ANTI-CORRUPTION TOOL KIT

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Anti-Corruption Legislation

VI. ANTI-CORRUPTION LEGISLATION

Tool 32 - International and Regional Legal Instruments

Introduction. Some corruption is transnational in nature or has transnational elements, while other forms are purely national or domestic, but affect domestic capabilities, standards of living and even social, economic and political stability to the extent where they have become international concerns, particularly on the part of governmental, intergovernmental and non-governmental entities responsible for international development. Growing concern about corruption as an international problem increased through the 1980s and 1990s to the point where a number of instruments and other documents have been developed. These include binding legal instruments, which set concrete requirements or standards which are in the nature of legal obligations, binding on States Parties to the instrument concerned in international law; normative legal instruments, which set standards which are legal in nature but which are not legally binding; normative instruments, which set standards which are not legal in nature (e.g., the allocation of resources to combat corruption); and other documents or instruments, which may contain such things as political commitments, mandates for the creation of instruments or other actions against corruption, recommendations and similar terms.

United Nations instruments and documents

The United Nations Convention against Corruption

While there have been many developments in international law, the picture remains incomplete. Legal instruments that are binding in nature are not universal or global in their application, and efforts of a global nature are thus far not legally binding. Some substantive issues, such as those arising from transnational private-sector corruption and the repatriation of the proceeds of corruption, and particularly proceeds of "grand corruption" cases, have yet to be addressed. [77] During 1999-2001 efforts have begun to develop a binding international legal instrument which would be global in both its approach to the subject-matter and in its geographical application. The actual negotiations, scheduled to occur in 2002-2003, are expected not only to produce the specified instrument, but also to provide a valuable forum in which all Member States of the United Nations can assemble to discuss corruption issues, to develop effective measures against corruption, and to build broad international consensus in support of such measures.

The United Nations Convention against Transnational Organized Crime

The United Nations Convention against Transnational Organized Crime[78], is principally focused on the activities of "organized criminal groups", but recognizes that corruption is in many cases both an instrument and an effect of organized crime activity, and that a significant portion of the corruption associated with organized crime is sufficiently transnational in its nature to warrant the development of several provisions in the Convention. The Convention is a binding international legal instrument, although the degree to which each provision is binding depends

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[77] The question of recovering assets in "grand corruption" cases has recently become the subject of international discussions. See Report of the tenth session of the United Nations Commission for Crime Prevention and Criminal Justice, E/2001/30, paragraphs 17-24, and GA/res/55/188, calling for the international cooperation against the illicit transfer of proceeds and in repatriating such funds to their countries of origin, as well as for consideration of this problem in the negotiation of the forthcoming United Nations Convention against Corruption.

[78] GA/res/55/25, annex, of 15 November 2000.

on the language used. [79] It is presently open for signature and ratification, and may achieve the necessary number of ratifications (40) to come into force during 2002 or 2003.

The Convention establishes four specific crimes to combat activities which are commonly used in support of transnational organized crime activities: participation in organized criminal groups, money-laundering, corruption, and obstruction of justice. States Parties are required to criminalize these activities, as well as to adopt legislation and administrative systems to provide for extradition, mutual legal assistance, investigative cooperation, preventive and other measures, as necessary to bring existing powers and provisions up to the standards set by the Convention. In addition to establishing a corruption offence (Article 8), the instrument also requires the adoption of measures to prevent and combat corruption (Article 9).

The criminalisation requirements include central provisions that are binding on States Parties and supplementary ones that are discretionary. The mandatory corruption offences capture both active and passive corruption: "…the promise, offering or giving…" as well as "…the solicitation or acceptance…" of any "undue advantage". In both offences the corrupted person must be a "public official" [80], the advantage conferred must be linked in some way to acting or refraining from acting in the course of official duties, and the advantage may be conferred directly or indirectly. States Parties are also required to criminalize participation as an accomplice in these offences. In addition to the mandatory offences, States Parties are also required to consider criminalizing the same conduct where the person promising offering or giving the benefit is in one country and the public official who solicits or accepts it is in another. They are also required to consider criminalizing other forms of corruption. In cases where the public official involved was involved in a criminal justice system and the corruption was directed at legal proceedings, the Convention offence relating to the obstruction of justice would also generally apply.

In addition to the criminalisation requirements, the Convention also requires the adoption of additional measures against corruption. The text calls for "…legislative, administrative or other effective measures to promote integrity and to prevent, detect and punish the corruption of public officials". It does not specify details of the measures to be adopted, but does require further measures to ensure that officials take effective action, including ensuring that the appropriate authorities possess sufficient independence to deter inappropriate influences on them.

Other Convention provisions, notably the articles establishing the money-laundering offence and providing for the tracing, seizure and forfeiture of the proceeds of crime may also prove useful in specific corruption cases. The Convention requires States Parties to adopt, to the greatest extent possible within their domestic legal systems, provisions to enable the confiscation of any proceeds derived from Convention offences and any other property used in or destined for use in a Convention offence. Courts or other competent authorities must have powers to order the disclosure or seizure of bank, financial or commercial records to assist in tracing, and bank secrecy cannot be raised as an obstacle to either the tracing of proceeds of crime or the provision of mutual legal assistance in general. Once proceeds or other property have been confiscated, they can be disposed of in accordance with the domestic laws of the State which has confiscated them, but that State is required to give "…priority consideration…" to returning them to a

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[79] The core obligations to create criminal offences and for cooperation in the areas of mutual legal assistance and extradition are generally binding, but other provisions incorporate additional conditions, limits or discretion on the part of the States Parties. The obligations to create criminal offences (articles 5, 6, 8 and 23), for example, use the language "…shall adopt…", whereas other articles use language such as "…shall take appropriate measures within its means…" (article 24), or "…shall consider…" the obligation in question (article 28).

[80] Article 8, paragraph 4 provides that "public official" includes any person who provides a public service as defined in the domestic law and as applied in the criminal law of the State Party concerned. See also *travaux preparatoires* note, A/55/383/Add.1, paragraph 19.

requesting State Party in order to facilitate compensation of victims or return of property to its legitimate owner. [81]

The application of the Convention is generally limited to cases that involve an “organized criminal group” and events that are “transnational in nature”. This does not apply to the corruption offence itself, which must be enacted by countries in a format which criminalizes the specified acts of corruption whether they involve organized crime and transnational aspects, or not. The requirements of transnationality and organized criminal group involvement would have to be met, however, to invoke the various international cooperation requirements in corruption cases. [82] Where these requirements are met, a wide range of assistance and cooperation provisions would apply to assist in investigations and ultimately, to secure the extradition or prosecution of offenders among States that are Parties to the Convention. [83]

The Plan of Action for the implementation of the Vienna Declaration on Crime and Justice Meeting the Challenges of the Twenty first Century (Corruption)

The Vienna Declaration on Crime and Justice, the political declaration of the Tenth United Nations Congress on Crime Prevention and Criminal Justice, dealt with a full range of the major crime issues confronting the Congress, including corruption. Paragraph 16 of the Vienna Declaration calls for enhanced international action against corruption, building on the Code of Conduct and Declaration against corruption and bribery (below), as well as regional instruments. [84] On endorsing the Vienna Declaration, the General Assembly requested the Secretary General to prepare plans of action for the implementation and follow up of the commitments in the Declaration, for the consideration and action of the United Nations Commission for Crime Prevention and Criminal Justice. Plans of Action were duly completed at the tenth session of the Commission, including a Plan of Action against corruption. [85]

The Plan of Action is divided into national and international actions. The national actions called for include:

- Various efforts in support of the proposed United Nations Convention against Corruption;
- Various measures to combat domestic corruption, including
- The assessment of the extent of domestic problems;
- The development of national strategies and action plans;
- National offences, powers and procedures to deal with corruption and related problems;
- Strengthening of domestic institutions, including institutional independence;
- Institutions and structures to foster transparency;
- The development of expertise in anti-corruption measures; and,
- Various measures to combat transnational corruption, including
- Signature, ratification and implementation of international instruments;

[81] Article 14, paragraph 2. The *travaux preparatoires* will also make reference to the use of confiscated assets to cover the costs of assisting and protecting witnesses in organized crime cases. See A/55/383/Add.1, paragraph 25.

[82] A broader standard also applies to mutual legal assistance, which is often needed to establish the involvement of transnational organized crime as a prerequisite of applying other Convention provisions.

[83] Where a country does not extradite a fugitive because the individual is one of its nationals, there is an obligation to prosecute the case in the same manner and with the same priority as if it was a domestic case.

[84] Report of the Tenth United Nations Congress on Crime Prevention and Criminal Justice, chapter I, part 1, paragraph 16.

[85] E/CN.15/2001/14/Rev.2, paragraphs 5-9. Also included in the final Report of the Commission, E/CN.15/2001/30/Rev.1

- Ensuring that domestic capacity exists to assist other States in transnational corruption cases;
- Raising the awareness of officials;
- Providing material and other assistance to other States, directly and via the United Nations Global Programme against Corruption; and,
- Reducing the opportunities for those engaged in corruption to transfer and conceal proceeds in other countries.

In addition to the Plan of Action against corruption, the text produced by the Commission also contains Plans of Action against transnational organized crime and money laundering. The first calls for ratification and implementation of the United Nations Convention, which as noted above, contains a series of provisions dealing with, or relevant to the fight against corruption. The second sets out a series of national actions, including national laws criminalizing money-laundering in all its aspects; the implementation of effective regulatory, administrative and investigative provisions; and support for international initiatives in this area. It does not deal with the question of the repatriation of proceeds recovered in other countries, but this is discussed in relation to corruption by paragraph 8, subparagraph (f) of the Plan of Action against Corruption.

The texts of the plans of action are not legally binding. The text of the various plans specifies that "…States will endeavour, as appropriate…" to support the specific actions called for in each plan, and the resolution whereby the plans were submitted to the General Assembly invites governments to carefully consider and use the various plans for guidance in their efforts to formulate legislation, policies and programmes in the subject-areas dealt with. [86]

The United Nations International Code Of Conduct For Public Officials

Following consideration of corruption issues by the fifth (1996) session of the United Nations Commission for Crime Prevention and Criminal Justice, the General Assembly adopted the International Code of Conduct for Public Officials. [87] The Code emphasizes the loyalty of officials to the public interest, the pursuit of efficiency, effectiveness and integrity, the avoidance of bias or preferential treatment, and ensuring responsible administration of public funds and resources. It calls for the avoidance of conflicts of interest by disqualification or non-participation where a private interest conflicts with a public responsibility while in office and with respect to previous offices. It also calls for the disclosure of assets, refusal of gifts or favours, and the protection of confidential information obtained in the course of public office. It also discusses issues arising from conflicts between partisan political activity and the public interest, calling for the avoidance of political activity by public officials and then outlining exceptions to this principle. Officials should not engage in major political activity unless the office itself is political (e.g. an elected office). More routine political activities should be limited to those that do not impair the function of the office or confidence in it, a flexible balance that would vary depending on the nature of both the political activities and the public office involved. The Code of Conduct is written in relatively general terms, for the guidance of legislative and administrative measures, and is not legally binding on U.N. Member States.

The United Nations Declaration against Corruption and Bribery in International Commercial Transactions

[86] Draft resolution of Finland and Germany as amended and adopted by the Commission, E/CN.15/2001/L.13

[87] GA/res/51/59 of 12 December 1996, annex.

During the same session, the General Assembly also adopted the United Nations Declaration against Corruption and Bribery in International Commercial Transactions. [88] Where the Code of Conduct is concerned with public sector corruption, the Declaration deals with both the private and public sectors. It calls for the enactment and enforcement of laws prohibiting bribery in international transactions; and laws criminalizing the bribery of foreign public officials; laws ensuring that bribes are not tax deductible. It also calls for international cooperation in areas such as investigation, prosecution and extradition and for countries to ensure that bank secrecy is not an obstacle to such cooperation. It proposes a partial definition of bribery which includes both active and passive bribery, but which is limited to cases involving "… any public official or elected representative…", and which is limited to breaches of a public duty respecting an international commercial transaction. Neither "public official" nor "international commercial transaction" is defined. The Declaration also calls for the development accounting standards and practices to improve transparency and business codes, standards or best practices which prohibit "…corruption, bribery and related business practices" in international commercial transactions. The text is in the nature of a political commitment and not a legal obligation, with actions to be taken through institutions at the national regional and international level, and subject to each State's constitution, fundamental legal principles, national laws and procedures.

Instruments and documents of the Organization for Economic Co-operation and Development (OECD)

The OECD's mandate includes a number of areas which are affected by domestic and transnational corruption or which may be relevant to anti-corruption strategies. These include general work in areas such as economic reform, good governance and sustainable development, and specific concerns such as international trade regulation, import-export structures, taxation policies and laws, and measures against money laundering. In this context, the OECD is responsible for several legal instruments, as well as other documents such as assistance materials prepared regarding specific countries or regions or specific issues, and the reports of the many meetings and conferences sponsored by the OECD which deal with corruption and related issues. [89]

OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions

The OECD General Council adopted an advisory instrument, the Revised Recommendation on Combating Bribery in International Business Transactions on 23 May 1997[90], which called for, *inter alia*, effective measures to deter, prevent and combat the bribery of foreign public officials, including the adoption of appropriate criminal offences in domestic law.

It then concluded the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions on 21 November 1997. [91] The instrument is in the nature of a series of binding legal commitments on the States Parties, and came into force following

[88] GA/res/51/191 of December 16 1996, annex.

[89] Further information, including the texts of the OECD instruments, can be obtained from: OECD, 2 rue André Pascal, F-75775 Paris Cedex 16, France, or on-line at www.oecd.org.

[90] OECD document C(97)123/FINAL.

[91] OECD document DAFFE/IME/BR(97)20. This document compiles several relevant texts, including the Convention itself, the OECD's Commentaries and its Council Recommendations on combating bribery and excluding the tax deductibility of bribes.

ratification by five of the ten OECD countries with the largest economies, on 15 February 1999.[92]

As of early 2001, 27 countries had ratified the convention and a further 7 countries were considering or in the process of ratifying it.

The OECD Convention, as its name implies, is relatively narrow and specific in its scope. Its sole focus is the use of domestic law to criminalize the bribery of foreign public officials. It applies to both active and passive bribery, but does not apply to forms of corruption other than bribery, bribery which is purely domestic, or bribery in which the direct, indirect or intended recipient of the benefit is not a public official. It also does not include cases where the bribe was paid for purposes unrelated to the conduct of international business and the gaining or retaining of some undue advantage in such business.

The obligation to criminalize[93] includes any case where the offender offers, promises or gives "…any undue pecuniary or other advantage …to a foreign public official…" to induce the recipient or another person to act or refrain from acting in relation to a public duty, if the purpose was to obtain or retain some business or improper advantage in the conduct of international business. States Parties are required to ensure that incitement, aiding and abetting or authorizing bribery are also criminalized and that the offences apply to corporations and other legal persons. Attempts and conspiracies, which pose a problem for some legal systems, must be criminalized if the equivalent conduct of bribing a domestic public official is criminalized. Prosecutorial discretion is recognized, but the Convention requires that it be exercised on the basis of professional rather than political criteria.[94]

Punishments must be "effective, proportionate and dissuasive", and of sufficient seriousness to trigger the application of domestic laws governing mutual legal assistance and extradition. Any proceeds or property of equivalent value must either be the subject of powers of seizure and forfeiture or the imposition of equivalent monetary sanctions. Bribing foreign public officials must also trigger national money laundering laws to the same extent as would the equivalent bribery of a domestic official. In addition to criminal penalties, the instrument also requires measures to deter and detect bribery in the form of accounting practices and safeguards to prevent domestic companies from concealing bribes paid to foreign officials, as well as appropriate civil, administrative or criminal penalties to ensure compliance.[95]

Since the OECD Convention came into force, the OECD Working Group on Bribery in International Business Transactions has adopted a rigorous process of assessing the status of implementation and compliance with its terms. Countries assess their own progress as well as that of other States Parties. Since 1999, their peers have reviewed 21 of the 34 States Parties. For each of these countries, the Working Group adopted a report, including an evaluation, which was made available to the public subsequent to the OECD meeting. The Working Group, in its June 2000 Report, expressed satisfaction about the state of overall compliance.

Revised Recommendations of the OECD Council on Combating Bribery in International Business Transactions

[92] The measure of economic size is export share, set out in OECD document DAFFE/IME/BR(97)18/FINAL. See Convention article 15.

[93] Article 1.

[94] Article 5. The text also refers to the 1997 revised recommendation, which states that investigations and prosecutions should be allocated adequate resources and priority.

[95] [info for OECD report here]

The OECD Council has also issued a series of non-binding recommendations dealing with bribery in international business transactions. The original text, adopted in 1994, was reviewed and further revised in 1997, based on the OECD's research and experiences in dealing with this problem. [96] It represents consensus within the OECD countries, but as a non-binding document, it is able to go beyond the text of the Convention, making recommendations which are both more specific and more flexible in allowing countries to tailor the measures proposed to their domestic legal systems and national priorities for combating particular aspects of the corruption problem. The first substantive recommendation, to the effect that countries "…take concrete and meaningful steps…[to adopt] …criminal laws…", for example is accompanied by an Annex setting out agreed common elements for criminal laws to assist national drafters and common elements of procedure to assist law enforcement and prosecutors in applying such laws. Some of these, such as the elements of a basic bribery offence, are similar to those found in the OECD Convention, others, such as the criteria for exercising prosecutorial discretion, are covered in greater detail. The following measures are recommended, each being accompanied by text giving additional detail or explanations:

- The creation and application of criminal laws;
- The creation and application of tax laws, regulations and practices;
- Appropriate company and business accounting practices;
- Banking, financial and other relevant provisions;
- The denial of public subsidies, licenses, government procurement contracts or other public advantages as a sanction in bribery cases;
- In addition to criminalisation (above), ensuring that bribery is illegal under civil, commercial and administrative laws; and,
- Providing for international cooperation in investigations and other legal proceedings.

Recommendation of the OECD Council on the Tax Deductibility of Bribes to Foreign Public Officials

Having determined that many of its transnational bribery cases involved companies or other corporate interests paying bribes to secure some foreign advantage, or in some cases to offset actual or perceived advantages on the part of competitors using similar tactics, the OECD chose taxation policies and laws as a key element in the fight against this problem. Corporations are primarily motivated by the overall financial implications of a proposed activity or transaction, and tax implications are a significant factor in this consideration. In most countries, corporate taxes are levied against profits, allowing the corporate taxpayers to deduct expenses incurred in generating such profits, such as research and development, negotiation, shipping and other costs. The bribery of foreign officials can constitute a significant cost, particularly if the officials involved are large in numbers or occupy very senior positions.

The 1996 recommendation itself is to the effect that countries address this problem by ensuring that foreign bribes are not allowed as deductible business expenses for tax purposes. This may have been largely overtaken by the 1997 recommendation and the Convention, however, since these advocate the criminalisation of such bribery, and in most countries costs incurred in the commission of a crime would be excluded as a general policy under pre-existing tax laws. The Convention and its commentaries do not refer to tax measures specifically, although the Convention does call for "additional civil or administrative sanctions" against bribe-payers and for business accounting practices which would make it impossible to conceal the true nature of

[96] Revised Recommendation of the Council on Combating Bribery in International Business Transactions, OECD Council, 23 May 1997, included in OECD document DAFFE/IME/BR(97)20. See also OECD document C(94)75/FINAL.

bribery expenses. [97] The 1996 recommendation that bribes not be allowed as tax deductions is re-stated as Recommendation IV of the 1997 Revised Recommendations.

Council of Europe Instruments and Documents

The Council of Europe was actively engaged in the development and adoption of anti-corruption measures, many of which are open to adoption or accession by non-European countries, or which may be useful as precedents for other countries developing national or regional legal provisions of their own. In 1999, the Council established GRECO, the Group of States against Corruption to strengthen capacities to fight corruption, monitor compliance with international instruments and other documents and similar measures. [98]

Criminal Law Convention on corruption (1998)

The Committee of Ministers of the Council of Europe adopted the text of the Criminal Law Convention on Corruption[99] in November 1998. In addition to European countries, it is also open for signature and ratification by other, non-member States that participated in its negotiation. Other States can also join by accession once the instrument is in force, provided certain preconditions, including the consent of all of the contracting States that sit in the Council's Committee of Ministers. [100] As of October 2001, the Convention was not in force, only nine of the required fourteen States having ratified it. The Convention is drafted as a binding legal instrument.

The Convention applies to a broad range of occupations and circumstances, but is relatively narrow in the range of actions or conduct that States Parties are required to criminalize. [101] It contains provisions criminalizing a list of specific forms of corruption, and extending to both active and passive forms of corruption, and to both private-sector and public sector cases. The Convention also deals with a range of transnational cases: bribery of foreign public officials and members of foreign public assemblies is expressly included, and offences established pursuant to the private-sector criminalisation provisions would generally apply in transnational cases in any State Party where a sufficient portion of the offence to trigger domestic jurisdictional rules had taken place. The majority of offences established are limited to bribery, which the instrument does not define. Trading in influence and laundering the proceeds of corruption must also be criminalized, but the instrument does not deal with any of the other forms of corruption, such as extortion, embezzlement, nepotism, or insider trading, and it does not seek to define or criminalize corruption in general.

The Convention requires States Parties to ensure that they have specialized "persons or entities" dedicated to the fight against corruption, and that such persons or entities have sufficient independence, training and resources to enable them to operate effectively. [102] It also provides for the protection of informants and witnesses who cooperate with investigators, the extradition of offenders, mutual legal assistance and other forms of cooperation. [103] The tracing, seizing, and

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[97] Article 3, paragraph 4 and article 8.

[98] Council of Europe resolution (99)5, 1 May 1999.

[99] European Treaty Series #173.

[100] See Article 33.

[101] The criminalisation requirements are found in Chapter II, Articles 2-14. Aiding and abetting must also be criminalised under Article 15, and corporate liability is required under Article 18.

[102] See Article 20.

[103] Articles 22 and 25-31.

freezing of property used in corruption and the proceeds of corruption are also provided for, but the text is framed in terms of international cooperation and does not deal with the return or other disposal of recovered proceeds. [104] Mutual legal assistance may be refused if the request undermines the fundamental interests, national sovereignty, national security or '*ordre public*' of the requested Party, but not on the grounds of bank secrecy. [105]

Civil Law Convention on Corruption (1999)

The Civil Law Convention on Corruption of the Council of Europe is the first attempt to define common international rules for civil litigation in corruption cases. Where the Criminal Law Convention seeks to control corruption by ensuring that offences and punishments are in place, the Civil Law Convention requires States Parties to ensure that those affected by corruption can sue the perpetrators civilly, effectively drawing the victims of corruption into the Council's anti-corruption strategy.

Generally, this has the advantage of making corruption controls partly self-enforcing by empowering victims to take action on their own initiative, but it also entails some loss of control on the part of government agencies. Some potential litigants may effectively be excluded by lack or resources, lack of access to legal counsel or similar factors, and corporate civil litigants, who have the means to bring a civil action, will usually decide whether to sue, settle or discontinue proceedings based on business or economic criteria which may not accord with the government's overall anti-corruption strategy. Creating a civil cause of action may also create some potential for conflicting or parallel civil and criminal proceedings, and rules for resolving such problems might be needed where they do not already exist.

As with the Criminal Law Convention, the Civil Law Convention is drafted as a binding legal instrument. Civil law provisions must be enacted which ensure that anyone who has suffered damage resulting from corruption can recover "…material damage, loss of profits and non-pecuniary loss." [106] Damages can be recovered against anyone who has committed a corrupt act, authorized someone else to do so, or failed to take reasonable steps to prevent the act, including the State itself, provided that a causal link between the act and the damages claimed can be proved. [107] Where appropriate, courts also have the power to declare contractual obligations resulting from corruption to be null and void, where the consent of any party to the contract has been "undermined" by corruption. [108] The instrument also requires Parties to "cooperate effectively" in civil cases, take steps to protect those who report corruption, and to ensure the validity of private-sector accounts and audits. [109] The Civil Law Convention is narrower that its criminal law counterpart in the scope forms of corruption to which it applies, extending only to bribery and similar acts, but applies to such acts in both private- and public-sector circumstances. It is not in force, having been ratified by only three of the necessary 14 countries.

The twenty guiding principles for the fight against corruption (1997)

The Council of Europe Committee of Ministers adopted a resolution setting out "Twenty Guiding Principles for the Fight against Corruption in November of 1997. [110] The principles are

[104] Article 23.

[105] Article 26, paragraphs 2 and 3.

[106] Article 3, paragraph 2.

[107] Articles 4 and 5.

[108] Article 8.

[109] Articles 13, 9 and 10.

[110] Resolution (97)24 of 6 November 1997. The principles were developed by the Multidisciplinary Group

multidisciplinary, covering the use of criminal and civil law measures, civil prevention, administrative reforms, transparency measures, and research, and are directed at encouraging individual countries to consult one another and coordinate national measures as a further precaution against transnational corruption problems. Attention is also drawn to the links between corruption and other forms of crime, particularly money-laundering and organized crime.

Model Code of Conduct for Public Officials (2000)

Similar to the United Nations', the Council of Europe has developed and adopted a model code for the conduct of public officials. [111] The language of some of the individual standards is of a mandatory nature, but the document itself is in the nature of a recommendation and is intended as a precedent for countries drafting their own mandatory codes of conduct. Many of the standards set deal with subject matter which is similar to the United Nations text, but the Council of Europe text is much broader, covering a wide range of aspects of public service conduct, rather than only those which are linked to anti-corruption measures or policies. Article 6, for example, which deals with arbitrary actions, is broad enough to cover problems such as general discrimination as well as conduct which is specifically biased by corrupt influences. The more important elements from an anti-corruption standpoint include:

- Avoidance of conflicts of interest (articles 8 and 13-16);
- Duties to act loyally (article 5), legally (article 4), and impartially (article 7);
- Dealing with gifts, improper offers and other forms of influence (articles 18-20); and,
- Accountability of public officials (articles 10, 25).

Of particular interest are Articles 13-16, which deal with conflicts of interest in more detail than most other instruments. The provisions discuss the possible range of conflicts which may arise, and place positive obligations on the official involved, who will often be the only person aware of the existence of a conflict, to identify and disclose potential conflicts, take appropriate steps to avoid them, and to comply with any legal or operational decisions taken by others to resolve the conflict. The Code notes that potential sources of frequent or regular conflicts may be incompatible with some areas of public activity altogether, [112] but it does not discuss any specific means of resolving such conflicts. [113] The need for controls to balance between legitimate forms of protected partisan political activity and conflicts between partisanship are also discussed. These deal with public officials in general, but not with those who serve by reason of their election to partisan political positions. [114]

European Union Instruments and Documents

Convention of the European Union on the protection of its financial interests and protocols thereto

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on Corruption, established as a result of the 1994 Malta Conference of the European Ministers of Justice.

[111] Council of Europe Recommendation Rec(2000) 10, of 11 May 2000, Appendix.

[112] Article 15.

[113] Article 15 simply requires the public official involved to identify and disclose such conflicts, and seek the approval or superiors for situations that may raise general conflicts. The only practical means of addressing such conflicts are usually either requiring the official involved to divest or disassociate himself from the private conflicting interest or to discharge or reassign the official to ensure that the public duties do not conflict. This is discussed in Part 4.I.h. of this Manual.

[114] Article 1, paragraph 4 excludes from the term "public official" those elected to office, members of the government and holders of judicial office.

The Convention (1995) and its two Protocols (1996 and 1997) [115] represent an attempt on the part of the European Union to address forms of malfeasance which are harmful to its own financial interests. They are legally binding and address corruption and other financial or economic crimes as well as related conduct, but only insofar as the conduct involved affects the interests of the E.U. itself. The Convention deals with a list of conduct designated as "fraud affecting the European Communities' financial interests".

The first Protocol deals with active and passive corruption, the second with money laundering and the confiscation of the proceeds of fraud and corruption as set out in the previous instruments. The forms of active and passive corruption dealt with in the first Protocol generally consist of bribery and similar conduct, in which some promise, benefit or advantage is solicited, offered or exchanged in return for undue influence on the exercise of a public duty. The forms of fraud set out in the Convention itself cover other areas of corruption, such as the submission of false information to a public authority to induce it to pay funds or transfer property it would not otherwise have done. The first Protocol distinguishes between the criminal conduct of officials, who can commit "passive corruption" by requesting or receiving bribes or similar considerations, and others, who commit "active corruption" promising or giving such considerations for improper purposes. The other instruments simply require States Parties to incorporate ("transpose") the principles set out into their national criminal law, which would generally result in offences applicable to everyone who engaged in the conduct prohibited. Generally the question of liability of legal persons such as corporations would be covered by the same principle. Article 3 of the Convention further calls for specific individual criminal liability for the heads of businesses or those exercising control within the business to be held criminally liable in cases where the business commits a fraud offence.

Convention of the European Union on the fight against corruption involving officials of the European Communities or officials of Member States

This Convention[116] incorporates essentially the same terms as the 1995 Convention on the protection of financial interests (above), but only deals with conduct on the part of officials of the European Community and its Member States. The conduct to which it applies is essentially bribery and similar offences, which States parties are required to criminalize. It does not deal with fraud, money laundering or other corruption-related offences.

Joint Action of 22 December 1998 on corruption in the private sector by the Council of the European Union

The Joint Action of 22 December 1998[117] incorporates many similar provisions to the proceeding European instruments, but there is one fundamental difference. Here the focus is on corruption in the private sector. The obligation is to criminalize both active and passive corruption conducted "in the course of business activities", which would include cases where neither the pay or nor the recipient of a bribe was connected in any way with public administration, as well as cases where the "business activities" involved business with government. The underlying policy is to use the criminal law of Member States to combat private sector practices on the basis that these distort free competition within the common market, thereby raising the possibility of economic damage to others not involved in the

[115] E.U. documents 495A1127(03), Official Journal C 316, 27/11/1995, pp.0049-0057 (Convention), 496A1023(01), Official Journal C 313, 23/10/1996, pp.0002-0010, and 497A0719(02), Official Journal C 221, 19/07/1997, pp.0012-0022.

[116] Document 497A0625(01), Official Journal C 195, 25/06/1997, pp.0002-0011.

[117] Document # 498X0742, Official Journal L 358, 31/12/1998, pp.0002-0004.

activity.[118] The text is drafted in binding legal terms, and Member States are required to bring forward proposals for implementation within two years of its entry into force.

Instruments and documents of the Organization of American States (OAS): The Inter-American Convention against Corruption

Inter-American Convention against Corruption

The principal focus of the anti-corruption strategy of the OAS has been the 1996 Inter-American Convention against Corruption. [119] The Inter-American Convention is drafted as a binding legal instrument, although some specific provisions contain language that limits or provides some element of discretion with respect to application. Generally, the obligations to criminalize acts of corruption are mandatory, while States Parties need only consider others, such as the implementation of certain preventive measures. The instrument has been in force since 6 March 1997, having been ratified by 20 OAS countries. [120] Countries that are not OAS members may also become Parties by acceding to it[121].

The Inter-American Convention is broader in scope than the European and OECD instruments, which focus primarily on bribery and its variations, but is still limited to conduct which is committed by or which affects "…a government official or a person who performs public functions…", both of which are defined. [122] In addition to passive and active bribery, the Convention also applies to any acts or omissions done by the person or official for the purpose of illicitly obtaining any benefits; and the fraudulent use or concealment of property derived from corruption. It is open to States Parties to apply it to other forms of corruption if the countries involved so agree. The instrument also applies to attempted offences and to various forms of participants such as conspirators and those who instigate, aid or abet offenders[123]. States Parties are required to adopt these acts or omissions, as well as transnational bribery and illicit enrichment (below) as domestic offences, and to ensure that adequate provision is made to facilitate the required forms of cooperation, such as mutual legal assistance and extradition. [124]

The questions of transnational bribery and illicit enrichment are dealt with separately. Faced with constitutional difficulties on the part of some States, these offences are made subject to the Constitution and fundamental principles of the legal system of each State Party, acknowledging that constitutional constraints might preclude or limit full implementation. Where this is the case and a State Party does not establish offences for these reasons it is still obliged to assist and cooperate with other States Parties in such cases "…insofar as its laws permit." Transnational bribery and illicit enrichment are also designated as "acts of corruption", making them subject to the other provisions of the instrument.

The transnational bribery provision requires that States Parties "…shall prohibit and punish…" the offering or granting of a bribe to a foreign government official by anyone who is a national,

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[118] See article 2 paragraph 2 and article 3 paragraph 2.

[119] OAS General Assembly resolution AG/res.1398 (XXVI-0/96) of 29 March 1996, annex. All OAS instruments are available in Spanish, English, French and Portuguese.

[120] Argentina, Bahamas (Commonwealth), Bolivia, Canada, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Trinidad and Tobago, United States of America, Uruguay and Venezuela.

[121] Article XXIII.

[122] Article I.

[123] Article VI.

[124] Article VII.

habitual resident, or a business domiciled in their territory. [125] The language is broader than that of the equivalent provisions of the OECD Convention, covering not only bribery where the purpose relates to a contract or business transaction, but also any other case where the bribe relates to “any act or omission in the performance of that official’s public functions.” The illicit enrichment provision simply requires the establishment of an offence the accumulation of a “significant increase” in assets by any government official if that official cannot reasonably explain the increase in relation to his lawful functions and earnings.

In addition to the foregoing criminalisation requirements, which are essentially mandatory, States Parties are also asked to consider a series of further offences. If adopted, these also become “acts of corruption” under the Convention, and trigger its cooperation requirements even among States that have not done so[126].

- Improper use of confidential information by an official;
- Improper use of government property by an official;
- Seeking any decision from a public authority for illicit gain; and
- Improper diversion of any state property, monies or securities.
- The Convention creates a series of preventive measures, although as noted above, these are not mandatory: [127]
- Standards of conduct for public functions and mechanisms to enforce them;
- The instruction of government personnel on responsibilities and ethical rules;
- Systems for registering the incomes, assets and liabilities of those who perform public functions;
- Government revenue and control systems that deter corruption;
- Tax laws that deny favourable treatment for corruption-related expenditures;
- Protections for those who report corruption;
- Oversight bodies to prevent, detect, punish and eradicate corruption; and,
- The study of further preventive measures.

As with several other instruments, bank secrecy cannot be invoked as a reason for not cooperating, but where information protected by bank secrecy is disclosed, it cannot be used for purposes outside the scope of the initial request without authorization from the State which provided it. [128] The fact that an act of corruption involved political motives or purposes does not necessarily make any offences involved “political offences” so as to exempt them from legal assistance and extradition procedures. [129] The Convention does not require States Parties to create retroactive crimes, but it does apply to acts of corruption committed before it came into force. [130]

Mechanism for follow-up on implementation of the Inter-American Convention against Corruption

[125] Article VIII.

[126] Article XI.

[127] Article III.

[128] Article XVI.

[129] Article XVII.

[130] Article XIX.

Following the coming into force of the Inter-American Convention, the first Conference of States Parties was held from May 2-4 2001 in Buenos Aires to establish a mechanism to follow up on the implementation of the instrument. [131] It called for the establishment of a mechanism to promote implementation, follow up on specific Convention commitments, facilitate technical cooperation activities and facilitate harmonization of relevant national laws. A committee of experts is established to conduct technical analysis of their Convention and its individual provisions as implemented by States Parties. Its reports and recommendations would then be reviewed by the Conference of States Parties, which represents all of the countries involved and would have the authority to implement recommendations. The committee of experts would select countries impartially for review, obtain information using a questionnaire, and prepare a preliminary report. Each country reviewed would be notified in advance, and given an opportunity to review preliminary report texts. Ultimately, the Conference of States Parties would review final reports, which would then be published. The Committee of experts, which is called upon to adopt and disseminate its own procedural rules, is directed to make provision for the appropriate participation of civil society in this process.

Future Convention against Corruption

In recent years, the international community has demonstrated an unprecedented awareness of the gravity of corruption. Responding to the call of addressing corruption in a coordinated manner, the international community became engaged in the negotiation and the elaboration of several international legal instruments within different organizations, such as the Council of Europe, the European Union, the Organization of American States and the Organization for Economic Cooperation and Development.

With the exception of the OECD, all the other intergovernmental organizations under which the existing international legal instruments have been developed are regional. One remark that can be made in this connection is that countries facing similar problems and sharing, at least to a certain degree, similar legal practices have developed these instruments. These characteristics are reflected in the approaches taken and the choices made in these instruments. However, while the OECD Convention is the only instrument having comprehensive geographical coverage, the scope of the instrument remains rather limited. The instrument tackles solely a specific part of the global problem of corruption; i.e. the so-called "supply" side of the bribery of foreign public officials. Similar considerations must be made with regard to the United Nations Convention against Transnational Organized Crime. While comprehensive in its geographical scope, this instrument remains limited with regard to substantive scope.

Preconditions and Risks

[131] OAS General Assembly resolution AG/RES.1784 (XXXI-O/01), 5 June 2001, and Summary Minutes of the Conference of States Parties, annexed.

Tool 33 - National Legal Instruments

Description

Criminal Law

Sanctioning of corruption and related acts Corruption has been defined as the abuse of (public) power for private gain. This would include acts such as bribery, embezzlement and theft of public resources by public officials, fraud damaging the state and extortion, as well as the laundering of the proceeds from such activities. Certain other behaviours such as favouritism and nepotism, conflicts of interest and contributions to political parties may, under specific conditions, be considered worth sanctioning by means of administrative or criminal law. The difficulty of defining these types of acts as corruption lies in the fact that only from time to time do they actually cause damage either to the state, the individual, or to the public at large. Often the harm they cause consists mainly of a negative perception that ultimately results in a decrease in trust of the public towards the State.

Another measure worth considering is the criminalisation of the creation of slush funds, that is the accumulation of assets "off the books" with the purpose to use such funds to pay bribes. In many national legal systems, the creation of slush funds is not necessarily illegal. [132]

There is an increasing tendency, both at the international and national levels, to criminalize the possession of unexplained wealth by introducing offences that penalize any (former) public servants who are, or have been, maintaining a standard of living or holding pecuniary resources or property that are significantly disproportionate to their present or past known legal income and who are unable to produce a satisfactory explanation for this. Several national legislators have introduced such provisions and, at the international level, the offence of "illicit enrichment" or "unexplained wealth" has become an accepted instrument in the fight against corruption. [133] An alternative to criminalisation of unexplained wealth could be to provide, instead, for administrative sanctions that do not require the unconditional presumption of innocence and that do not carry the stigma of conviction or make a person liable to imprisonment. Examples would be loss of office, loss of licenses and procurement contracts, and exclusion from certain professions, etc. [134]

Since legal persons, in particular corporate entities often commit business and high level corruption, normative solutions must be developed regarding their criminal liability. This desire has been recognized by many jurisdictions and is provided for in some international legal instruments. Companies that do not have any risk of being dissolved and loosing their assets if they engage in, or tolerate, criminal activities of their staff, are unlikely to strengthen compliance with the law. This is especially true if there are incentives to not comply with the law, as is often the case in the context of corruption. Both, the UN Convention against Transnational Organized Crime and the Criminal Law Convention of the Council of Europe foresee establishing (criminal) liability of legal persons for the participation in the offences of active and passive corruption and money laundering.

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[132] Art. 8 of the OECD Convention and Art. V. of the OECD Recommendation (Note 3). See also the Report of the Expert Group Meeting on Corruption and its Financial Channels (Paris, 30 March to 1 April 1999), I.E.14 (k).

[133] For example, Hong Kong SAR Prevention of Bribery Ordinance Section 10; Botswana Corruption and Economic Crime Act, Art. 34; Organisation of American States, Inter-American Convention against Corruption, Art. IX; National Law of the Republic of Indonesia on combating the criminal act of corruption No. 31/ 1999, Art. 37

[134] For example, Italian Law No. 575/ 1965.

Confiscation of the proceeds of corruption

Confiscation of the proceeds of corruption should be obligatory and where proceeds per se cannot be confiscated, confiscation should be ordered for the equivalent value of the proceeds. In this regard, consideration for easing the evidentiary requirements needed in order to establish the illicit origin of the proceeds of corruption should be allowed. Various national legislators have introduced such provisions. They are all based on the concept that a public officials' property should be confiscated if they maintain standards of living, or if they control or possess pecuniary resources or property, that are disproportionate to their present or past known sources of income, and if they fail to give a satisfactory explanation in this regard[135]. The official is in the best position to explain how he or she came into these excessive possessions. Jurisprudence in most legal systems agree that courts can require defendants to establish (at least on the balance of probabilities) the existence of facts "peculiarly within their own knowledge". Such is the case with personal possessions. This does not reverse the burden of proof but simply establishes rules for the gathering and evaluation of evidence that allows the court to base its decision on a realistic foundation. Unexplained wealth that is totally out of proportion with past and present sources of income points to some sort of hidden income. Although such wealth may be totally legal (such as inheritance, gifts from wealthy relatives, or a win on the lottery) it is likely to be illegal if the owner cannot – or is unwilling to - provide a satisfactory explanation for it.

Both the Convention against Transnational Organized Crime and the Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988 provide a useful model with respect to easing the onus of proof and provides a procedural mechanism that can be of immense significance in anti-corruption efforts. The approach has both tactical and strategic appeal. As a tactical weapon, it offers a means of forfeiture that requires relatively few resources and involves little risk of unfairness or error. Placing the burden of identification and explanation of assets on the possessing official is tantamount to conducting psychological and tactical warfare against corruption. The constant fear of being required to account for ill-gotten possessions should give rise to a state of anxiety that would have a deterrent effect.

In easing this burden of proof and shifting the onus of proving ownership of excessive wealth onto the beneficiary, careful consideration must be given to the principles of due process, which in many jurisdictions are an integral part of the constitutional protection of human rights. To ensure consistency with constitutional principles, no change would be made in the presumption of innocence or the obligation of the prosecuting authority to prove guilt. What may be established is a procedural or evidentiary rule of a rebuttable presumption. Some countries, such as Italy[136] and the United States[137], in order to overcome constitutional concerns, provide for the

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[135] German Criminal Code Art. 73d, Singapore, Corruption Confiscation of Benefits Act, Art. 5; Art. 34a Norwegian General Civil Penal Code

[136] Other states like Italy also enriched their legal framework with special administrative procedures that allow for forfeiture and confiscation of assets independently of criminal conviction. Art. 2 ter of the Law 31 May 1965/ No. 575 foresees the seizure of property that is owned directly or indirectly by any person suspected of participating in Mafia-type associations when its value appears to be out of all proportion to his or her income or economic activities, or when it can be reasonably argued, based on the available evidence, that the said goods are the proceeds of unlawful activities or the use thereof. The seized property consequently becomes subject to confiscation if its lawful origin cannot be proved.

[137] The United States Anti-Drug Abuse Act 31 U.S.C. § 5316 foresees a so-called "civil confiscation". Differently from criminal confiscation, this type of measure does not require proof beyond reasonable doubt of the illicit origin of the property to be confiscated, but considers a probable cause to be sufficient. The rules of evidence of criminal procedure are not applicable. If the illegal origin is probable, the burden of proof shifts to the owner who has to prove the legal origin of the property. However, civil confiscation has been strongly criticized for violating the rights of defense and of private property.

possibility of civil or administrative confiscation. Unlike confiscation in criminal matters, this type of legislation does not require proof of illicit origin “beyond reasonable doubt”.

Instead, it considers a high probability of illicit origin and the inability of the owner to prove to the contrary as sufficient to meet this requirement. However, the more these sanctions resemble criminal penalties, the more they lead to criticisms based on human rights. It is interesting to note that Germany, in order to overcome concerns raised with regard to the presumption of innocence, has re-introduced the property penalty recalling medieval penal proceedings. This provision, as the name indicates, does not enable the confiscation of property of illegal or apparently illegal origin, but establish a real penalty that applies independent of the actual origin of the concerned assets. By introducing this provision, the legislature has tried to avoid any limitation of the presumption of innocence.

Laws to facilitate the detection of corruption

Although corruption is not a victimless crime per se, unlike most crimes, the victim is often not easily identifiable. Usually, those involved are beneficiaries in some way and have an interest in preserving secrecy. Clear evidence of the actual payment of a bribe can be exceptionally hard to obtain and corrupt practices frequently remain unpunished. The traditional methods of evidence gathering will often not lead to satisfactory results. Additional laws are needed providing for more innovative evidence gathering procedures, such as integrity testing, amnesty regulations for those involved in the corrupt transaction, whistleblower protection, abolition and/ or limiting of enhanced bank, corporate and professional secrecy, money laundering statutes, and access to information.

Money laundering statutes

Money laundering statutes can contribute significantly to the detection of corruption and related offences by providing the basis for financial investigations. Identification and recording obligations as well as the reporting of suspicious transaction, as it is also required by the UN-Convention against Transnational Organized Crime, will not only facilitate detection of the crime of money laundering but will also help identify the criminal acts from which the illicit proceeds originated. It is therefore essential to establish corruption as a predicate offence to money laundering.

Identification by financial institutions of the true beneficiaries of a transaction can often be difficult. Criminals engaged in money laundering typically use false identities. Financial institutions must refrain from entering into business relations where true identification is questionable and in particular when identification is impossible because of the use of company schemes that are mainly designed to guarantee anonymity. Furthermore, all relevant information regarding the client and the transaction need to be registered. In order to make this a manageable task, the obligation should exist, at a minimum, where the transaction exceeds a certain value or where the client wants to enter into a permanent business relationship with the institute, for example when opening an account. Regardless of the value of the single transaction, financial operators should be obliged to report such transactions that give rise to reasonable suspicions that the assets involved in the transaction derive from one of the predicate offences of money laundering. The reporting obligation should be established independent of the institute actually executing the transaction.

In order to support financial institutions in implementing this obligation, “Red Flag Catalogues” indicating instances in which they should pay special attention to transactions having no apparent economic or obvious lawful purpose, should be provided to them. Criteria relating to corruption/money-laundering will be different from those “red flags” pointing towards drug-money laundering. It is possible to make distinctions between high-risk areas, industries and

persons, and risky transactions. It might therefore be advisable to include in the traditional lists of "red flags" those situations that point to possible corruption proceeds.

The above obligations should not necessarily be limited to institutions entitled to execute financial operations. Instead, it should also be considered to extend the obligations to other businesses that are typically conducting transactions of considerable value, such as broker/dealers in gold, company shares and other precious commodities.

The statute should also provide for sufficient penalties for violation of the obligations. In some jurisdictions it might be considered to provide for procedures that ensure the adequate protection of the bank personnel.

Limitation of bank and professional secrecy as well as the introduction of adequate corporate laws

Banking secrecy laws are a serious obstacle to successful corruption investigations. The Convention against Transnational Organized Crime and the Drug Convention address the issue of bank secrecy in the context of confiscation. Efforts at reducing secrecy of account ownership has resulted in some traditional tax havens adjusting procedures to allow more access to accounts and greater possibility of confiscation, while other jurisdictions have used the opportunity to capture a greater share of the international market by offering enhanced bank secrecy.

However, bank secrecy is not the only obstacle to investigations. Accounts opened in the name of a company often provide for the true beneficiaries to remain anonymous. Banking laws and regulations that prevent information on the true identity of beneficiaries from being obtained have been identified as a source of concern at various international fora, such as the Paris Expert Group on Corruption and its Financial Channels and the OECD Working Group on Corruption. [138].

Access to information legislation

Access to Information Laws usually adopts four methods to achieve its objective. It usually provides that (1) every government agency is required to publish an annual statement of its operations, (2) a legally enforceable right of access to documented information held by the government be recognized, subject only to such exceptions as are reasonably necessary to protect public interests or personal privacy. (3) A person's right to apply to amend any record containing information relating to them which, in their opinion, is incomplete, incorrect, out of date or misleading be recognized and (4) independent bodies provide a two-tier system to appeal against any refusal to provide access.

Administrative Law

Judicially-supervised administrative procedures, involving the citizens' right to a hearing, notice requirements and a right to a statement of reasons for a public official's decision, are all effective mechanisms for preventing and controlling corrupt practices because they give civil society a tool to challenge abuse of authority. This is also an effective mechanism for citizens to challenge non-transparent policymaking.

By creating judicially enforceable procedural administrative rights, politicians decentralize the monitoring function to their constituents, who can bring suits to place public pressure in cases of politicians of bureaucratic abuse of power. In these cases, one could state that administrative

[138] Report of the Expert Group Meeting on Corruption and its Financial Channels (Paris, 30 March to 1 April 1999), I.C.6 (f), and I.D.11.

substantive laws and procedures are means of ensuring accountability and act as instruments of political control of the state. They serve the purpose of monitoring and disciplining public officials.

There are also some drawbacks that need to be taken into account when introducing administrative law as an anti-corruption tool. First, extensive administrative procedures may entail a slower, less flexible administration. At the same time, these procedural rights that extend to politicians' opponents may be used for political purposes in order to gain electoral advantages.

Tool 34 - Dealing with the Past; Amnesty and Other Alternatives

Purpose

The purpose of tools such as amnesty, reconciliation and other alternatives to endless debate concerning past wrongs is to avoid the possibility that new anti-corruption initiatives will be overwhelmed by the past. Imposing amnesty, for example, will help to ensure compliance with newly created laws by offering a chance to make a new start. Anti-corruption initiatives, especially those aimed at strengthening the investigation and prosecution of corruption, have a better chance to succeed if they make a fresh start, break with the past and signal a change of climate.

Description

Parties to offences can be encouraged to come forward and offer evidence. This inevitably gives rise to the question of amnesty. In Central and Eastern Europe, legal provisions can grant immunity from prosecution to bribe-givers who report the crime within 24 hours. However, this provision has historically not operated effectively, if at all. In the US, the first actor involved in an offence sanctioned by the Securities and Exchange Commission who “blows the whistle” is commonly granted immunity. This arrangement can introduce an element of risk into the corruption equation: since all of the involved persons are dependent on each other’s continuing silence, each has absolute power over the other.

Granting Amnesty. By declaring that matters occurring before a certain date will not be prosecuted requires that legal provisions be implemented. This amnesty should take effect when the new law comes into force or when a new anti-corruption authority becomes operational. However, exceptions to broad amnesty should be contemplated in cases where the crime is so offensive as to require investigation and prosecution regardless of whether doing so will over-burden the newly implemented anti-corruption authority. Since selection of unforgivable matters can be delicate, some important parameters should be taken into consideration.

- The person or persons making the decision to proceed regardless of amnesty towards other crimes must have the trust of the public;
- The decision to proceed must be definitive.

The mechanism used for determining such exceptional cases should have the trust of the public. The responsible committee should comprise people of high integrity and who enjoy the trust of the public. All allegations regarding cases of corruption that occurred before the effective date of the amnesty should be analyzed by the committee and then either forwarded for further investigation or filed.

Truth and Reconciliation. A process of “truth and reconciliation” would require a public admission of the act to be forgiven and the redistribution of the proceeds in exchange for immunity from prosecution. Public forgiveness without restitution of the proceeds of the corruption would probably not be accepted by the community. It may be the case that those reporting their crimes are unable to make full restitution. In such cases, the possibility of not insisting on full restitution should be considered. Instead, the current property of those requesting truth and reconciliation could be taxed, regardless of its actual origin. The percentage to be paid in tax should also be determined. Criminals who admit their involvement in corrupt practices may consider an admission to be a chance for clearing up their past criminal activities in a relatively “cheap” way. The public should be made aware of the need for and advantages of this reconciliation mechanism. If this sort of ‘plea bargaining’ was not permitted, it is likely that many past offences will be unreported and opportunities to collect at least partial repayments will never materialize.

In addition to admitting to the corruption offences, amnesty-seekers should have to identify all other persons involved in the offences. In addition, they should be encouraged to reveal any other information in their possession regarding corrupt practices.

Recovered monies and property should be paid into an "integrity fund" which could be used to provide higher incentives for the public service in general and to support governments' anti-corruption strategies.

Preconditions and Risks

It is advisable to use amnesty, reconciliation and other forms of dealing with the past rather than the traditional criminal justice system if:

- The government is creating a newly organized anti-corruption agency;
- Corruption has been, or still is, systemic and the large number of cases will probably paralyse the new agency; and
- Many of the public servants, because of their low salaries, were forced to use corrupt practices in order to survive

Although the approach of making a fresh start will have moral, practical and political implications, if this is not addressed at the outset, the entire new anti-corruption strategy may be at risk.

First, in new environments characterized by changed rules and different expectations, it can be difficult to judge the acts committed in the old environment according to new standards.

Second, newly developed public awareness can cause heightened expectations that government is serious about fighting corruption. From a pragmatic point of view, there is a real danger that a new anti-corruption authority will be overwhelmed by complaints concerning matters alleged to have occurred years ago. Attempts to investigate past allegations of corruption are not as likely to produce concrete evidence as more recent allegations. Witnesses forget facts, documents can be difficult to locate and the actors may no longer be in the jurisdiction. It might therefore be preferable to use available resources to address present and future cases.

Third, the political will to defeat corruption is likely to be undermined by influential persons who might be adversely affected by effective anti-corruption action.

Therefore, a provision to investigate "old" offences could be included in the new law and could appear as follows:

"*Investigation of pre-[date] offences*

1) Notwithstanding section [ ], the [anti-corruption authority] shall not act as required by that section

   a) With respect to alleged or suspected offences committed before [date] except in relation to –

   b) Persons not in [the country] or against whom a warrant of arrest was outstanding

c) On [date];

2) Any person who has been interviewed by an officer of the police or of the [anti-corruption authority] and to whom allegations have been put that he has committed an offence referred to in this [law];

3) An offence which the [defined and established committee] on reference by the [head of the anti-corruption authority] considers sufficiently serious to warrant action.

4) A certificate in the hands of the chairman of the committee stating that the committee considers an offence sufficiently serious to warrant action shall be conclusive evidence of that fact.

The decision of the committee under subsection 1(c) shall be final and not liable to questioning in any legal proceedings."

Without the exceptions the provision would read:

"Notwithstanding section [ ], the [anti-corruption authority] shall not act as required by that section in respect of alleged or suspected offences committed before [date]."

Tool 35 - Standards to Prevent and Control the Laundering of Corruption Proceeds

Purpose

The prevention and control of money laundering activities has two main aims: to protect the stability of the international financial system; and to facilitate law enforcement activities.

Description

The connection between corruption and the laundering of its proceeds is not new and has been highlighted on several occasions in the past. In 1997, the United Nations General Assembly expressed concern (in Resolution A/ RES/ 51/ 59) about the links between corruption and other serious forms of crime, in particular organized crime and economic crime, including money laundering. Since then, the UN Commission on Crime Prevention and Criminal Justice has addressed the connection between corruption and money laundering in its annual sessions. [139]. Other international agencies have also been active in this area. Both the OECD's Convention on Combating Bribery of Officials in International Business Transactions and the Council of Europe's Criminal Law Convention on Corruption address both transnational corruption and the laundering of its profits. [140]

The link between money laundering and corruption is not only related to the laundering of corruption proceeds, but goes much further. Money laundering as such produces a corruptive effect on national and international financial systems. Nevertheless, for most banks and bankers the decision of whether or not to refuse criminal proceeds is based exclusively on financial considerations. As long as the possible returns outweigh the risks for both the banks and bankers, money laundering will continue to erode and undermine the financial system. Although banks recently have - or at least pretend to have - recognized the financial advantages to be made from complying with this change of mind-set, this is still not reflected in the actual practice of carrying out business, and in particular in the internal reward system. As long as the financial system continues to reward its employees for attracting new business but does not award them for being cautious when dealing with clients, the flow of illegal proceeds will continue to corrupt individuals and institutes alike. [141]

Due to the close link between corruption and money laundering, various international fora have noted that a comprehensive anti-corruption strategy must also include actions to prevent and control the laundering of corruption proceeds. [142]

The particular connection between money laundering schemes, under-regulated financial systems and corruption is also being given increased intention. The expert group meeting on corruption and its financial channels, held in Paris in April 1999, stated clearly that money laundering methods are not only being used in a phase *post delictum*, but also during and even

[139] Commission on Crime Prevention and Criminal Justice, "Promotion and Maintenance of the Rule of Law and Good Governance - Action against Corruption", *Report of the Secretary-General*, p. 7 and Addendum p. 5; Commission on Crime Prevention and Criminal Justice, *Report on the Seventh Session*, "Draft Resolution for Adoption by the Economic and Social Council", p. 13, and "Promotion and Maintenance of the Rule of Law: Action Against Corruption and Bribery", p. 49.

[140] OECD, Convention on Combating Bribery of Officials in International Business Transactions, 21. 11. 1997, Article 7; European Council, Criminal Law Convention on Corruption ETS No.173, Article 13.

[141] Oliver Stolpe, Geldwäsche and Mafia, *Kriminalistik*, No. 2, 2000, p. 99 and 101.

[142] *Report of the Expert Group Meeting on Corruption and its Financial Channels,* Paris, 30 March to 1 April, 1999.

before the bribe money is actually paid. Bribe givers and bribe takers are bound by confidentiality of a covert arrangement and seek to dissociate the origin of the bribe money from its destination. It was further noted that in order to camouflage the origin and destination of bribes, the respective financial flows are channeled through states and territories that do not possess a comprehensive and effective system to detect money laundering and similar illegal transactions. Their financial sectors are generally inadequately regulated and supervised, their legislation does not guarantee the judicial authorities' access to information, while their corporate laws allow the founding of shell companies and trusts to conceal the true identity of the beneficiary of transactions and the actual owners of funds. [143]

The actual transaction of bribe money is the most significant element of the offence of corruption. Once this money is transferred into an under-regulated financial system, investigators will find it extremely difficult – if not impossible – to gather evidence. Especially in cases of bribery of foreign public officials, it is most likely that this disguised method will be used. This represents a serious obstacle for the efficacy of the OECD Convention and other binding international instruments.

In their attempts to contain money laundering, national legislators and international organizations have emphasized that a comprehensive approach is needed that combines preventive (regulatory) and sanction-oriented measures. [144] The objective of the first measures is to prevent the abuse of the financial system for money laundering purposes, and to create a paper trail, which is a precondition for successful investigative work. The second component of the approach depends heavily on the criminal sanctioning of the various forms of money laundering, including the laundering of corruption proceeds.

Regulatory Approach

The following rules have been developed with the aim of preventing money laundering. [145]. However, they also follow a much broader agenda. Their primary goal is to establish a paper trial for all (including all legitimate) businesses and thereby to create "structures of global control" in the financial sector. [146] As regarding corruption prevention, the more difficult it becomes to hide and launder corruption proceeds, the greater the deterrent effect of anti-laundering legislation.

The "Know your Customer" Rule (KYC). The **KYC** aims at preventing financial institutes from doing business with unknown customers, but could acquire an entirely new dimension if it were applied to the beneficial owner. [147] When it is impossible to identify the beneficial owner because company schemes are used that are mainly designed to guarantee anonymity (such as IBC's, trusts, Anstalten, Stiftungen and joint accounts) financial operators should be clearly obliged not to enter into business relations. Although, when done seriously, this requirement is very demanding, it could provide a relatively manageable way to deal with companies incorporated in under-regulated financial centers. It would allow IBC's etc. to be isolated without having to blacklist the uncooperative financial centers, an approach that is still a source of controversy. [148]

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[143] *id*.

[144] *id*

[145] See the Basel Statement of Principles of 1998.

[146] Mark Pieth, "The Harmonisation of Law against Economic Crime," *European Journal of Law Reform*, 1999, p. 530 et seq.; idem, in: *European Journal of Crime, Criminal Law and Criminal Justice*, 1998, p. 159 et seq.

[147] FATF 1996 R. 11 and the related Interpretative Notes.

[148] Report of the Expert Group Meeting on Corruption and its Financial Channels (Paris, 30 March to 1

Due Diligence. The term “due diligence” refers to three additional relevant provisions:

- The obligation to be even more diligent in unusual circumstances; [149]
- The obligation to keep identification files and records on the economic background of unusual transactions; [150] and
- The obligation to inform the competent authorities about suspicious transactions. [151]

These rules have been promoted at the international and national level for quite some time now. However, large-scale money laundering cases continue to occur, even in those countries that have adopted the rules and in those financial institutes that advertise their compliance with those rules.

Revise Existing Red Flag Catalogues. The obligation to “pay special attention to all complex, unusual large transactions, and all unusual patterns of transactions, which have no apparent economic or visible lawful purpose” [152] is especially relevant. A series of criteria may lead to a transaction or business pattern seeming unusual, and it is almost certain that the criteria relating to corruption/money-laundering will be different from those “red flags” pointing towards drug-money laundering. It is possible to make distinctions between high-risk areas, industries and persons, and risky transactions. It might therefore be advisable to include in the traditional lists of “red flags” all those situations that point to possible corruption proceeds. For example, recent discussions among experts has led to the idea that regulations should be promulgated requiring financial institutions to report on account activity of all higher level politicians and government leaders. These indicators should encourage financial operators to apply special caution when dealing with large sums originating from areas with endemic corruption. Even greater caution should be exercised when the client or beneficiary performs an important public function, whether it be a head of state, minister, or party leader. Furthermore, clients involved in specific business sectors, such as the arms trade, should be asked to answer additional questions relating to the background of the transactions, the origin of the funds and their destination.

Sensitize Financial Operators. In order to sensitize financial operators and create a stimulus for financial institutions, money-laundering cases could be simulated. This form of integrity testing could help:

- To make financial operators more attentive; and
- To identify training needs.

In addition, disincentives and sanctions should be introduced for institutes or their personnel that fail the test.

Protection of Bank Personnel. Bank personnel that have used “whistleblower” anonymity to report suspicious transactions should be guaranteed protection.

Identify Non-complying Financial Institutions and Operators. Integrity testing could also be used as a pro-active approach to identify financial institutions and operators that, due to lack of will or capacity, do not comply with the rules of “due diligence” and “know your customer” or are actively involved in the laundering of monies. [153] Such institutions should then receive administrative sanctions. Depending on the seriousness of the failure to comply, the compulsory

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April 1999), I.C.6 (e).

[149] FATF 1996 R. 14.

[150] FATF 1996 R. 12 and 14.

[151] FATF 1996 R. 15.

[152] FATF R.14.

[153] *Report of the Expert Group Meeting on Corruption and its Financial Channels* (Paris, 30 March to 1 April 1999), I.E.14 (i).

administration of the institute and the temporary or permanent exclusion of the responsible financial operator from exercising the financial profession might be considered. If there is a suspicion that an institute is involved in money laundering, similar tests could also be used to gather supportive evidence. These must, however, guarantee the right to a fair trial and the presumption of innocence.

Criminal Law

The following criminal law provisions are relevant to fighting corruption/money-laundering.

- Make Corruption a Predicate Offence to Money Laundering. 154 In most legal systems, corruption has not yet been made a predicate offence to money laundering. Although the FATF recommendations and the currently negotiated UN Convention against Transnational Organized Crime have extended the scope of the criminal offence of money laundering to all serious offences, they still leave it up to each country to determine which offences are considered serious enough. This issue deserves to be studied from a technical rather than a political perspective. It might turn out to be a crucial instrument for making large-scale transnational bribery more risky and costly. [155]
- Introduction of Minimum Standards on International Co-operation. [156] In particular, the application of the clause "A Party shall not decline to render mutual legal assistance for criminal matters within the scope of this Convention on the ground of bank secrecy" should be promoted (This clause is contained in Article 12, paragraph 6 of the UN Convention against Transnational Organized Crime and in Article 9, paragraph 3 of the OECD Convention.) However, the most difficult topic in international co-operation is still how to secure prompt and effective assistance without forcing Member States to depart from their fundamental legal principles and from safeguarding human rights. [157] Again, here the instruments developed in the context of the Council of Europe could be a very valuable resource.
- Criminalize the Creation of Slush Funds. In many national legal systems, the creation of slush funds is not necessarily illegal. The diversion of funds "off the books" might represent a breach of the accounting rules of one country and perhaps even of its criminal law. [158] However, there is no guarantee that countries that have not signed the OECD instruments against bribery, and especially the under-regulated financial centres, would be ready to react to this diversion of funds. It is therefore necessary to promote the criminalization of slush funds at both the international and national levels. [159]
- Introduction of Criminal Liability of Companies. 160 The criminal liability of companies is a complementary but essential rule for increasing the risk for private enterprises of tolerating their staffs' involvement in corrupt practices, money laundering or other economic or financial crimes. Companies that do not run any risk of being dissolved and

[154] *Report of the Expert Group Meeting on Corruption and its Financial Channels* (Paris, 30 March to 1 April 1999), I.E.14 (a).

[155] See the Paris Conclusions, p. 4.

[156] *Report of the Expert Group Meeting on Corruption and its Financial Channels* (Paris, 30 March to 1 April 1999), I.C.7-8.

[157] See p. 4 of the Paris Conclusions.

[158] Art. 8 of the OECD Convention and Art. V. of the OECD Recommendation (Note 3).

[159] See also the *Report of the Expert Group Meeting on Corruption and its Financial Channels* (Paris, 30 March to 1 April 1999), I.E.14 (k).

[160] *Report of the Expert Group Meeting on Corruption and its Financial Channels* (Paris, 30 March to 1 April 1999), I.C.6 (b) and I.E.14 (c).

loosing their assets if they engage in, or tolerate, the criminal activities of their staff, are very unlikely to strengthen compliance with the law, especially if there are high incentives not to do so, as is often the case with corruption and money laundering.

Private Company Regulations

Promotion of Adequate Company Regulations. Inadequate company regulations that prevent the disclosure of information on the true identity of beneficiaries from being obtained have been identified as a source of concern at various international fora, such as the Paris Expert Group on Corruption and its Financial Channels and the OECD Working Group on Corruption. [161]This is an area in need of more extensive study. [162]However, new laws on meaningful registers might prove unnecessary if clients in the financial sector are made to provide thorough identification. Some of the provisions described above already apply to all FATF Member Countries and - with minor modifications - to the Caribbean Financial Action Task Force (CFATF). Indirectly, through the United Nations and OAS model codes, they have also been exported to other areas of the world. In some regions they have been picked up and embedded in binding international or national law[163]. To some extent, the details may have been delegated to the self-regulation bodies of the financial industries. And the worldwide coverage goes way beyond the banking sector and includes all sorts of financial intermediaries. However, at this point, the challenge is no longer to merely ensure the adoption of the FATF recommendations at the global level, but also to enforce them through proper training, controls and sanctioning.

Measures at the International Level

There are at least four different ways to promote harmonized substantive standards for under-regulated financial centers. [164]

Step-by-Step Approach. The under-regulated financial centers should be encouraged to join initiatives that promote a step-by-step approach to reach compliance with the FATF recommendations. Groups like the OECD Working Group on Bribery or the UN Global Offshore Forum have been established for this purpose. Under-regulated financial centers should be convinced to introduce the standards without having to join such working groups, for example in the context of regional participant groups.

Listing of uncooperative jurisdiction. Under-regulated financial centers could be encouraged to make an effort to comply with international legislation or, alternatively, be listed as uncooperative if they continue to ignore international anti money laundering statutes. [165] Some international bodies are pursuing this or a similar approach to pressuring uncooperative offshore centers. However, legal obstacles are only partially responsible for a lack of cooperation. Many studies suggest that the insufficient responsiveness to mutual legal assistance requests and police cooperation inquiries seem to depend mainly on factual rather than legal obstacles. Law

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[161] *Report of the Expert Group Meeting on Corruption and its Financial Channels* (Paris, 30 March to 1 April 1999), I.C.6 (f), and I.D.11.

[162] See III.4 of the Limassol Conclusions.

[163] See the Council of Europe Convention 141 (see above note 3) and the EC Directive of 1991.

[164] UNODCCP, *Financial Havens, Banking Secrecy and Money Laundering*, Vienna, 29 May 1998. Control and Crime Prevention has created the Global Offshore Forum, an initiative aimed at denying criminals access to the global offshore financial services market for the purpose of laundering the proceeds of their crime.

[165] *Report of the Expert Group Meeting on Corruption and its Financial Channels* (Paris, from 30 March to 1 April 1999), I.E.13 (d).

enforcement agencies experience reluctance in responding to international legal aid requests, and not only in the so-called offshore centers. [166]

Isolation of Uncooperative Jurisdictions. As an alternative to coercion, insistence on strict customer identification for all financial operations by institutions in the OECD and the FATF areas, including the identification of beneficial owners, could indirectly isolate the unwilling under-regulated financial centers. However, the rules established on identification would require some clarification. No financial institution could simply rely on identification made by another financial institution domiciled in an under-regulated OFC. The identification would have to be repeated even in business relations with correspondent banks domiciled in such locations (perhaps with the exception of subsidiaries, if these are subjected to the same standards as the mother bank). [167]

Preconditions and Risks

Any initiative to create a binding international legal instrument has to take into consideration to what extent existing initiatives already contain the measures identified above. In this context, attention should be paid in particular to: General Assembly Resolutions 51/59 and 51/191; the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions; the Organization of American States' Inter-American Convention against Corruption; the Principles to Combat Corruption in African Countries of the Global Coalition for Africa; the Council of Europe's Criminal and Civil Law Conventions on Corruption and the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime; the 40 Recommendations of the Financial Action Task Force; and the recommendations of the UN Expert Group on Corruption and its Financial Channels, the UN Expert Group on Corruption held in Buenos Aires in 1999, the Global Forum against Corruption; and the work done by the Multidisciplinary Group on Corruption of the Council of Europe.

Several international organizations have recently focused on the issue of under-regulated financial centers. The perspectives vary according to the mandate of the organization.

Ad hoc Working Group of the Financial Stability Forum.

The Financial Stability Forum established an Ad-hoc Working Group on OFC's on 14 April 1999, in which several European, American and Asian states as well as the Basel Committee on Banking Supervision, the International Association of Insurance Supervisors, the International Organization of Securities Commissions and the OECD are participants. Its primary interest is to evaluate the risks OFC's pose for the stability of the world's financial system (by addressing prudential and market integrity concerns). It does, however, endeavor to develop a methodology to assess compliance with international standards. Its final report was published in April 2000.

UN International Financial Centre Initiative.

The UNODCCP has promoted this initiative to deny criminals access to international financial services for the purposes of laundering the proceeds of crime. It does this by ensuring that all centers have internationally accepted anti-money laundering measures in place and that the supervision and regulation of financial institutions reflect these standards.

The Financial Action Task Force (FATF).

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[166] Oliver Stolpe, Geldwäsche and Mafia, *Kriminalistik*, No. 2, 2000, p. 99-107.

[167] See III.5 of the Limassol Conclusions.

The forty recommendations of the FATF, updated in 1996, cover a central part of the concerns in regulating the financial sector. Apart from its regular work, it has established an ad hoc group on "non-co-operative jurisdictions."

The Council of Europe

The Council of Europe Convention on Money Laundering, Search, Seizure and Confiscation of Proceeds from Crime, its Convention on Mutual Legal Assistance in Criminal Matters and its Criminal and Civil Law Conventions on corruption[168] - together with the Group of States against Corruption (GRECO) Agreement Establishing the Group of States Against Corruption[169] - contribute considerably to a legal framework of co-operation.

The European Union.

The European Union is primarily approaching the issue of corruption with a view to protecting its financial interests. Therefore, its work on OFC's is set in the context of preventing tax fraud. [170] Further input may be expected from the EU initiatives to combat serious organized crime, especially in the area of international co-operation. [171]

With all these initiatives at the international and regional levels regarding the issue of offshore centers, there is the great danger of duplication. Close coordination and information sharing are therefore essential if duplication of efforts and wasting resources is to be avoided.

[168] See Note 3.

[169] GRECO, Strasbourg, 12 May 1999.

[170] See Note 3 of the "Euroshore" Programme and the projects for a "Corpus Iuris," a core criminal code on EU-fraud.

[171] See the Action Plan on Combating Organised Crime of 28 April 1997 and the recent decisions of the European Council at its Tampere Meeting of 15 and 16 October 1999. See especially N. 57 of the Presidency's Conclusions.

Tool 36 - Legal Provisions to Facilitate the Gathering and Use of Evidence in Corruption Cases – Easing the Burden Of Proof

Purpose

The purpose of this tool is to increase the risk for corrupt public officials of being convicted in a court of law.

Description

Unlike most crimes, corruption offences usually have no obvious or complaining victim. More often than not, those involved are beneficiaries having an interest in preserving secrecy. Clear evidence of the actual payment of a bribe can be exceptionally hard to obtain and corrupt practices frequently remain largely unpunished. While evidence of specific corrupt acts is often lacking, circumstantial evidence is frequently available.

Since, in some countries, criminal phenomena such as organized crime, drug trafficking, corruption and money laundering have reached dimensions that undermine the very basis of their economic, political and social systems, the time may have arrived where government should consider easing its burden of proving guilt to gain conviction of the accused. Furthermore, due to growing globalization, the fight against these crimes has increasingly become the responsibility of a larger number of countries within the same geographical region, if not of the world community. The steadily growing number of regional and international initiatives and instruments to streamline the fight against these crimes - such as the 40 recommendations of the FATF against money laundering, the OECD and OAS Conventions against corruption, the UN Convention against drug trafficking and the UN Convention against Transnational Organized Crime - are clear signs of increasing world-wide intolerance of these crimes.

With respect to easing the burden of proof necessary to convict corrupt individuals, the current practice of evidence gathering and evaluation found in most of our courts, independent of their legal tradition, does not differ significantly from the above-proposed measure of easing the burden of proof. Conviction is a reaction to an event that took place in the past. Only the accused themselves will know what really happened, while all the other players in the criminal procedure rely on probabilities. Conviction becomes possible once these probabilities are high enough to leave no reasonable doubt that a certain event took place and in a certain manner.

Increase the Significance of Circumstantial Evidence. With the increase of the levels of corruption and the complexity of methods used to transfer bribes, in many societies there is a growing need for a legal framework to increase the effectiveness and efficiency of the investigation, prosecution, conviction and sanctioning of corrupt practices. Laws should be made enforceable by increasing the significance of circumstantial evidence.

In this regard, national and international legislative bodies have introduced a number of alternatives. What they all have in common is that they focus on the results of criminal acts rather than on the illicit practice at its root. Two main strategies can be identified in this context. One aims at criminalizing inexplicable wealth while the other focuses on facilitating the confiscation of such wealth.

Criminalizing the Possession of Inexplicable Wealth. There is an increasing tendency to criminalize the possession of unexplained wealth by introducing offences that penalize any (former) public servants who are, or have been, maintaining a standard of living or holding pecuniary resources or property that are significantly disproportionate to their present or past known legal income and who are unable to produce a satisfactory explanation for this. Several national legislators have introduced such provisions and, also at the international level, the

offence of “illicit enrichment” or “unexplained wealth” has become an accepted instrument in the fight against corruption. [172]

Criminal Confiscation of Inexplicable Wealth. Various national legislators have introduced confiscation provisions requiring a less challenging evidentiary basis. They are all based on the concept that public officials’ property should be confiscated if they maintain standards of living, or if they control or possess pecuniary resources or property that are disproportionate to their present or past known sources of income, and if they fail to give a satisfactory explanation in this regard. The beneficiary of excessive wealth, and nobody else, is in the best position to explain how they came into these possessions. The jurisprudence of most legal systems agrees that courts can require defendants to establish (at least on the balance of probabilities) the existence of facts “peculiarly within their own knowledge”. Such is the case with personal possessions.

Property Penalty and other Measures to Remove the Illegally Earned Goods. Due to the strong constitutional protection of the presumption of innocence and of private property in some legal traditions, legislators have been forced to produce more innovative approaches. Some Member States have decided to (re)introduce instruments which very much recall medieval penal proceedings. In particular, the “property penalty” and similar tools have been adopted in various Member States. These provisions, as the name indicates, do not confiscate property of illegal or apparently illegal origin, but establish a real penalty that applies independently of the actual origin of the concerned assets. By introducing this provision, the legislature has tried to avoid any limitation of the presumption of innocence. Where one can’t or is unwilling to explain the origins of his property, the government presumes that its origins were illicit.

Civil and Administrative Law Confiscation. Some countries, Italy[173] and the United States[174] for example, also provide for the possibility of civil or administrative confiscation in order to avoid concern about unconstitutionality. Unlike confiscation in criminal matters, this type of legislation does not require proof of illicit origin “beyond reasonable doubt”. Instead, it considers a high probability of illicit origin and the inability of the owner to prove the contrary, as sufficient to meet this requirement. However, the more these sanctions resemble criminal penalties the more they lead to criticisms based on human rights.

Disciplinary Action. Another alternative is to leave the criminal law context aside and provide, instead, for administrative sanctions that do not require an unconditional presumption of innocence and that do not carry the stigma of criminal conviction. Examples would be loss of office, loss of licenses and procurement contracts, and exclusion from certain professions, etc. [175]

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[172] For example, Hong Kong SAR Prevention of Bribery Ordinance Section 10; Botswana Corruption and Economic Crime Act, Art. 34; Organisation of American States, Inter-American Convention against Corruption, Art. IX

[173] Other states like Italy also enriched their legal framework with special administrative procedures that allow for forfeiture and confiscation of assets independently of criminal conviction. Art. 2 ter of the Law 31 May 1965/ No. 575 foresees the seizure of property that is owned directly or indirectly by any person suspected of participating in Mafia type associations when its value appears to be out of all proportion to his or her income or economic activities, or when it can be reasonably argued, based on the available evidence, that the said goods are the proceeds of unlawful activities or the use thereof. The seized property consequently becomes subject to confiscation if its lawful origin cannot be proved.

[174] The United States Anti-Drug Abuse Act 31 U.S.C. § 5316 foresees a so-called "civil confiscation". Differently from criminal confiscation, this type of measure does not require proof beyond reasonable doubt of the illicit origin of the property to be confiscated, but considers a probable cause to be sufficient. The rules of evidence of criminal procedure are not applicable. If the illegal origin is probable, the burden of proof shifts to the owner who has to prove the legal origin of the property. However, civil confiscation has been strongly criticized for violating the rights of defence and of private property.

[175] For example, Italian Law No. 575/ 1965.

Preconditions and Risks

Each of the measures described above is likely to be criticized as violating basic human rights. Most probably, the legislature will be accused of trying to circumvent the presumption of innocence. Critics will assert that the introduction of “harsher” measures by other countries does not justify similar action in their own country, because each State must shape its laws according to the constitutional requirements, legal traditions and specific criminal phenomena of its own society. [176] There are a series of solid arguments that can be expressed in this respect.

First. While, for countless crimes, it might be difficult and unnecessary to attempt to precisely define the stage at which this evidential burden shifts onto the defence, this is possible in the case of corrupt officials. Unexplained wealth that is out of proportion with past and present sources of income points to some sort of hidden income. Although this might be totally legal (such as inheritance, gifts from wealthy relatives, or lottery winnings) it is most likely to be illegal if the owner cannot – or is unwilling to - provide a satisfactory explanation for it. However, in order to meet legitimate human rights concerns, the approach chosen – as outlined above – should not change procedural law. The burden of proof should rest with the prosecutor and only when there is a clear case of assets that greatly exceed a known income, it should then be the responsibility of the defendant to explain the possession of unexplained wealth.

Second. Generally, the principle of the presumption of innocence does not prohibit legislatures from creating criminal offences containing a presumption by law as long as the principles of rationality and proportionality are duly respected. [177] Various national legislators have already established norms that, to some extent, oblige the accused to produce evidence to refute a legal presumption. [178] Courts concerned with judging whether or not these norms were constitutional have found them to be in accordance with the principle of the presumption of innocence. [179]

Third. With regard to confiscation provisions, the tendency to shift the burden of proof raises two questions, First, is the principle of the presumption of innocence applicable at all? Second, if it is, does this require the same levels of proof needed for criminal liability? In many national

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[176] Derek Hodgson, *Profits of Crime and their Recovery*, p. 82.

[177] European Court of Human Rights, Salabiaku Case of 7 October 1988, http://www.dhcour.coe.fr/hudoc/Vi…cemode+&RelatedMode+0&X=605102225; European Commission of Human Rights, No. 12.386/66, 15.4.1991; Hong Kong Court of Appeal, Attorney General v. Lee Kwong-kut, AC 951, 1993 and Attorney-General vs. Sin Yau Min No. 88, 1991; the German High Court (Bundesverfassungsgericht Entscheidungssammlung 74, 358); Daniel R. Fung, *Anti-Corruption and Human Rights Protection: Hong Kong's Jurisprudentially Experience*, paper presented at the 8th International Anti-Corruption Conference, http://www.transparency.de/iacc/8th_iacc/papers/fung.html. For a comprehensive analysis of the justifiability of the offence of illicit enrichment see: B. De Speville, *Reversing the Onus of Proof,* paper presented at the 8th International Anti-Corruption Conference, http://www.transparency.de/iacc/8th_iacc/papers/despeville.html

[178] For example, the Dutch Ministry of Justice is currently elaborating an article that penalises money laundering and according to which it is sufficient to prove that the proceeds “apparently” originate from some crime. Similar regulations have been introduced in Malta and Chile. The French Customs Code also contains, in its Art. 414, a presumption by law that any person in possession of goods while entering France without declaring them is presumed to be legally liable unless he or she can prove a specific event of *force majeure* to exculpate him.

[179] The Hong Kong Court of Appeal with regard to Section 10, Hong Kong Prevention of Bribery Ordinance, Attorney General v. Hui Kin Hong, Court of Appeal No. 52, 1995; Attorney General v. Lee Kwong-kut, AC 951, 1993; See also European Court of Human Rights, Salabiaku Case of 7 October 1988; European Commission of Human Rights, No. 12.386/66, 15.4.1991 with regard to Art. 414 of the French Customs Code; The Italian High Court of Penal Cassation., Section.VI., 15.4.1996, in Cass. pen. 1996, 3649 ff. And the Italian Constitutional Court Ordinance. No. 18/ 1996, in *Legislazione penale,* 1996, 559 ff. with regard to Art. 12 sexies of the Law No. 356/ 1992 .

legal systems, confiscation is not considered a penalty but a "compensating measure" as long as it only aims at depriving the offenders of whatever they have gained illegally and therefore have no right to possess. [180] Its purpose is simply to put the offenders into the same (economic) situation in which they found themselves before committing the crime. The aim, unlike a penalty, is not to inflict any punishment.

Fourth. Neither the principle of rationality nor that of proportionality impedes the introduction of easing the burden of proof, as outlined above.

Proportionality

In view of the urgent need for more effective laws against corruption, the provisions argued for above must be proportional. This is also because some corrupt conduct, in the judiciary for example, might put at risk the very system that should be guaranteeing the constitutional rights of due process and fair trials. Easing the evidential burden while respecting the basic principle of the presumption of innocence is not therefore simply justifiable but also desirable. However, the aim should be to promote only those laws that respect international human rights norms, including the principle of the presumption of innocence. The challenge is to strike the right balance between society's need to protect itself against corrupt practices, and safeguarding accused persons from unfair and unjustified intrusions into their privacy or wrongful conviction. [181]

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[180] The situation is different with respect to confiscation of the *instrumenta sceleris* or *producta sceleris*. In this context, in addition to the preventive scope a penalty like effect might prevail.

[181] B. De Speville, *Reversing the Onus of Proof*, paper presented at the 8th International Anti-Corruption Conference, http://www.transparency.de/iacc/8th_iacc/papers/despeville.html

Tool 37 -Whistleblower Protection

Purpose

The purpose of whistleblower protection is to encourage people to report crime, civil offences (including negligence, breach of contract, breach of administrative law), miscarriages of justice and health and environmental threats by safeguarding them against victimization, dismissal, and other forms of reprisal. [182]

Description

The culture of inertia, secrecy and silence breeds corruption. People are often aware of forms of misconduct but are frightened to report them. Recent public inquiries into major disasters and scandals have shown that this culture in the workplace has cost hundreds of lives, damaged thousands of livelihoods, caused tens of thousands of jobs to be lost and undermined public confidence in major institutions. In some of these cases, victims may have been compensated but no one was held accountable for what happened. This culture persists because it is almost certain that the person who "blows the whistle" would be victimized. Therefore, to overcome this and to promote a culture of transparency and accountability, a clear and simple framework must be established that encourages "whistle-blowing" and protects such "whistleblowers" from victimization or retaliation.

A Law to Protect Whistleblowers.

The main purpose of whistleblower laws is to provide protection for those who, in good faith, report cases of mal-administration, corruption and other illicit behavior inside their organization. Some whistleblower laws are only applicable to public officials, while others provide a wider field of protection including private sector organizations and companies. Experience shows that the existence of a law alone is not sufficient to instill trust in potential whistleblowers. The law must provide for a mechanism that allows the institution to deal with the content of the message and not the messenger. In other words, the disclosure must be treated objectively and even if it proves to be false, the law must apply as long as the whistleblower acted in "good faith". It must also apply irrespective of whether or not the information disclosed was confidential and the whistleblower therefore might have breached the law by blowing the whistle.

Prevention. The first aim of any whistleblower act is to prevent the person making the disclosure from being victimized, dismissed or treated unfairly in any other way, for having revealed the information. The best way to do this is to keep the identity of the whistleblower and the content of the disclosure confidential for as long as possible.

Deterrence. Furthermore, the law should establish an offence for employers to take detrimental action against whistleblowers if they made the disclosures in accordance with the law.

Compensation. The law should oblige the recipient of the disclosure to treat its content and the identity of the whistleblower with confidentially. It should also contain rules providing for compensation or reinstatement in case whistleblowers suffer victimization or retaliation for disclosing the information. In the case of dismissal, it might not always be acceptable for

[182] Estelle Feldman, *Protection of Whistleblowers*, paper presented at the 9th International Anti-Corruption Conference, http://www.transparency.de/iacc/9…pers/day3/ws7/d3ws7_efeldman.html: John Feneley, *Witness Protection Schemes – Pitfalls and Best Practices*, paper presented at the 8th International Anti-Corruption Conference, http://www.transparency.de/iacc/8th_iacc/papers/feneley.html; Elaine Kaplan, *Whistleblower Protection in the United States Government*, paper presented at the Global Forum on Fighting Corruption , http://www.usia.gov/topical/econ/integrity/document/kaplan.htm

whistleblowers to be reinstalled in their position. The law should therefore provide for alternative solutions by obliging employers either to provide for a job in another branch or organization of the same institution, or to pay financial compensation.

Co-ordination with the Legal Framework. The part of the whistleblower law that seeks to protect whistleblowers from unfair dismissal must be coordinated with the labour laws of single countries. In particular, where the "employment-at-will" doctrine or similar legal principles allow employers to dismiss employees without reason, the law must create exceptions from this guiding principle. Protections for an employer should guarantee that "blowing the whistle" does not become an easy way to avoid dismissal or to avoid other form of disciplinary action.

Who to Turn To. Generally, the law should provide for at least two levels of institutions to which whistleblowers can report their suspicions or offer evidence. The first level should include entities within the organization for which the whistleblower works, such as supervisors, heads of the organization or internal or external oversight bodies created specifically to deal with mal-administration. If the whistleblower is a public servant he or she should be enabled to report to bodies such as an Ombudsman, an anti-corruption agency or an Auditor General.

Whistleblowers should be allowed to turn to a second level of institutions if their disclosures to one of the first level institutions have not produced appropriate results, and in particular if the person or institution to which the information was disclosed.

- Decided not to investigate:
- Did not complete the investigation within a reasonable time;
- Took no action regardless of the positive results of the investigation; or
- Did not report back to the whistleblower within a certain time.

Whistleblowers should also be given the possibility to directly address the second level institutions if they:

- Have reason to believe that they would be victimised if they raise the matter internally or with a prescribed external body; or
- Reasonably fear a cover-up.

Second level institutions could be designated members of the parliament, the government or the media.

Implementation. Experience shows that whistleblower laws alone will not encourage people to come forward. In a survey carried out among public officials in New South Wales, Australia, regarding the effectiveness of the protection of the Whistleblower Act 1992, 85% of the interviewees were unsure about either the willingness or the desire of their employers to protect them. 50% stated that they would refuse to make a disclosure for fear of reprisal. The ICAC New South Wales concluded that, in order to help the Whistleblower Act work:

- There must be a real commitment within the organisation to act upon disclosures and to protect those making them; and
- An effective internal reporting system must be established and widely publicized in the organization.

A Law to Protect against False Allegations.

Since whistle blowing can be a double-edged sword, it is necessary to protect the rights and reputations of persons against frivolous, vexatious and malicious allegations. The events in post-war U.S.A., and the phenomenon of the "informer" in authoritarian states, underscores this danger. Whistleblower legislation should therefore include clear rules to restore damage caused by false allegations. In particular, the law should contain minimum measures to restore a damaged reputation. Criminal codes normally do contain provisions sanctioning those who

knowingly come forward with false allegations. It should be made clear to whistleblowers that these rules apply also to them if their allegations are not made in good faith.

Dealing with Whistleblowers and Managing their Expectations.

In order to ensure effective implementation of whistleblower legislation, those people or institutions that receive the disclosures must be trained in dealing with whistleblowers. Whistleblowers often invest a lot of their time and energy on the allegations they are about to make. They suffer from a high level of stress. If their expectations are not managed properly, it might prove fatal for the investigation and damage trust in the investigating body. In particular, the investigation process and the expected outcome (criminal charges, disciplinary action, etc.) must be explained to the whistleblowers, as well as the likelihood of producing sufficient evidence to take action, and the duration and difficulties of investigation. Whistleblowers should also be informed that the further the investigation proceeds, the more likely it would become for their identity to be revealed and for them to be subjected to various forms of reprisal.

Make the Whistleblower "Last the Distance". During the investigation, whistleblowers must be kept updated about progress made. Concern about the effectiveness of protection must be acknowledged. The law will never be able to provide full protection and whistleblowers must be made aware of this. It is therefore essential for the investigating body to make every effort to ensure that whistleblowers "last the distance" by informing them about all of the steps taken and to be taken and the implications for the continued anonymity of the whistleblowers, reactions they might encounter as well as other factors which may impact a whistle-blowers willingness to continue providing information to authorities. In addition, they should be given legal advice and counseling.

Avoid Leakage of Information. The most effective way to protect whistleblowers is to maintain confidentiality regarding their identity and the content of their disclosures. However, some country experiences show that the recipients of disclosures do not pay enough attention to this important factor. Quite often, information is leaked, rumours spread, and whistleblowers suffer from reprisals. It is not enough to sanction the leakage of information. Instead, it might be more effective to train the recipients of disclosures on how to conduct investigations while protecting the identity of the whistleblower for as long as possible.

Preconditions and Risks

Perception of Lacking Commitment. If whistleblowers are not convinced that the investigating body is committed, they will turn away and probably not take any further steps.

Credible Investigating Body. If there are no external independent bodies to which whistleblowers can directly turn, many potential whistleblowers will not voice their concern.

Clarity of the Law. Since the law must instill trust and the targeted audience often may have modest educational backgrounds, it must be drafted in an easily understandable way.