. Since then, the Council of Europe has been actively promoting and defending the principles and values enshrined in its Statute: Democracy. Rule of law, individual rights and freedoms and social progress. For many years the Warsaw pact considered us the political/ideological branch of NATO. Paradoxically, after the fall of the Berlin Wall the Council of Europe was the first organisation that former Communist countries, including Russia, applied to join. Thus, we have become a truly pan-European organisation with now 41 Member States, 17 of which are Central and Eastern European countries.

The Council of Europe is relatively well known as a human rights protecting organisation, mainly because of the judgements of our European Court of Human Rights. However, and this is perhaps less known to the general public, our organisation has also been very dynamic in the legal field. So far 175 international treaties and agreements and a countless number of recommendations and other pieces of soft law have been concluded within the Council of Europe.

Many of these instruments deal with international co-operation in legal matters. I should like to stress, in particular, that we have developed a comprehensive network of legal instruments that form the basis of today's European co-operation against crime: extradition, mutual legal assistance, execution of judgements, transfer of prisoners and so on.

Although it has always been present in the history of humanity, at the beginning of the 90s corruption virtually exploded across the newspaper columns and law reports all

over the world, irrespective of economic or political regimes. In our continent, countries of Western, Central and Eastern Europe were literally shaken by huge corruption scandals. For the Council of Europe, it was only a natural continuation of its past record in international co-operation in criminal matters to address this serious and complex issue. As a matter of fact, we reacted vigorously against widespread corruption because we viewed it as a threat to all the basic principles our organisation stands for. Fighting corruption internationally seemed to us a means of defending the stability of democratic institutions. the rule of law, human rights and social progress.

Moreover, corruption is a subject well suited for international co-operation: it is a problem shared by most, if not all, our member States. Moreover, the most serious forms of corruption invariably contain transnational elements. Finally, if all countries are threatened by corruption, it appeared evident that our new member States, countries in transition to democracy and market economy, were even more vulnerable to it, their reforms being undermined and their new democratic institutions destabilised by corruption phenomena, often linked to organised criminal groups.

Launched at the 19th Conference of European Ministers of Justice, in Malta in 1994, the Council of Europe's activities against corruption. received considerable political impulse at the 2nd Summit of Heads of State and Government in October 1997, where it became a top priority for our organisation and our Member States.

Our approach to the fight against corruption is characterised by its:

a) **Multidisciplinarity.** Corruption is a prism with many sides and requires action of different types. e.g. legal and non-legal. Legal measures should include criminal, civil and administrative law measures.

b) Monitoring. The credibility of instruments against corruption depends upon an appropriate system for evaluating compliance with the obligations arising therefrom. All Council of Europe instruments are linked to the monitoring mechanism provided by the Agreement known as GRECO —Group of States against Corruption.

c) Ambition. Corruption is a serious and complex problem. It arises in citizens profound feelings of distrust, unfairness and inequality, undermining their faith in the foundations of society, provoking a waste of scarce public resources and increasing the cost of public services. It is a vehicle for organised criminal groups to infiltrate political institutions and the legal economy and to launder dirty money. Our efforts are, therefore, directed to raising public life standards, without leaving gaps through which corrupt practices may survive or reappear. The Council of Europe seeks to tackle all forms of corrupt behaviour in order to preserve the integrity and impartiality of public administration and the social fabric.

d) Comprehensiveness. We are developing an integrated set of instruments of different

types, with a view to building up a net of standards that will render corruption more difficult and costly.

e) Flexibility. Countries are left the time and the means to adapt to new international standards, to choose the instrument to sign, to apply soft law or, through a system of reservations and declarations, to postpone acceptance of some commitments.

I should like to refer in some detail, Mr Chairman, to the features of some of most outstanding instruments, adopted by the Council of Europe, in particular to those which might be of more interest for this particular workshop.

A) THE CRIMINAL LAW CONVENTION ON CORRUPTION

This Convention was adopted in November 1998 and opened for signature on 27 January 1999. Up to now it has been signed by 30 countries and ratified by one. It is important to note that it is open to the accession of Council of Europe Member States and of non-member States having participated in its drawing up (US, Japan, Canada, Mexico). It should be recalled that becoming a party to the Convention implies automatic submission to GRECO's monitoring procedures

From the point of view of the substance, this Convention is, certainly, one of the most comprehensive treaties in this field. It contains an obligation to criminalise, on the basis of a set of common elements, a large range of corruption offences, including active and passive corruption of national, foreign and international public officials, active and passive corruption of members of national, international and supranational parliaments or assemblies, active and passive corruption of judges and staff of domestic, international or supranational courts, active and passive private corruption, active and passive trading in influence involving national and foreign public officials, laundering of corruption proceeds and corruption in auditing.

In addition, the Convention deals with substantial or procedural issues, such as jurisdiction, sanctions and measures, liability of legal persons, setting up of specialised authorities for the fight against corruption, co-operation among authorities responsible for law enforcement and control, and protection of witnesses and persons co-operating with the judicial authorities. Finally, it provides for enhanced international co-operation in the prosecution of the corruption offences defined thereon, in particular regarding extradition, mutual judicial assistance and the exchange of spontaneous information.

Therefore one of its main characteristics of this Convention is 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.

This is clearly reflected in the range of offences covered by the Convention. The CoE Convention imposes, like the OECD and EU Conventions on corruption, an obligation to establish as criminal offences the bribery of foreign and international public officials, judges and members of Parliament, -the elements of these offences being identical to those pertaining to the bribery of domestic officials or members of parliament. However, the CoE Convention is notably broader in that it covers also the passive side of bribery, and public officials and parliamentarians of all countries, regardless of whether they are CoE member States or Contracting Parties to the Convention.

Moreover, the distinctive approach of the CoE Convention can be more clearly appreciated by referring to its provisions dealing with some additional offences, which. are completely left aside by the other Conventions, such as active and passive bribery in the private sector and trading in influence.

I shall be now referring in some detail to these innovative offences and also to another aspect of the Convention, which might be of interest to the business lawyer, the provisions on the liability of legal persons for acts of corruption.

a) Corruption in the private sector

Articles 7 and 8 of the Convention extend criminal liability 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. Criminalising private corruption is a pioneering but necessary effort to avoid gaps in any 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, and damages society as a whole. Secondly, to ensure respect for fair competition. Thirdly, because over the years important public functions have been privatised (education, health, transport, telecommunication etc). The transfer of such public functions to the private sector, often related to a massive privatisation 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

There are several important differences between the provisions on public and private sector bribery. Private bribery is restricted to the domain of “business activity”, thus deliberately excluding any non-profit oriented activities carried out by persons or organisations. “Business activity” means any kind of commercial activity, in particular trading in goods and delivering services, including services to the public.

The second important difference concerns the scope of recipient persons. This Convention prohibits bribing any persons who “direct or work for, in any capacity, private sector entities”. Again, this a sweeping notion covering not only 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 comprises 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. They can be corporations but also entities with no legal personality. Public entities fall therefore outside the scope of this provision.

The third important difference relates to the behaviour of the bribed person in the private sector. In the case of public bribery it is, according to Article 2 and 3 of the Convention, immaterial whether the bribed officials acted, or was intended to act, in breach of his duties. In the case of private sector bribery the breach of duty is one of the essential elements of the offence. 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 principals 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 criminalise 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 authorisation or approval. It is the secrecy of the benefit rather than the benefit itself that is the essence of the offence. Such a secret behaviour threatens the interests of the private sector entity and makes it dangerous.

b) 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 Convention illustrates the CoE' s comprehensive approach, which views corruption, in its various forms, as a threat to the rule of law and the stability of democratic institutions.

Criminalising 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 behaviour of those persons who are in the neighbourhood 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.

Article 12 of the Convention criminalises, therefore a corrupt trilateral relationship where a person having real or supposed influence on officials, judges or members of parliament, trades this influence in exchange for an undue advantage from someone seeking this influence. The difference with 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. "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.

The active trading in influence is quite similar to active bribery, with some differences: a person gives an undue advantage to another person (the 'influence peddler') who claims, by virtue of his professional position or social status, to be able to exert an improper influence over the decision-making of domestic or foreign public officials members of domestic public assemblies, officials of international organisations, members of international parliamentary assemblies or judges and officials of international courts. The passive trading in influence side resembles passive bribery 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.

c) Corporate Liability

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 organisation, 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.

There is an international trend 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.

The Convention does not stipulate in its Article 18 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. 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 a "person who has a leading position". The leading position can be assumed to exist in the three situations described by Article 18 — a 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.

Furthermore, the Convention imposes an 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.

B) THE DRAFT CIVIL LAW CONVENTION ON CORRUPTION.

In 1997, a feasibility study showed that it was possible to conceive a number of scenarios in which the use of civil law remedies might be useful against given forms of corruption. On the basis of this study, the Council of Europe has elaborated a Civil Law Convention on corruption, adopted on 8 September 1999, which will open for signature at the 105th Ministerial Session in November 1999.

The Convention is the first attempt to define common principles and rules at an international level in the field of civil law and corruption. It deals with civil remedies for damage resulting from acts of corruption, validity and effect of contracts, transparency and protection of whistle blowers, evidence, State liability, contributory negligence, limitation periods, accounts and audits, non-pecuniary remedies, interim measures, international co-operation and monitoring.

It is important to underline that one of the main characteristics of this Convention is, once again, its wide scope, which reflects the Council of Europe comprehensive approach to corruption as a threat not only to international business or to the financial interests but to the democratic values, the rule of law, human rights and social and economic progress. Civil remedies are therefore not only a means for protecting the victims private interest, but also, indirectly to serve the higher values I have just referred to.

Let me deal quickly with two of the most important aspects of this Convention: the right of victims to seek compensation and the validity of contracts

a) Compensation for damage

The basic purpose of the Convention is to enable persons who have suffered damage as a result of corruption to defend their rights and interests, including the possibility of obtaining damages. Accordingly Article 3 of the Convention embodies an obligation to provide in the domestic law of each country for the right to bring a civil action in corruption cases, in order to obtain full compensation.

Under the Convention, damages must not be limited to any standard payment but must be determined according to the loss sustained in the particular case. It is clear that the compensation for damage suffered may vary according to the nature of the damage. Material damage is normally compensated financially, whereas non-pecuniary loss may also be compensated by other means, such as the publication of a judgement.

The compensation must cover "material damage"-*(damnum emergens)*, the actual reduction in the economic situation of the victim-"loss of profits" -*(lucrum cessans)*, i.e. the profit which could reasonably have been expected but that was not gained as a result of corruption. It must also cover, finally, "non-pecuniary loss" refers to those losses which cannot immediately be calculated, as they do not amount to a tangible or material economic loss. The most frequent example of non-pecuniary loss is the loss of

reputation of the competitor.

b) In order to obtain compensation the plaintiff will have to prove

i) the occurrence of the damage. The damage must fulfil certain conditions to justify a claim for compensation. must be sufficiently characterised, particularly as regards the connection with the victim himself or herself

ii) that the defendant acted with intent or negligently. An unlawful behaviour on the part of the defendant is therefore, required. Those who directly and knowingly participate in corrupt transactions are primarily liable for the damage and, above all, the giver and the recipient of the bribe, as well as those who incited or aided the corruption. Moreover, those who failed to take the appropriate steps, in the light of the responsibilities, which lie on them, to prevent corruption would also be liable for damage. This means that employers are responsible for the corrupt behaviour of their employees if, for example, they neglect to organise their company adequately or fail to exert appropriate control over their employees

iii) that there was a causal link between the corrupt behaviour and the damage. An adequate causal link must exist between the act and the damage, in order for the latter to be compensated. The damage should be an ordinary and not an extraordinary consequence of corruption. Thus, for instance, "loss of profits" by an unsuccessful competitor, who would have obtained the contract if an act of corruption had not been committed, is an ordinary consequence of corruption and should normally be compensated. On the other hand, there would be no adequate connection if, for example, an unsuccessful competitor, in his or her anger and disappointment over the loss of business, fell down the stairs and broke his leg.

The draft provides, of course, that GRECO will monitor the implementation of the Convention.

C) AGREEMENT ESTABLISHING THE "GROUP OF STATES AGAINST CORRUPTION —GRECO" — A MONITORING MECHANISM

On 5 May 1998, the Committee of Ministers of the Council of Europe, at its 102nd Ministerial Session adopted a resolution authorising the setting up of the "Group of States against Corruption" — GRECO in the form of a Partial and Enlarged Agreement.

GRECO aims at improving the capacity of its member States to fight corruption by following up, through a dynamic and flexible process of mutual evaluation and peer pressure, compliance with their undertakings in this field and, in particular, with the 20 Guiding Principles for the fight against corruption and the implementation of our Criminal law Convention and other international legal instruments to be adopted.

GRECO is opened to the participation of member States and non-member States of the Council of Europe on an equal footing. Indeed, for the international fight against corruption to be effective, there is a need for as many States as possible to be committed against this blight of society. Some non-European countries, like the US, Canada and Japan, have been very active in the drafting of the GRECO Agreement. This role was recognised by the Agreement's Preamble and by the privileged way offered to them to become members of GRECO and participate in it on an "equal footing" with Council of Europe member-States. I would like to take this opportunity to launch a strong appeal to these countries, and especially to the US, to join GRECO as soon as it will start working.

GRECO is aimed at providing a flexible, dynamic an efficient mechanism to ensure compliance with undertakings in the field of corruption. It defines a master-type procedure, which can be adapted to the different instruments under review. Becoming a Party to the Criminal law Convention or other instruments will entail, automatically, the obligation to participate in GRECO, and to accept monitoring procedures defined under the GRECO system.

In order to carry out its tasks, GRECO will conduct evaluation procedures in respect of each of its members. For each evaluation round. it will start by selecting specific provisions on which the evaluation procedure will be based. It will visit the countries concerned, for the purpose of seeking information concerning its law or practice. After receiving comments by the member undergoing the evaluation, GRECO will adopt a report stating to which extent that country its fulfilling its international undertakings. It may address specific recommendations to member countries with a view to improving its domestic laws and practice. If appropriate, a public statement will be issued when a member remains passive or takes insufficient action in respect of the recommendations addressed to it by GRECO.

According to its Statute, GRECO will become operational as soon as 14 States notify their will to join. At present, 23 countries have already done so and the first Session of GRECO took place in September 1999, whereas a second meeting took place last week in order to finalise GRECO's rules of procedure. We hope and expect GRECO to become rapidly a permanent forum, a pole of reference, for debating and improving, through mutual evaluation and peer-pressure, anti-corruption policies and measures throughout Europe and beyond.

Mr Chairman, in addition to the aforesaid, let me also briefly mention other actions and initiatives under way, which are likely to see the light this year.

D) THE MODEL CODE OF CONDUCT FOR PUBLIC OFFICIALS

The purpose of this text is threefold: to define the ethical climate that should prevail in the public service, to spell out standards of ethical conduct expected from

public officials and to inform the public of what conduct to expect from public officials when dealing with them.

The Model Code, both a public document and a message addressed to every individual public official, will reflect and reinforce the basic standards set out in the criminal legislation dealing with dishonesty and corruption; this legislation in turn provides the basis for the Code.

The draft Code is now under examination by our experts and is likely to be ready for adoption at the end of the year.

I shall now conclude.

While questions of the macroeconomic framework fall outside the remit of the Council of Europe, the establishment of a fair, stable, transparent and predictable legal and institutional framework is an essential concern for our organisation. A market economy, based on competition and free trade, is able to unleash the dynamic forces and to mobilise the hidden resources of each country. At the same time. competition has to take place within a clearly defined legal framework ensuring that the most efficient and not the most powerful or ruthless are successful. In fact, this is largely equivalent to being a country which accepts democracy, the rule of law, individual rights and freedoms, all the basis principles enshrined in the Statute of the Council of Europe. In our view, therefore, fighting corruption cannot be dissociated from the defence of our principles and ideals, from the defence of democratic security in Europe.

This is one of the main reasons why we are putting so many efforts in implementing an ambitious and comprehensive programme to counteract the spread of the corruption scourge. The Council of Europe is not alone in this combat and we pay tribute to the OECD for its efforts. We welcome the adoption and entry into force of the OECD Convention on bribery in international business transactions, which constitutes a major step forward. Although the geographica1 scope and approaches of both organisations somehow differ, they can easily complement one another. We have been associated with the work carried out by the OECD, and we have, in turn, invited the OECD, the World Bank and other international organisations to join the Council of Europe initiatives against corruption. There is certainly room for additional co-operation as shown by the Anti-corruption network for transition economies recently established at the initiative of the OECD and USAID, in which the Council of Europe is also present.

The results achieved by the Council of Europe in the fight against corruption would not be there had we not received help, impulsion and input from non-member States and other international organisations such as OECD. We are sure that we will be able to count on them for the implementation of the standards that have been defined and for the further development of our Programme of Action. In turn, the Council of Europe will always be ready, when so required, to co-operate with others in the global combat

against corruption.

Every effort is needed to expel the corrupt from our hardly won democratic regimes, to ban bribes and undue payments from public life. In short, to build the walls that will preserve the stability of our economies, the moral foundations of our societies and the dignity of our peoples.