CIVIL LAW AND CORRUPTION

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a. General Considerations

One of the peculiarities of the Council of Europe approach in the fight against corruption is the possibility to tackle corruption phenomena from a civil law point of view. The basic idea behind such an approach is that, in certain cases (e.g. in competition situations), the party who has suffered damage because of an act of corruption, might be more interested to recover the money lost, than to see the other party, the presumed briber, in prison (although the latter might be a justified moral satisfaction).

As noted in the Programme of Action against Corruption of the Council of Europe, when fighting against corruption, civil law is directly linked with criminal law and administrative law. Where corruption is forbidden under criminal law, in most States a claim for damages based on the commission of the criminal act can be made. Civil law is an area of great complexity and has seldom been considered in the fight against corruption. Nevertheless, it has great potential to become one of the measures which may be used more frequently in the future, besides criminal law, to fight corruption.

A Civil Law Convention on Corruption has been adopted by the Committee of Ministers of the Council of Europe on 9 September 1999 and will be open to signature on 4 November 1999. This Convention aims at providing effective remedies for victims of corruption and enabling them to defend their rights and interest, including the possibility of obtaining damages.

b. Accessibility and effectiveness of civil law remedies in the fight against corruption

Therefore, in an overall strategy to fight corruption the remedies provided by civil law are not to be overlooked. However, these remedies are effective only where they are easily accessible to victims and provide an actual protection of their interests.

The lack of case-law in the civil law field as regards corruption cases shows that victims of corruption are reluctant to bring civil actions.

The main reasons for this behaviour could be both the general context in which corruption practices developed and legal difficulties encountered.

(i) General context

As to the first category of difficulties, close business partners or employees of those involved in bribery practices may be aware of what is happening, but they prefer to keep their suspicion undisclosed. In most cases of corruption, experience has shown that the main reasons behind the reluctance of victims to bring civil actions are commercial and economic considerations. These include the following:

- unequal position between employer and employee (i.a. lack of protection of whistleblowers) and between business partners (where loss of individual or corporate credibility may be an inhibiting factor);

- risks of losing both time and money;

- rules on confidentiality and on legal professional privileges;

- cultural acceptance of corruption as a part of business transactions;

- lack of incentives to bring civil actions;

- lack of transparency in the structures and procedures of the administrative bodies and private companies;

- lack of knowledge of customs in the foreign country;

- maintaining commercial relations (i.e. the bribing company which is receiving contracts from the bribed company will not proceed in a manner which would impede it from receiving future contracts).

Thus, in many situations it might be better for competitors to keep the corruption undisclosed (thus not bringing civil actions) and find another way to satisfy their interests.

(ii) Legal difficulties

- Uncertainty of the law

An important reason for not bringing civil actions in cases of corruption, is the uncertainty on the applicable law (i.e. which country's and which area of law applies) and the exact content of it. Victims of corruption may therefore be reluctant to bring an action as they have difficulties in assessing the chances of success. If the case is lost, they would in some countries be liable to pay the legal fees for themselves and the defendant.

- Problems of evidence

As far as problems of evidence are concerned, the following difficulties may arise when bringing a civil action in corruption cases:

- proving that corruption has occurred;

- proving that damage has occurred and assessing the amount of damage;

- proving the causal link between acts and damages (eg.proving that the unsuccessful competitor would have obtained the contract had an act of bribery not been committed);

- one of the main obstacles in finding evidence of corrupt behaviour arises from the lack of transparency in the structures and procedures of the administration and the private sector.

- Difficulties in enforcing judgements

Finally, execution of judgements is a fundamental aspect for the effectiveness of civil remedies in corruption cases.

Rules on state immunity could create problems when enforcing judgements against foreign States.

Furthermore, some States are not obliged to comply with decisions rendered to their detriment. In some cases States, although condemned, are not obliged by a judgement.

Finally, difficulties may arise when enforcing foreign judgements. In this context international co-operation is therefore fundamental.

The recently adopted Civil Law Convention is divided in two major parts: substantive (see Part A below) and procedural (see Part B below). Important provisions concerning the relation between European Community Law and the Convention are also contained in the text of the Convention (see Part C below).

A. Substantive provisions

(i) The identification of the "victim" of corrupt behaviour

Among the various civil law aspects linked to the problem of corruption, attention might first be paid in determining the victim(s) of this kind of offence.

Adequate protection must be given to the interests of parties who have suffered injury because of acts of corruption, for example if they have been unjustly excluded from public tendering procedures, or have lost other legitimate earnings, or have been forced to pay unjustifiably high prices compared with those on the market, because of the bribes which had to be paid in some sectors.

(ii) Definition of corruption for the purpose of civil law

Notwithstanding the apparent spread of the phenomenon of corruption (or perhaps because of it), it seems difficult to arrive to a common definition of corruption. Such a definition has been discussed for a number of years in different fora, such the United Nations, the OECD, the EU and the Council of Europe. In the context of the Council of Europe, the definition of corruption has been adapted according to the legal field from which corruption is considered. Therefore, while the Programme of Action against Corruption contains a very broad definition of corruption, the Criminal law Convention has opted for criminal law definitions related to each corruption offence considered.

The Civil Law Convention has instead opted for a general definition of corruption, which is defined as follows: "Requesting, offering, giving or accepting, directly or indirectly, a bribe

or any other undue advantage or prospect thereof, which distorts the proper performance of any duty or behaviour required of the recipient of the bribe, the undue advantage or the prospect thereof".

Such a definition is important as it lays the basis for any future work in the field of civil law and corruption, both at national and international level, and is a precondition for any agreement that can be reached at an international level in this field.

(iii) Legal remedies

As indicated above, States should provide victims of corruption with appropriate remedies to defend their rights and interest, including the possibility of obtaining damages.

When dealing with questions of compensation of damage, the text underlines the importance of the relation between the *damnum emergens* (i.e. the effective material damages) and the *lucrum cessans* (i.e. the lost profits), by providing for the possibility for claims for damages to include loss of profits and non-pecuniary loss, besides effective material damages.

In some countries it is possible to recover damages on the basis of the loss of an opportunity of success, which is determined on the basis of an assessment of probabilities.

Damages for non pecuniary loss which have been suffered as a result of corruption should be recoverable (like any other form of pecuniary damage) through civil proceedings.

For example, a consequence of corruption may be the loss of reputation. Therefore measures should be provided to compensate also this kind of loss (e.g. pecuniary compensation or publication of the judgement).

(iv) Evidence

The text then turns to the question of evidence. Normal rules relating to proof in civil proceedings are considered in this draft, i.e. the plaintiff has to prove that an act of corruption has taken place, that the defendant is responsible for this act of corruption, that he or she has suffered damage and that there is a causal link between the act of corruption and the damage. However, the text provides for defendants to be liable if they commits or authorises the act of corruption and they fail to discharge their responsibility for preventing the act of corruption.

Corruption is, by its nature, secretive and plaintiffs may encounter great difficulty in obtaining the evidence required to substantiate their claim. There are various methods of meeting this difficulty. For example, certain legal systems provide for an application to court for an order for discovery, while in other legal systems a judge can appoint a specific person to obtain the information required.

The Convention does not require Parties to adopt a specific procedure for the acquisition of evidence in corruption cases. In particular, it does not provide for any obligation for Parties to introduce the reversing of the burden of proof in civil procedures relating to corruption cases. It aims at encouraging those Parties which do not have any effective procedures for

the acquisition of evidence, to adopt such procedures, in particular in order to deal with corruption cases.

(v) Validity and effect of contracts

Another interesting area of the fight against corruption through civil law, relates to questions of validity and effects of contracts between public administrative authorities and private persons, or between private persons, which have been influenced in any way by corrupt acts or bribes.

The UN draft agreement on illicit payments in international commercial transactions, like many of the texts drafted more recently within the framework of other international bodies, notes the need to deal with the effects in civil law of the illicit conduct referred to in the agreement, by making it obligatory for the Contracting States to declare null and void contracts which are vitiated by corrupt practices and by nullifying them in courts.

The current situation is that if tenders or contracts are vitiated by corrupt practices, the public administrative authority or the innocent party to the contract is entitled to decide how to deal with the contract. It could therefore ask for the contract to be declared void or maintained, if there were advantages to be gained in doing so, as long as the rights of third parties, who might have suffered damage as a result of a tender where there were vitiating factors, were respected.

Attention should also be paid to a problem linked to the performance of contracts for works when corruption has come to light either in connection with the performance of the contracts themselves or with ensuing criminal investigations.

The possible interruption or suspension of the performance of a contract, e.g. when it has been declared void, might, *in facto*, give rise to various difficulties as regards both the need to complete the work and the employment of the labour force concerned.

While most countries do not have any specific rules governing such situations, attention should however be drawn to the matter as, when cases of corruption are discovered, it might be necessary to look for ways of limiting the repercussions on the labour force and on the execution of work which is in the public interest.

The Convention distinguishes contracts obtained by corruption and those concerning the payment of the bribe. As far as the first kind of contracts are concerned, and notwithstanding the right to sue for compensation for damage, any party whose consent to enter into a contract has been undermined by an act of corruption, shall have the right to apply to Court for the contract to be declared void. It remains open to the parties concerned to continue with the contract if they so decide. The drafting clearly provides that the applicant for such a declaration must be one of the parties to the contract. It remains for the Court to decide on the status of the contract, having regard to all the circumstances of the case

It should be noted that, as it is clear from the text of this provision, Parties are not obliged to provide in their internal law for the possibility for third parties to ask for the contract to be declared null and void. It is clear that nothing prevent Parties from

going further than the content of this provision, if they so wish, by recognising the right of interested persons to request the contract to be declared null and void. In any event, persons who have a legitimate interest may, under other provisions of this Convention (e.g. Articles 3 and 4) bring an action for compensation for damage resulting from an act of corruption.

As regards contracts (or clause of a contract) concerning the payment of the bribe, the Convention states that they have to be null and void.

(vi) Transparency

As far as questions relating to transparency is concerned, the Convention contains two important provisions relating to the protection of employees and accounts and audits.

As regards the protection of employees, the Convention requires each Party to take the necessary measures to protect employees, who report in good faith and on the basis of reasonable grounds their suspicions on corrupt practices or behaviours, from being victimised in any way.

As regards the necessary measures to protect employees, the legislation of Parties could, for instance, provide that employers be required to pay compensation to employees who are victims of unjustified sanctions.

In practice corruption cases are difficult to detect and investigate and employees or colleagues (whether public or private) of the persons involved are often the first persons who find out or suspect that something is wrong.

The ”appropriate protection against any unjustified sanction” implies that, on the basis of this Convention, any sanction against employees based on the ground that they had reported an act of corruption to persons or authorities responsible for receiving such reports, will not be justified. Reporting should not be considered as a breach of the duty of confidentiality. Examples of unjustified sanctions may be a dismissal or demotion of these persons or otherwise acting in a way which limits progress in their career.

It should be made clear that, although no one could prevent employers from taking any necessary action against their employees in accordance with the relevant provisions (e.g. in the field of labour law) applicable to the circumstances of the case, employers should not inflict unjustified sanctions against employees solely on the ground that the latter had reported their suspicion to the responsible person or authority.

Therefore the appropriate protection which Parties are required to take should encourage employees to report their suspicions to the responsible person or authority. Indeed, in many cases, persons who have information of corruption activities do not report them mainly because of fear of the possible negative consequences.

As far as employees are concerned, this protection provided covers only the cases where they have reasonable ground to report their suspicion and report them in good faith. In other words, it applies only to genuine cases and not to malicious ones.

As regards accounts and audits, the Convention recognises that national laws on accounts and audits are important tools for identifying and combating corruption. Stringent regulations on accounts and audits may help prevent and discover accounting irregularities such as inadequately identified transactions and liabilities, recording of non-existent expenditure, false documents and off-the-book accounts.

The provision on this question is inspired by the Fourth Council Directive on the annual accounts of certain types of companies (78/660/EEC, Article 2, paragraph 3), the Seventh Council Directive on consolidated accounts (83/349/EEC, Article 16, paragraph 3) and the Eighth Council Directive on the approval of persons responsible for carrying out the statutory audits of accounting documents (84/253/EEC, Article 1, paragraph 1, letter a). This provision aims at ensuring effective procedures without specifying any legal requirements. It relates to the annual accounts of companies which comprise the balance sheet and other financial statements, the profit and loss account and its appendices. In order to make the fight against corruption more effective, annual accounts should give a true and fair view of all aspects of companies' financial situation. Furthermore, the text underlines the central role of auditors in the fight against corruption. As part of the annual account, the balance sheet is a survey of assets and liabilities at a particular point of time. The provision refers to independent external audits, as well as internal company controls.

(vii) Interim measures

It is a common experience of plaintiffs in most European (and non-European) countries that their attempts to secure recovery through civil proceedings may be frustrated by unscrupulous debtors who conceal or dissipate their assets away before the judgement is rendered. This problem is particularly serious when proceedings are necessary in other countries**.**

The Convention therefore requires Parties to enable persons to apply to the court for such interim orders as are necessary to preserve their rights and interests (e.g. for the preservation or the custody of property during the course of civil proceedings). This provision aims at preserving the position of both parties (the plaintiff and the defendant) while justice is rendered in the dispute**.** It is left to the Parties to decide how this aim is to be achieved. They could provide for the possibility of adopting interim measures before the proceedings have formally started, at the beginning or during the proceedings or a combination of these.

In fact, in civil law cases (including corruption cases), very often it is necessary to preserve the property which is the object of the civil action (or any other property which belongs to defendants), until the final judgement on the case is given.

The measures referred to in the Convention aim mainly at:

i. providing preliminary means of securing assets out of which an ultimate judgement may be satisfied; or
ii. maintaining the status quo pending determination of the issues at stake.

In both cases, the object of such measures is to provide a ready means of ensuring that the aims of the civil justice system are not defeated.

B. Procedural provisions

The Guiding Principles for the fight against corruption (Principle 20) contain an undertaking to develop to the widest extent possible international co-operation in all areas of the fight against corruption.

When dealing with cases of corruption involving international elements, several problems could arise, such as the uncertainty on the applicable law, the problems related to evidence, as well as the difficulties in recognising and enforcing foreign judgements.

In particular, corruption in international business transactions has become an increasingly common phenomenon. For example, it is possible that a company in country A may find that it has lost a contract in country B on the basis of a bribe which was paid to a company in country C, or to a public official in that country. In such a situation, the company in country A may experience difficulties in trying to seek redress. Such difficulties may relate, for instance, to the transmission of judicial and extra-judicial acts, to the choice of jurisdiction to seek redress, the uncertainties of the applicable law in a situation where several different alternatives may be possible, the obligation for the company to advance security for legal costs if the law suit is filed with the courts of another country and difficulties in having the judgement recognised and executed in a foreign country.

However, the Convention deliberately does not address these questions. Indeed, the Convention requires Parties to co-operate**,** whenever possible, in accordance with existing and relevant international legal instruments in these fields, such as the Brussels and Lugano Conventions on Jurisdiction and Enforcement of Judgements in Civil and Commercial Matters of 1968 and 1988 respectively, the 1965 Hague Convention on the Service Abroad of Judicial and Extra-Judicial Documents in Civil or Commercial Matters, the 1970 Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, the Hague Conventions on Civil Procedures of 1954 and 1980.

These Conventions, as well as those which are being negotiated in various international *fora* (such as the Hague Conference on Private International Law), constitute a sufficiently relevant *corpus iuris* which could and should be applicable also in corruption cases involving an international element. Those Parties to this Convention which are not yet Parties to these international instruments are invited to consider doing so whenever possible, in order to be able to comply with the provisions of the Civil Law Convention.

However, although the drafters did not find it necessary to include any provision concerning specific questions of international co-operation relating to corruption cases, the co-operation required by the Convention has to be an effective one. It will be up to the GRECO to monitor the proper and effective implementation by Parties of this provision.

Moreover, the drafters of the Convention believed that Parties to this Convention, which have neither signed nor ratified the Conventions dealing with the subjects referred to in this provision, should endeavour to grant each other an equivalent level

of mutual legal assistance in judicial matters in the fields covered by this Convention, even if it does not contain a specific legal obligation to that effect.

C. EC Law and the Civil Law Convention

Since the entry into force of the Amsterdam Treaty, the co-operation within the European Union in civil law matters has become part of the competence of the European Community. It was therefore necessary to provide in the framework of the Civil Law Convention appropriate provisions which would make it compatible with the new EC competence in the area of civil law and vice-versa.

For this reason, the Convention enables the European Community to become a Party to the Convention at any time as any State. The Convention also requires Parties to provide for appropriate procedures for persons who have suffered damage as a result of an act of corruption by its public officials in the exercise of their functions to claim for compensation from the State or, in the case of a non-state Party (i.e. the European Community), from that Party's appropriate authorities.

The Convention recognises the fact that the Parties may, for certain purposes, conclude bilateral or multilateral agreements, or any other international instrument, relating to matters dealt with in the Convention. The drafting makes clear, however, that Parties may not conclude agreements which derogate from the Convention. It is possible that the Parties submit themselves, without prejudice to the objectives and principles of this Convention, to rules on this matter within the framework of a special system which is binding at the moment of the adoption of this Convention. This special regime applies to the European Community and to its member States, as well as to future member States from the date of their accession to the European Union. The Convention safeguards the continued application of agreements, treaties or relations relating to subjects which are dealt with in the present Convention, for instance in the European Community or in the Nordic co-operation.

SHORT VERSION

The Civil Law Convention on Corruption

A feasibility study on the drawing up of a convention on civil remedies for compensation for damages resulting from acts of corruption was adopted by the Committee of Ministers in February 1997. The study gives as complete a picture as possible of all aspects related to civil law and corruption and shows that it is possible to conceive of a number of scenarios where use of civil law remedies might be useful against particular forms of corruption. On the basis of this study, the GMC has finalised a Civil Law Convention on Corruption, which was adopted by the Committee of Ministers on 9 September 1999 and will be opened for signature on 4 November 1999 at the forthcoming Committee of Ministers Session in Strasbourg.

This new Convention, which is part of the Council of Europe multidisciplinary Action Plan to combat corruption, is the first attempt to define common international rules in the field of civil law and corruption. It requires the future Contracting Parties to provide in their domestic law "for effective remedies for persons who have suffered damage as a result of

acts of corruption, to enable them to defend their rights and interests, including the possibility of obtaining compensation for damage."

The Convention deals, *inter alia*, with the following aspects:

- compensation for damage;
- liability (including State liability for acts of corruption committed by public officials);
- contributory negligence: reduction or disallowance of compensation, depending on the circumstances;
- validity of contracts;
- protection of employees who report corruption;
- clarity and accuracy of accounts and audits;
- acquisition of evidence;
- court orders to preserve the assets necessary for the execution of the final judgement and for the maintenance of the status quo pending resolution of the points at issue;
- international co-operation.

Compliance by the States Parties with the commitments entered into under the Convention will be monitored by the Group of States against Corruption (GRECO). The Convention is open to non-member States which took part in its elaboration (Belarus, Bosnia and Herzegovina, Canada, the Holy See, Japan, Mexico and the United States of America) and will come into force after the fourteenth ratification. States not members of GRECO will automatically become members upon ratification of the Convention.