EUROPEAN PARLIAMENT

Directorate General for Research

WORKING PAPER

MEASURES TO PREVENT CORRUPTION IN EU MEMBER STATES

Legal Affairs Series

JURI 101 EN

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In December 1997 it was reported that a Dutch team of archaeologists found at Rakka in Syria about 150 cuneiform inscriptions which indicate that the site contained an administrative centre of the Assyrian civilization dating from the 13th century BC. A special archive was found, perhaps from the equivalent to a modern 'Ministry of the Interior', with data about employees accepting bribes, including the names of senior officials and the name of an Assyrian princess.

CONTENTS

OVERVIEW

Introduction

This document has been produced in association with the correspondents of the European Centre for Parliamentary Research and Documentation in the EU Member States. Their replies to our call for assistance have been extremely helpful and the document could not have been produced without their contributions. Analysis of these replies presents a number of problems, which have been resolved in some cases by calling on the scholars attached for short periods to DG IV to produce the summaries attached, especially where the base material was not in a language known to the editor.

In particular, it should be noted that different aspects of the fight against corruption are important in different countries; the country reports annexed do not therefore always follow a common pattern, with the emphasis being placed on different points. In some countries, such as Denmark, the issue of corruption is not a matter of public debate at all and little recent attention has been paid to the issue by legislators; the country summary is therefore short.

The study has been produced to assist the work of the European Parliament's Committee on Civil Liberties in the follow-up to Parliament's Resolution of 15 December 1995 on the fight against corruption and, in particular, on the Parliament's response to the Communication of the Commission on a policy to combat corruption (COM(97)192). It seeks to address the question of how Member States are responding to the problem of corruption, especially in regard to the public sector and to public procurement.

Awareness of the problem of corruption and its link with politics is now widely spread, although certain Member States have not yet changed legislation to respond to new circumstances and to the discussions on this subject which have been held in various international fora such as the OECD and the Council of Europe, as well as the European Union. Some Member States are clearly more affected by bribery and corruption than others, although obviously it is not possible to support this assertion with statistics. The need for transparency in regard to award procedures for public contracts is possibly the highest priority and new EU rules may be having an impact in this area. A paper is annexed at the end of this document which discusses EU public tendering requirements and how the situation is developing in three large Member States: France, Britain and Italy.

Certain aspects of the issue of corruption, such as financing arrangements for political parties and declarations of the outside interests of members of parliaments, have been examined in other recent DG IV publications. In particular, W-6 in the National Parliaments Series of DG IV Working Papers, which treats the subject of "Transparency and MPs' Financial Interests in the EU", has been recently revised (July 1996) and W-34 in the Political Series on "The financing of Political Parties in the Member States of the EU" has also been recently reissued (December 1997).

The following summaries of the situation in individual Member States were drawn up on the basis of replies from ECPRD correspondents to a letter sent in November 1997, in which they were requested to provide information concerning measures taken to prevent corruption in their country, especially legislative measures taken in recent years. A copy of the EP's resolution of 15 December 1995 on the fight against corruption in Europe was sent with this letter.

Following initial contacts with the central secretariat of "Transparency International" in Berlin, the issue of national measures to prevent corruption and the overall context was discussed in some cases with national chapters of this organisation.

Main points in common

◆ ***Legislation***

The penalties applied for bribery of public officials may on occasion be limited to fines but, insofar as they require imprisonment, sentences may vary between 6 months and 10 years, depending on the country and the seriousness of the offence. Sometimes those who offer and those who take bribes are treated in the same way, sometimes the latter receive harsher penalties. In some countries, there are especially severe penalties for judges and magistrates convicted of accepting bribes.

In certain Member States penalties apply exclusively to bribery of public officials and not to the private sector. There is also sometimes a distinction between those elected to public office for a limited mandate on the one hand and permanent or temporary civil servants on the other.

Cases of corruption actually brought to trial are few in all Member States, perhaps because there are rarely individuals involved who have suffered direct damage to their interests and who therefore bring a complaint to the attention of the public authorities. Also court systems are sometimes overburdened and reluctant to take on such cases. Irrespective of application of existing law, there also seem to be various loopholes in the coverage of legislation. The lacunae in several Member States seem to include:

- provisions to cover the unsuccessful soliciting of bribes,
- the specific inclusion of those holding electoral office,
- application to employees in the private sector,
- application to civil servants of other states and to international civil servants,
- the punishment of influence – peddling,
- intimidation of public officials to encourage them to act contrary to their duty.

No attempt is yet made in the legislation of any state to include specifically bribery of officials of European institutions, although in many cases the law may be interpreted to include them. The punishment of crimes of corruption several years after their commission also seems to raise particular problems which have not yet always been resolved.

The concept of "active" and "passive" corruption is used by several countries to mean bribing and receiving bribes. Some also distinguish between bribery before and after the event or the corrupt act of the official concerned.

Legislation in the Member States has developed largely as a response to specific cases of corruption or unethical behaviour. It also reflects a range of public opinion which responds differently to the same phenomenon in different parts of the EU. In the United Kingdom, for example, there has been a long investigation of standards of behaviour in public life which has highlighted a wide variety of problems, but it is not apparent that payments to individual Member of Parliament for putting specific oral questions to Ministers in Parliament would necessarily have received the same response in all Member States. In part, differences of treatment of the phenomenon of corruption also reflect the basic cleavage between the majority of Member States which have always managed legal affairs on the basis of "Codes" and those which depend on common law.

◆ ***Non – legislative measures***

In some countries special offices have been established to combat corruption In particular, in Germany there are "Anti – Corruption Sections" in many Länder, with two large cities having specialised departments of public prosecution running "corruption registers". In France the "Service Central de Prévention de la Corruption" was established in 1993 with a view to centralising information needed for the detection and prevention of corrupt acts; this body produces an annual report.

The question of the incompatibility of responsibilities at the political level with business or other interests is a matter which has been discussed in several countries but which is regulated more by custom than law. It is frequently a matter for the Prime Minister concerned to ask ministers to divest themselves of private interests where their public policy decisions may have an impact.

The declaration of interests required of politicians in some national parliaments is discussed in the separate paper of DG IV mentioned above (W – 6 in the National Parliaments Series).

Other matters with a possible link to corruption and which have been discussed in various Member States include lobbying activity and additional measures to combat fraud, as well as the point which has caused much discussion in the OECD in recent years:

- tax treatment of bribes to foreign nationals.

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COUNTRY REPORTS

AUSTRIA

Introduction

The penal clauses in the Criminal Code (StGB) which refer to the prevention of corruption in Austria have developed in three stages.

1. On 29 April 1964 the Austrian Parliament passed a resolution on measures to fight breach of trust and corruption, the **"Antikorruptionsgesetz"**[1] . The reason for this law was a number of spectacular and scandalous economic affairs, especially the so – called "fraud with export bounties". Unscrupulous economic "outsiders", working with modern methods, were able to snatch large amounts of money as export bounties from the Ministry of Finance, although the exports consisted in reality of useless display packages. For the first time bogus firms founded abroad appeared; bank accounts in Switzerland and Liechtenstein also played an important role.

2. In the meantime corruption in Austria changed its complexion completely: bank managers and captains of industry are no longer the main perpetrators of "White Collar Crimes". To an increasing extent, politicians have become involved in economic crime as a consequence of big construction projects at home and with the construction of big manufacturing plants in developing countries These have often been undertaken by territorial authorities or by associations and companies controlled by big political parties.

   In particular two recent scandals involving the public sector were connected with the construction of the General Hospital in Vienna (AKH) and with the activities of a housing development company As a consequence a resolution on measures to fight against breach of trust and against corruption was adopted by the Austrian Parliament on 1 April 1982 which changed and completed the regulations, the so – called **"Zweites Antikorruptionsgesetz"**[2].

3. The **"Strafrechtsänderungsgesetz"** of 1987[3] and of 1996[4] further extended the regulations.

A. Penal code provisions against corruption

The regulations relevant to the fight against corruption can be divided into three groups:

I) *Breach of trust (§ 153 StGB)*
These provisions cover in general breach of trust and malversation by those entitled by law, by order or by contract to dispose of funds who take advantage of this situation by accepting gifts or other payments or who do not deliver the financial advantages to the rightful owner.

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1 BGBl. Nr. 116; put into force on 04 April 1964.

2 BGBl. Nr. 205/1982

3 BGBl. Nr. 605/1987

4 BGB1. Nr. 762/1996

II) *Abuse of public power (§302 StGB)*
This provision covers abuse of power knowingly committed by officials of executive bodies. The goal is to guarantee an objective, impartial and legitimate execution of law.

III) *Specific provisions against corruption:*

a) Bribery of public officials or of the executive staff of public enterprises (§304 and 305 StGB)
These provisions cover all types of bribe – taking (demanding, taking or being promised a financial advantage):
- abuse of power or impropriety in the decision – making process brought about by some undue inducement or benefit (bribe – taking with a link to illegal behaviour);
- bribe – taking linked to legal behaviour in the decision – making process (in this case the taking or being promised a small amount of money is – under restricted conditions – exempt from punishment).

b) Bribe – taking by court experts and by other staff and advisors of public enterprises (§§306 and 306a StGB)
These provisions are similarly designed, taking into account the importance of court experts in the decision – making process of judicial authorities as well as other staff of public enterprises, including advisors, and covers any passive corruption of the persons mentioned.

c) Illegal intervention (§308 StGB)
The offence is "interference" which has the consequence that an official act is not done or impartially carried out as a result of the demanding, taking or being promised a financial advantage. Those not allowed to be illegally influenced in this way include civil servants, executive staff of enterprises who exert a substantial influence on the management, managers, members of the executive board and members of representative bodes (e.g. the First and Second Chamber or of a parliament of a Bundesland).

B. Associated criminal offences

Receiving (§164 StGB)
This provision imposes penal law sanctions on any person who supports the offender of a crime against property to conceal or to negotiate an object obtained by committing or received for committing the offence.

Money laundering (§165 StGB)
Serious offences related to corruption (such as breach of trust or the abuse of public power) can – under some specific circumstances (e.g. assets higher than 100.000 ATS or 7.200 ECU) – be linked to offences of money – laundering.

There is also a complex and comprehensive system of secondary punishment, which was amended in 1996, and which may also be relevant in the fight against corruption (confiscation of profits of crime and forfeiture). The Austrian Act on Preventive Policing ("Sicherheitspolizeigesetz") obliges the police to take appropriate measures to prevent any crime listed in the StGB.

C. Other regulations

1. There is a prohibition on civil servants taking gifts intended to create a good atmosphere or to maintain favours which the civil servant receives because of the status quo *(§ 59 Beamten – Dienstrechtsgesetz 1979)*.

2. The public award of contracts is determined in the so – called *Bundesvergabegesetz* from 1993[5].

3. Private or public donations for political parties which exceed the amount of 100,000 ÖS have to be published (*§ 4 Abs. 710 Parteiengesetz* [6]).

5 BGBl. Nr. 462/1993; also BGBl. Nr. 404/1997

6 BGBl. Nr. 404/1975

BELGIUM

Introduction

The issue of corruption has become a subject of public concern especially in the context of the failures of the police, administrative system and the judiciary associated with recent cases of paedophilia. These problems were given prominence by the Parliamentary Committee of Inquiry into the disappearance of children. They were so serious that the question of possible political protection for those charged was also investigated by this committee of inquiry. Under pressure from public opinion, the Prime Minister in the context of his general policy statement on 7 October 1997, laid out before Parliament his plans for police reform.

Furthermore, the question of corruption has arisen in connection with the hidden financing of political parties and abuses in the field of public procurement which are currently a matter of public concern, especially involving Dassault (modernisation of F16 aircraft) and Agusta (purchase of helicopters).

A. Legislation

Articles 246 to 248 of the Criminal Code make passive corruption (accepting bribes) a criminal offence for officials and civil servants. Seeking bribes is currently not a punishable offence. An official may be banned from public employment in addition to other penalties. Article 252 makes active corruption, both paying and offering bribes, a criminal offence. A Royal Decree of October 1934 also foresees the banning from exercise of the functions of administrator, commissioner or manager in private firms where prison sentences have been imposed for an act of corruption.

A proposal by an individual senator to modify this legislation, in particular by imposing harsher sentences, is currently under discussion in the Senate. The government will also soon present proposals.
(A draft law concerning criminal organizations has already been adopted by the Chamber of Deputies and is now under examination in the Senate.)

B. Tax provisions favouring corruption

Article 58 of the code for income tax provides for "secret commissions by firms" to be recognised as professional expenses for tax purposes where recognised as "common practice". This article is expected to be reformed via the draft law on corruption to be presented by the government.

C. Party financing and electoral expenditure

The law of 4.7.89 on limitation of electoral expenditure and accounts of the political parties provides, in addition to limits on expenditure for electoral propaganda:

- public financing with a view to reducing collusion with economic interests; parties represented in both assemblies receive a fixed amount (5 million BF) and a variable amount (50BF per valid vote),
- other donations by moral persons and associations are forbidden,

- to ensure transparency the public funds are transferred to a specific non – profit making association, for which a company auditor must prepare an annual report, both on its accounts and on those of the associated political party
- a parliamentary commission checks these reports and approves them, failing which the party concerned suffers a cut in its public financing.

D. Internal control in the administration

The "Comité Supérieur de Contrôle" is an administrative body specialising in controls on public purchasing and the use of public subsidies. It looks for fraud, irregularities and offences committed in the public service. Under a magistrate's authority, it has about one hundred investigators and enjoys functional autonomy. It is the major instrument in the fight against corruption. A draft law integrating its investigation service with the judicial police ("près les parquets") is before Parliament; the intention is to reinforce the independence of this body.

E. Regulation of public purchasing

Corruption of public officials is one ground for annulment of public contracts. Article 314 of the Penal Code lays down penalties for affecting the awarding of contracts by violence, threats, gifts, promises or any fraudulent means. The draft law against corruption will render ineligible corruptors convicted (in the context of public purchasing) from further public contracts.

F. Declaration of interests

The law of 2.5.95 on the obligation to state mandates, functions, professions and make a declaration of property establishes a system of transparency for those in positions of public responsibility. MPs (and, in the future, regional and communal representatives) are required to make an annual declaration mentioning all mandates, directorships or professional activities exercised by them in the preceding 12 months, stating whether the position was remunerated. This list is published in the "Moniteur Belge". A detailed property declaration is also required in the month following taking up the position, which must be renewed every 5 years. These declarations are kept confidential by the Court of Auditors. Only an investigating magistrate is entitled to open these declarations.

G. Incompatibilities

There are no provisions which make a parliamentary mandate incompatible with private sector activities or those of a non – profit making nature. (But MPs may not be an advocate in the public administration, nor plead in cases involving the interests of the state.) It is however customary for a minister to give up management positions in firms on his appointment.

Public purchasing legislation also prevents those with a direct interest in a contract from participating in the award procedure. A law of 1931 forbids ministers from taking an active role in firms who have benefited from public contracts received during their office. The combining of responsibilities outside the cases of incompatibility mentioned is permitted, but the Prime Minister is able to ask a member of his government to renounce functions which are, in his judgement, incompatible with a ministerial assignment.

DENMARK

Introduction

There have been few changes in recent years. However, in 1997 the Danish Parliament did change fiscal legislation so that firms could no longer deduct expenditure on bribes to civil servants paid abroad from taxable profits, thus meeting the requirements recently agreed in the context of the OECD.

A. Legislation

The penal code provides that persons **offering** bribes to persons working as public servants or in public duties may be punished by a maximum of 3 years' imprisonment (section 122). Public servants or those with public duties **accepting** bribes may be punished by up to 6 years' imprisonment (section 144).

The accounts of political parties are regulated by law 404 of 13.6.90. Accounts must be published by all parties with candidates standing in national or European elections. They must include information on support received from public authorities, subscriptions, other private contributions, investment income and contributions from various other sources. From 1996 accounts must also contain names and addresses of private contributors giving more than DKR 20,000 to a political party in a single year.

FINLAND

Introduction

Corruption is a subject which has not been much discussed in the Finnish Parliament. However lately the situation has started to change. Some years ago there was debate concerning a Member of the Government, the Secretary of State for Trade and Industry, who stood trial in connection with his activities. He was accused of bribery and corruption and was in the end sentenced to one year on probation and had to leave his post as a Secretary of State. However he succeeded in being re – elected to Parliament in 1995.

At the moment Finnish legislation to combat corruption (including the black economy and money – laundering) is going through major reforms. There is a need to amend and consolidate as well as to reform the legislation. Also, some new laws will soon be adopted to strengthen measures to prevent corruption.

A. Legislation

♦ *Economic crimes and the black economy*

The Finnish Government introduced on 1 February 1996 a policy programme to reduce economic crimes and the black economy. The programme refers to their negative economic impact in regard to instability in labour market, distortion of competition between enterprises, encouraging tax evasion and strengthening the basis for corruption. It proposes that work in combatting corruption should emphasize preventative policies and should include all possible measures and instruments. On 23 October 1997 the Government appointed a ministerial working group to recommend necessary measures to prevent economic crimes and the black economy. The measures recommended in the programme are to be realized by the end of 1998.

♦ *Transparency and openness*

Transparency is a leading principle in Finnish public administration and is based on the Constitutional Law. From an international point of view, this kind of openness in public administration is exceptional. It enables checks on the legality and significance of the use of public power. The supervision of the public servants is effected either by the Chancellor of Justice (*oikeuskansleri*) or by the Parliamentary Ombudsman (*eduskunnan oikeusasiamies*). Every citizen has the right to take action against any public servant, but the supervision of the Members of the Government can only be exercised by the *oikeuskansleri.* The Law of Civil Servants and the Municipal Laws are the legislative basis for this supervision.

Finland is reforming its legislation on transparency and openness. The Government presented a bill about the reform of the law concerning openness and transparency to Parliament before the end of 1997, for which the reading will take place during 1998.

♦ *Public procurement*

A government statement to amend the Act on Public Procurement was approved by Parliament in November 1997 and was confirmed on 19 December 1997. It changes the previous Act on Public Procurement from 1992, which came into effect as part of the EEAagreement in January 1994 and is intended to increase competition in public procurement. The new law comes into force on 1 March 1998.

♦ *Bribery*

The basic provisions against bribery among public servants and employees of public corporations can be found in the Criminal Law and the Public Servant Law. In the Criminal Law (Chapter 40) bribery is divided in bribe – taking, gross bribe – taking (active bribe – taking) and bribe misdemeanour and is punishable by a maximum 4 years imprisonment. In October 1997 the Government fulfilled its international engagements and sent to Parliament a bill to criminalize bribery in the private sector. This should require only minor changes in Finnish legislation.

♦ *Preventing fraud*

The Convention on the Protection of the European Communities´ Financial Interests and the Convention on the Fight against Corruption will be submitted to Parliament for approval this spring (1998). The EU regulations and conventions with regard to fraud require only minor amendments to Finnish legislation and will be submitted to Parliament simultaneously. A new law concerning the prevention of money – laundering was adopted by Parliament on 30 January 1998 and will also come into force on 1 March 1998. Money – laundering is now condemned in the criminal law (Chapter 32, article 1) as a crime of concealment. The new law is associated with the Government Statement of February 1996 aimed at reducing economic crime and the black economy. Its aim is to prevent money – laundering, to promote its discovery and to intensify the tracking down and recovery of its profits. In order to handle detection, the government has established a new clearing centre for money – laundering which functions under the Central Criminal Police.

B. Financing of political parties

Political parties receive subsidies from the government within the limits of the budget assigned to subsidies for public activities. These are prescribed in the party law and controlled by the Ministry of Justice. The subsidies are divided proportionately to representation in Parliament. After receiving the subsidies, the party has to render an account in accordance with government orders. It is possible to check only subsidies received from the government, not those received as members´subscriptions or donations. It is permissible to receive donations from private companies and interest groups for election campaigns, but only if it can not be considered as bribery. The control of the financing of the party campaigns is based on the Criminal Law (Chapter 40) and reflects the content of Resolution A4 – 0314/95 of the European Parliament on combatting corruption.

FRANCE

Introduction

Thanks to more efficient controls and a better understanding of the machinery of fraud, the number of cases of fraud and corruption disclosed has risen sharply. The most serious cases concern public procurement contracts, a field in which the regulations are complex and guarantee neither transparency nor freedom of access and equality of opportunities between bidders. Corruption is encountered among senior civil servants, elected representatives or business leaders who make use of it either to enrich themselves or to fund political parties.

Most offences are covered by the Criminal Code and the Labour Law Code (A). The Central Corruption Prevention Department (SCPC) set up in 1993 has the power to centralize information which may be useful in detecting and preventing offences (B). Major legislative machinery for preventing corruption exists both in the public procurement sector (C) and in the funding of political parties (D). However, improvements might be envisaged with a view to improving the efficiency of corruption prevention measures (E).

A. Offences defined by the Criminal Code (sections 432 and 433)

Active or passive corruption, taking unlawful advantage of an interest, extortion by means of one's position favouritism and the sale of influence. There is also section L152(6) of the Labour Law Code which refers to corruption by a manager or employee of a private firm.

B. The Central Corruption Prevention Department (SCPC)

Prior identification of the ways in which corruption operates, and the centralization of information, should make it possible to combat corruption effectively by preventing offences from taking place. A large number of supervision services already existed in France, and the legislature did not wish to introduce a further layer of supervision, but rather to meet the need for centralized information, so as to prevent corruption from occurring. For this reason Act no. 93 /122 on transparency and the prevention of corruption in business and in public procurement procedures set up the Central Corruption Prevention Department (Articles 14 and 6), for which specific arrangements were laid down by an implementing decree of 22 February 1993. The SCPC's powers relate to offences defined in the Criminal and Labour Law Codes.

a. Composition of the SCPC

Headed by a senior law officer, a former Chief Public Prosecutor, the SCPC is administratively part of the Ministry of Justice, but is not subject to its authority. Officials from various departments of government (the Interior Ministry, the administrative courts, the criminal investigation department, the tax authorities etc.) are appointed to the SCPC by decree for a renewable four-year term (Section 1 of the implementing decree of 22 February 1993) to constitute a group of specialised experts capable of exploiting the centralized data systematically in the interests of more effective preventive and punitive action.

b. Its purpose

Section 1(1) of the 1993 Act specifies that: *'[The SCPC is intended] to centralise the information necessary for the detection and prevention of active and passive corruption offences, the sale of influence by persons in public office or by specific interests, extortion, taking unlawful advantage of an interest or denial of the freedom and equality of bidders for public procurement contracts.'*

When it has gathered information furnishing evidence of a corruption offence, the SCPC is required to bring an action before the Public Prosecutor, and once a judicial investigation has been opened its part in the proceedings is automatically at an end. (Sections 2 and 3).

'It shall supply at the request of the administrative authorities opinions on measures which may be taken to prevent' corruption offences (Section 1). The administrative authorities to which these opinions may be addressed are listed in the Decree: heads of regional or local authorities (mayors, chairmen of General Councils, Regional Councils and groups of local authorities); heads of national administrative departments, supervisory bodies and administrative commissions; heads of private bodies providing a public service. Its opinions are confidential and constitute an aid to decision – making. It aids the judicial authorities, at their request, by supplying them with the information they need. (Section 4).

c. Scope of its activities

- At national level by working together with the major administrations' supervisory bodies through its permanent liaison committee and working parties;
- At Community level, through direct contact with the Commission on the matter of public works.

The SCPC has also specialised in the study of sectors particularly susceptible to corruption such as lobbying, sport, and international trade. Training modules have been set up with a view to raising the awareness of decision – makers about situations where there is a risk of corruption. Members of the SCPC may provide this information to authorities which request it.

It has been regretted in some quarters that the SCPC has no investigative powers (no power to make inquiries or to transmit documents), since the lack of a right to communicate documents is an obstacle to the progress of its work and to its knowledge of the ways in which corruption operates. Article 5 of the Act provided for this investigative power, but this article was withdrawn on a decision of the Constitutional Council of 20 January 1993.

The annual reports of the SCPC are published only in response to a political decision (as was the case with the first report in 1993 – 94). The Prime Minister has recently decided that the 1997 report will be published in the near future.

C. Provisions specifically applicable to public procurement contracts

The most serious cases of corruption relate to the public procurement sector. Some breaches of the regulations were due to errors and anomalies which could easily have been avoided, most often by improving the training of those involved who were not aware of the constantly changing

regulations applying to public procurement contracts, However, most offences were the result of elaborate mechanisms set up either just before signature of the contracts (e.g. restrictive practices such as consulting only 'tame' organizations, and overcharging) or at the time of the implementation of the contracts (e.g. a decision – maker requiring the contracting firm to pay a commission).

New legislative provisions have recently been adopted to ensure the transparency of public procurement contracts and the equal opportunities of bidders:

- Act no. 913 of 3 January 1991, as amended, on the transparency and regularity of public procurement procedures, making the award of contracts subject to rules on public notification and competition (implementing decree No. 92/311 of 31 March 1992) by establishing an interministerial inquiry commission on the regularity and impartiality of the preparation, award or performance of State procurements contracts. It also makes the procedures for the award of certain contracts (those for amounts exceeding a level set by the Ministry of Economic Affairs and Finance) subject to requirements of public notification and competition.
- Act no. 92/1282 of 11 December 1992 on procedures for the award of certain contracts in the water, energy, transport and telecommunications sectors (implementing decree no. 93/990 of 3 August 1993).

D. Provisions specifically applicable to the funding of political parties

Before 1988 France had no rules on the funding of political life. Following a number of scandals, however, the legislator had to intervene. Acts nos. 88/227 of 11 March 1988 on the financial transparency of political life, and 90/614 of 12 July 1990 on participation by financial bodies in combating the laundering of the proceeds of drug – trafficking, set up a system for the public funding of political parties (under certain conditions linked to electoral results) and imposed a framework for private funding.

The Corruption Prevention Act (29 January 1993) retains the possibility of private funding for politics, but imposes stricter regulation on gifts by firms to political parties and their candidates. Parliament decided to lower the ceiling for electoral expenses and to make some changes to the rules on public funding, so as to reduce the political parties' funding needs.

The constraints already imposed by the 1988 and 1990 acts were strengthened:

- a stricter ceiling was placed on contributions by legal persons to political parties;
- such gifts were to be published in the Official Gazette and to appear in the campaign accounts submitted by all candidates to the National Political Parties' Campaign Accounts and Funding Commission (set up by the 1990 Act);
- the ceiling for authorised electoral expenses was lowered;
- changes were made to the rules for public funding: before 1993, a party had to present 74 candidates for the legislative elections or satisfy the representativeness criterion; now only 50 are needed, but the representativeness criterion has become cumulative.

E. Scope for improvements

The Convention adopted by the Member States of the OECD, which calls on its signatories to take measures to make active corruption by foreign officials an offence and to prosecute those responsible for the corruption of other countries' agents on their territory, should be ratified. This would enable France to remedy at national level the legal vacuum as regards the penalties for corruption by foreign officials, since no penalties currently exist under the Criminal Code.

During the negotiations in the OECD, an American proposal, for the banning of all tax deductions following payments in connection with corruption, met with opposition from some states. In France, Article 39 of the General Tax Code allows for the deductibility of payments made *'in the interests of the company'* with a legitimate objective. A recommendation by the OECD of 4 July 1996 **calls on** the Member States to abolish this option (which has already been adopted by France, though the abolition of the tax deduction provided in the Tax Code is not on the agenda).

Solutions used in other countries might be imported into France, but no consensus currently exists on these. One might, for example, consider adopting the notion of 'reformed offenders' from Italian law, or a reversal of the burden of proof so that persons suspected of corruption would be required to prove their innocence.

GERMANY

Introduction

The Criminal Code (*StGB*) distinguishes between bribery (active corruption) and bribe – taking (passive corruption) and, in less serious cases, between "advantage – granting" (Vorteilsgewährung, passive corruption) and "advantage – taking" (Vorteilsnahme, active corruption). Bribery is illegal but the Code refers not to a crime but to an offence. It covers bribery only where a public agent is involved and not in the private sector. In this case, the law of unfair competition (*UWG*, "bribery of employees"), is invoked which is only of minor importance, because of the very complex procedure of prosecution and the low sentence imposed (maximum: one year). The public prosecutor tends not therefore to bring charges under this provision, even if he is informed about the bribery.

The Criminal Code distinguishes between "Amtsträger" (public servants holding an 'office') or elected deputies, on the one hand, and private persons (§12 *UWG*) on the other, but the term "Amtsträger" has been extended over the years, due to increasing privatisation in the pursuit of public duties. Serious loopholes in the law concerning the fight against corruption have been revealed. The Federal Supreme Court pursued until now a rather broad interpretation of the term "Amtsträger" (i.e. auxiliary Postmen and medical superintendents in a hospital were included), but a judgement of the 15 July 1997 turned out to be very restrictive: i.e. a self – employed safety inspector working for a public body was considered by the Court as a private person! Following the new legal provisions it is now the nature of the job which is paramount and not the job description.

During the last few years, bribery scandals have come to light in Germany, especially in the construction industry and in the procedure of public appointments. The new legislation as yet not only enacts punitive laws, because it appears that better prevention of corruption is necessary. Many problems prevent an efficient struggle against corruption, for example a reluctance to make accusations and, on a more basic level, often the courts simply do not have time to deal with all the cases, especially in the new Länder.

Since 1992 in many Länder so – called "Anti – Corruption Sections" have been established. The initiatives of the administration also cover some specialised Departments of Public Prosecution, in particular at Frankfurt and Munich: these both run corruption registers, wherein the audit office regularly carries out investigations helped by the Office for the Control and Supervision of Cartels and the local auditing bureaus. Firms where corruption exists can temporarily be excluded from mailing lists for public contracts.

A. Legislation

1) Infractions defined by legislation

***Criminal Code** (StGB)*

§§331	*"Advantage taking" (Vorteilsannahme)*	"Amtsträger": maximum prison sentence 2 years or fine; magistrate/judge: max. prison sentence 3 years or fine
§§ 332	*"Bribe – taking" (Bestechlichkeit)*	"Amtsträger" from 6 months to 3 or 5 years or fine, magistrate/judge: from 6 months to 10 years depending on gravity of the offence
§§ 333	*"Advantage granting" (Vorteilsgewährung)*	prison sentence up to 3 years or fine
§§334	*"Bribery" (Bestechung)*	even attempted corruption is illegal "Amtsträger": prison sentence ranging from 3 months to 5 years or fine magistrate/judge: prison sentence ranging from 3 to 5 years
§§264	*"Subsidy fraud" (Subventionsbetrug)*	prison sentence from 6 months to 10 years or fine Also lose right to hold public office and to vote. In the case of voluntarily averting of the effect of one's own wrongful act impunity is guaranteed
§§264a	*"Capital investment fraud" (Kapitalanlagebetrug)*	prison sentence up to 3 years or fine
§§264b	*"Advertisement fraud" (Ausschreibungsbetrug)*	prison sentence up to 3 years or fine
§§108b	*"bribery of electorate" (Wählerbestechung)*	prison sentence up to 5 years or fine
§§108e	*"bribery of a deputy" (Abgeordnetenbestechung)*	prison sentence up to 5 years or fine The problem is, that only direct exchange of monies for votes is punished. Secret contracts, acceptance of contributions, supplementary work in firms and so on are beyond the scope of prosecution.

Law of contract

§ 138 BGB	a contract is deemed void, if it is focused on the bribery of domestic or foreign "Amtsträger".

Labour law

§ 10 BAT	an employee must in principle not accept bribes under penalty of dismissal without notice.

Law against unfair competition

§12 UWG	bribery of employees

Law of income tax

§ 4, Absatz 5, Nr. 10 EstG	Abrogation of tax deductibility of bribes *(Schmier – und Bestechungsgelder)*

Since 1996 this law prohibits the granting of favours and all monies linked therewith. One must however be found guilty of the illegal transfer of monies before a trial can take place. The tax office reports to the Department of Public Prosecution and the Public Affairs Office any overtly suspicious acts. A prerequisite for the prohibition of a fiscal deduction is therefore the criminality of the respective payment mentioned. Besides, more and more bribes even to domestic recipients are paid through foreign countries.

2) The "law to fight corruption", 13 August 1997

On the 26 June 1997, the Bundestag passed the "law to fight corruption" (*BGBl*. I S. 2038) and the second "law to limit additional work" (as it was deemed that corruption was more prevalent here) on second and third reading.

B. Criminal Law

a) granting and receipt of favours

The most important aspect in the sector of §§ 331 ff. *StGB* is with respect to its increased scope. Concerning the acceptance of additional jobs and gifts it is now not allowed to promise or accord "Amtsträger" in their 'general administration' any advantages. Until now, the existence of a "bribery agreement" had to be proven, which is of course extremely difficult. Now, these "injustice agreements" have been relaxed and the proof of the services granted in return is no longer needed. The scope of the sentence for granting favours and the receipt of such was lifted: regarding officeholders from 2 to 3 and judges from 3 up to 5 years of the maximum prison sentence.

b) bribery and taking of bribes

The elements of bribery and the taking of bribes were extended. The legal procedure regarding bribery and taking of bribes in business relations were taken over from the *UWG* to the *StGB*. This shift demonstrates the fact that bribery is being better dealt with. The maximum prison sentence was also increased: formerly it was one, now it is 5 years. Moreover, third parties can also be prosecuted: if a civil servant accepts a gift for a party or an association, he himself is open to prosecution. These new laws closed a legal loophole. The remit of sentencing for serious cases has been changed (minimum of one year and a maximum of ten years). Concerning organised crime and bribery, these now fall under the "Erweiterte Fall" (§ 73d *StGB*) and it is possible to apply the "Vermögensstrafe" (§ 43a *StGB*).

c) law against unfair competition

To accentuate the state's protection of competition, the clause about "offences against competition" was integrated into the *StGB*. The central new penal clause is the restraint of trade arrangement/agreement in advertising (§ 298 *StGB*): Public and open propositions to positions should be the norm in future and a central register of corruption should lead to a temporary exclusion of firms which are suspected of corruption. So – called "calls for tenders" shall be made illegal, i.e. secret agreements between firms aimed at reaching consensus between them to the detriment of fair competition. The law stipulates that fines of up to 1 Mill. DM and up to three

times the amount of the money involved in the actual bribery itself. Several sources criticizes this law, for example the "Verbandsdirektor der Wirtschaftsvereinigung Bauindustrie" (director of the federation of the construction industry), who assesses the situation as follows: German criminal law should protect recognized principles like life, liberty, property, but competition does not belong in this category. The new law will cause the destruction of medium – size firms, which have been formed out of the necessity to pool their resources. The above law restricting cartel formation may destroy such firms.

C. Law for Civil Servants

§ 70 *BBG* forbids civil servants to accept rewards or gifts relating to their office (where formerly this was merely restricted), risking a disciplinary procedure according to § 33 *BDO*. The articles 9 to 13 of the civil service law regulation were tightened up, but the essential content remained the same. There is also a new regulation regarding a "supergrass" type approach to corruption, i.e. someone accused of a minor offence may get his sentence reduced if he/she gives evidence relating to larger crimes.

D. The second law to limit additional working (9 September 1997)

This contains modifications in regard to acceptance of additional jobs by civil servants and soldiers, both those requiring and not requiring approval, and calls for a more effective control by the employer. Permission for supplementary work shall not exceed 5 years and be subject to conditions and instructions. There is a new obligation to inform the administrative service office or disciplinary superior of certain additional work.

E. Prevention of corruption in party funding

The Federal Republic of Germany was the first European country to introduce direct public funding of political parties. Details are covered by the Law on Parties of 1967 (*PartG.*), which was most recently updated in 1994. A fundamental change appeared within the framework of Art. 21 Abs. 1 of the Basic Law the sixth law to change the party law from the 28 January 1994.

In April 1992, the Federal Constitutional Court declared that the overall state *funding* must not exceed 50% of a party's total income. At the same time, the Court now allows for the direct funding of political parties which was previously declared unconstitutional and points out that strict control is necessary. The current distribution formula for equality of opportunities was abolished. The level of reimbursement of election campaign expenditure is regulated by Article 18 of the Law on Parties.

A specific report shall attempt to stamp out corruption and be an effective control. Pursuant to paragraph 23 and 24 of the same Law, a report has to be drawn up specifying all income, expenditure and assets. The report is audited at the end of the year by an independent auditor. All reports must be submitted by 30 September to the President of the German Bundestag who will verify and publish them. The Federal Court of Audit will verify implementation of the electoral expenditure reimbursement scheme by the Federal President.

The acceptance of private donations is regulated by Article 25 which stipulates all exceptions (Paragraph 1). There is an obligation of publication in the statement of accounts in the case of big donors (donations over 20,000 DM in the course of a calendar year) indicating the name and address of the donor and the entire amount. The sentence is imposed by doubling of the illegally accepted donation plus the illegally procured amount itself. In the case of donations exceeding 230 millions DM they reach an "absolute upper limit" and a reduction of the government grant consequently occur.

F. Proposals

In adopting the law against corruption 1997, the Bundestag pointed out that preventive regulation is necessary to fight corruption effectively, besides modification and restriction of the Criminal Law and the Law of civil servants. That implies organisational and personal economic regulations and also elaboration of a behavioural code for the federal area.

However the new law disappointed some and in particular the Länder of Bavaria and Berlin. It lacked:

- the possibility of tapping telephones of suspicious persons by criminal prosecution offices, which is prohibited by §§ 100a of the criminal procedure rules. The constitution has now been changed but a government proposal on regulation of telephone tapping was rejected. A compromise has now been adopted by the Bundestag in the framework of the so-called "großer Lauschangriff";
- the possibility of reduced sentences for police informers and persons who turn states evidence (because both accepters and donors of bribes are seen as equally guilty).

GREECE

Introduction

Greek legislation concerning transparency exists in various forms. It can be either a Law, a Presidential Decree or a Ministerial Decision. It has to be noted, however, that no consistent body of law concerning fraud and corruption exists. With the exception of the Greek Criminal Code, the word corruption can be found only in legislation concerning either the Greek Police or the Greek Fire Brigade. There is only one Decision concerning corruption within the Body of Chartered Accountants.

A. Legislation

Under art.2 of law 2479/97 acts of corruption by officials are considered to be "criminal activities" within the meaning of law 2331/95. As such, officials who acquire goods that result from such activities, facilitate such transactions or do not declare the truth when acting as witnesses, are liable to extremely severe prison sentences of up to ten years (aggravated offence). The system provided for by law 2331/95, concerning the prevention and punishment of money – laundering (the "legalisation" of resources originating from "criminal activities") through special procedural rules, control of bank transactions and checks by a special commission, generally applies also to the abovementioned cases.

Greece has signed a certain number of conventions which, however, have not yet been ratified by the Greek Parliament. Only the following have been ratified: the Convention for the protection of the Communities' Financial Interests (26.07.95), including its first (27.09.96) and second (19.06.97) protocols, the Convention for the fight against the corruption of officials of the EU or of Member States (25.06.97) and the Convention on corruption of officials in international transactions (17.12.97).

B. Financing of Political Parties

Art.16 of law 2429/1996 provides that political parties must maintain a transparent system of economic management. They are obliged to keep annual accounts of all their revenue and expenditure in separate categories. For every sum received, political parties have to give a receipt and keep a record of names for all those who contributed more than 300,000 drachmas in any one year. The balance of their accounts and this record of names must also be published within the first two months of every year in at least two daily newspapers of Athens. A copy of the Balance of Accounts along with the newspapers where it was published has to be send within 15 days from the date of publication to a parliamentary Control Committee and the Minister for the Interior as well.

Art.18 provides that candidates in general elections must submit an analytical declaration of their expenses and subsidies received during their electoral campaign to the Control Committee, no later than two months after the polling date. This declaration must also include the names of those who made a total contribution of over 50,000 drachmas and has to be published in at least one daily newspaper of their constituency.

Financial control of political parties and candidates in general elections is the responsibility of a parliamentary Control Committee comprised of one MP representative from every political party in the Parliament. Anyone who tries to obstruct in any way the work of this Committee faces a sentence of at least six months in prison. Political parties and candidates of general elections who fail to comply with their legal obligations also face very heavy fines.

C. Declaration of Interests

Members of Parliament must make an annual declaration of their revenue and property, as well as the revenue and property of members of their family. The Prime Minister, MPs, heads of the parties represented in Parliament, those responsible for financial management of political parties, secretary generals of Ministers, officials who under the law benefit from prerogatives of economic management, mayors and members of commissions of public contracts are under the same obligation. These declarations are checked as necessary by the parliamentary Control Committee or by the deputy of the Public Procurator of the Court of Justice.

D. Bribery of Officials

Under art. 235 and 236 of the law 1234/72, civil servants who accept bribes and the persons who offer them are punished with imprisonment of at least one year. Under art. 237 of the same law, judges accepting bribes can also be punished with imprisonment of at least one year while those who try to bribe them can be sentenced to at least three months in prison.

E. Public Contracts

Presidential Decree 394/96 aims to prevent corruption by providing specific obligations and time limits for the authorities in order to reply in cases of public tenders' objections. According to this legislation the terms governing a competition for supplies in the public sector must be clear and the body that holds the competition has to make it widely known. Those who wish to take part in such competitions must submit a written offer before the closing date specified in the invitation to tenders. The evaluation of the competition results is carried out by a board of 5 members where tenders also have the right to file a complaint.

IRELAND

Introduction

During the last eighteen months there have been three major political corruption scandals in Ireland regarding senior figures. Firstly, a minister in the then Fine Gael Labour Democratic Left 'rainbow' coalition, Michael Lowry, was found to have had an extension to his house paid for by a leading businessman, Ben Dunne. Following on from this it emerged that the former Taoiseach (PM), Charles Haughey, had received at least one million pounds from the same man during his time in office, and thirdly Ray Burke, the then Minister for Foreign Affairs, was exposed as having received an envelope containing 40,000 pounds from a leading property developer who had just invested in his constituency. The property developer's success in achieving unorthodox planning permission caused concern.

These scandals were much discussed throughout 1997 and led to demands for, and eventually the adoption of new legislation. This was the 'electoral act' of 1997, whose Part IV on 'disclosure of donations' is of particular interest.

A. Legislation

The act first defines what a donation is, namely a granting of money, property or goods, the conferring of the right to use property or goods, the supply of services without payment or favour or the accrual of profit by a member of the *Oireachteas*[7] arising from an event organised by an outside source.

It then goes on to define when a donation is deemed to have been made, namely if any of the above mentioned 'donations' is made to any member of the *Oireachteas*, European Parliament, member of any branch of local government, to a political party or any subsidiary organisation thereof or to any election candidate for any of the abovementioned legislative positions.

The 1997 legislation does not however entirely proscribe the granting of donations but rather specifies the specific cases in which they may and may not take place. It stipulates firstly that anonymous donations may not exceed 100 punts[8]. If the anonymous donation does in fact exceed this amount then the recipient (whether that be an individual member or a political party) must inform the Public Offices Commission of both the fact that an anonymous donation has been received and must specify the amount of money or the nature of the goods or services acquired. The Public Offices Commission shall then in turn inform both houses of the *Oireachteas* as to the moneys, property or goods received and the deputy or institution who in fact received it. The specific procedural elements through which this is to be directed are to be left to the Minister for Finance of the government of the day.

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7 The collective noun for both the upper and lower houses of the Irish legislature (i.e. the Dáil and Seanad).

8 An Irish pound, currently valued at about £ 0.90 Sterling.

In the case of non – anonymous donations, each member of the Oireachteas or of the European Parliament must, before the end of January each year, inform the Public Offices Commission of any donations in excess of 100 punts received in the previous year, the amount or nature of the goods received and the name, profession and address of the donor of such. Equally, before the end of March, each political party must inform the said commission as to any goods or monies in excess of 100 punts received, the exact amount of such and the name, address and profession of the donor.

Furthermore all unsuccessful candidates for any seat in the national or European legislature must, not later than 56 days after polling day, inform the Public Offices Commission as to any donations in excess of 100 punts.

A person is deemed to be to have committed an offence if he or she fails to notify the Public Offices Commission of donations received within the time limit as specified above, fails to inform the Commission of the amount or in any way knowingly falsifies the information with regard to any respect of the procedure as stipulated by the 1997 Electoral Act. A person found to have failed to inform the Commission within the time limits is liable to pay a fine not exceeding 1,000 punts. If however the person has knowingly falsified information with regard to the donation, then the sentence will consist of a fine not exceeding 20,000 punts and/or 3 years' imprisonment. Proceedings for an offence may only take place with the consent of the Director of Public Prosecutions.

As regards the donors: companies, trade unions, societies and building societies must report donations exceeding 4,000 punts and furthermore must specify both the exact amount and the recipient.

B. Current issues

A judicial tribunal (the Moriarty Tribunal) is investigating the activities of Messrs Haughey and Lowrey and in particular their relationship with Mr. Ben Dunne. However the above legislation is not seen to apply in this case as their actions preceded 1997 and as such they are being tried in accordance with the previous legislation, which left the situation as to the acceptance of donations very vague. Furthermore being a tribunal of inquiry (as opposed to a trial before a court) it can only expose facts and no prosecution is involved. However the files may later be sent to the Director of Public Prosecutions.

There is a large degree of public cynicism regarding the operation of such tribunals, which are seen to have little impact, despite their enormous cost to the taxpayer. For instance, in the early nineties there was a long and protracted tribunal over allegedly suspect relations between a large beef producer, Larry Goodman, and the then Taoiseach, Albert Reynolds. This 'Beef Tribunal' is generally seen to have benefited nobody except the Barristers involved, whose fees cost the exchequer about 5 million punts; despite the seemingly overwhelming evidence against Mr. Reynolds as regards the alleged sale of Irish passports to Iranian nationals, the affair came to nothing.

ITALY

Introduction

The issue of corruption has been a key topic in Italy for several years, in particular subsequent to the 'Mani Pulite' campaign since 1995. However, this campaign appears to have addressed the question of the proper application of existing legislation rather than the need for new provisions. Once again the issue of the financing of political parties has been a crucial element.

A committee established by the Speaker of the Chamber of Deputies in September 1996[9] conducted research on the phenomenon of corruption and its report examined corruption in public administration and private life as well as politics. Apart from the issue of financing of political parties, the report emphasises the need to regulate lobbying activities in order to curb their potentially corrupting effects.

Nine bills or draft laws intended to modify existing legislation on corruption are under examination, but none has yet been approved.

A. Legislation

The criminal code rules concerning corruption were amended in April 1990. The code distinguishes between "concussione" (Article 317), the offence whereby a public official extracts money or other assets by use of his position, and "corruzione" (Art. 318/9 a public official receiving undue rewards for official acts or omissions). The penalties provided for also applicable to those giving or offering such inducements to the official. Abuse of office (Art. 323) is a third category of offence, involving the intentional obtaining of advantages by carrying out, or omitting to do so, functions in the capacity of public official or one charged with a public service.

Financing of political parties is regulated by Laws 175 of 2 May 1974 and 515 of 10 December 1993. Candidates standing for the Senate and the Chamber of Deputies are reimbursed electoral expenses on the basis of a regional breakdown by population and the proportion of votes obtained by the parties. Parties themselves are financed by the state according to a formula whereby those parties with lists in more than two thirds of constituencies or at least 2% of the national vote receive an equal share of 15% of the total available plus a share of the remainder corresponding to the votes obtained.

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9 "Comitato di studio sulla prevenzione della corruzione". On the same day another committee was created to examine draft legislation "Commissione speciale per l'esame dei progetti di legge recanti misure per la prevenzione e la repressione dei fenomeni di corruzione".

B. Discussion and proposals

Three draft laws have been submitted in recent years and there has been a wide ranging debate on the need for improvements. The report for the 'Study Group on the Prevention of Corruption' submitted in 1996, after analysing the extent and the causes of the problem, called for the following actions in regard to **public administration**:

- simplification of legislation,
- an increase in transparency in regard to privatisation,
- introduction of incompatibility rules for public officials seeking elected office,
- better training for public officials in technical matters regarding contracts and construction works,
- selection and promotion criteria for public servants which are separated from political considerations,
- measures to improve the status of public service,
- codes of behaviour for public servants,
- checks on the wealth of public servants in sensitive sectors,
- restrictions on the nature of activities of public servants after leaving their employment,
- aligning disciplinary procedures with the results of criminal trials,
- revision of regulations and procedures for public contracts,
- development of control systems.

In regard to the area of **political activity**, the group proposed:

- revision of the checks on political nominations,
- new provisions for financing of political parties with stricter limits and full publicity
- regulation of lobbying activity,
- proper maintenance of voting secrecy (to prevent purchase of votes),
- revision of the rules regarding ineligibility and incompatibility for electoral office.

In regard to **private activities**, the group proposed:

- new discipline in regard to conflicts of interests,
- revision of the inspection procedures for fiscal, sanitary and environmental matters, reducing the margin of discretion,
- reducing links between public and private activities,
- increasing internal controls in companies with shareholders,
- introduction of codes of conduct for the professions.

There are three principal collections of documentation by the Study services of the Italian Parliament in regard to corruption:

* Documentazione sui reati di concussione e corruzione, Senato della Repubblica, N.33, ottobre 1994
* Documentazione in materia di corruzione, Camera dei deputati, N.42, novembre 1996.
* Dossier Provvedimento: Modifiche alla disciplina dei reati contro la Pubblica Amministrazione, N.344, maggio 1997.

LUXEMBOURG

Introduction

Current legal provisions are known to be incomplete. Recent events involving cases of corruption in neighbouring countries and the work done in international bodies has raised awareness of the need to introduce new legislation. Cases brought to court under existing provisions are rare. A recent resignation of a minister in suspicious circumstances may increase public interest in measures to combat political corruption, but first indications do not show this to be a case of political or personal corruption..

A. Current provisions

Article 240 of the Penal Code provides for imprisonment from 5 to 10 years for any public official, or person charged with a public service, who embezzles public money.

Article 243 provides that all public officials found guilty of demanding bribes or of receiving amounts in excess of what is due will be punished by 6 months to 5 years imprisonment, increased to 10 years where violence or threats were used.

Fines may additionally be imposed for these offences, ranging from 20,000 to 400,000 francs.

Article 245 provides that all public officials, or persons charged with a public service, who receive undue advantage through official acts will be punished by imprisonment from 3 months to 2 years and by fines of up to 1,200,000 francs.

Article 247 provides that all public officials committing unjust acts or refusing to carry out an act required by his duty will be imprisoned from 3 months to 3 years and receive a fine of up to 1,200,000 francs. Article 248 increases this to imprisonment of 1 to 5 years and a fine of up to 500,000 francs if he agrees in response to offers, promises or gifts to commit a crime.

Judges or arbitrators found guilty of corruption may be punished by up to 5 years imprisonment and by fines of up to 500,000 francs (Arts. 249 and 251).

Article 252 provides that those corrupting public officials will be punished by the same penalties as the corrupted. Attempted corruption may be punished by prison for up to 1 year and fines of up to 200,000 francs. The value of the presents offered by the corruptor will be given to charity.

B. Proposals

The draft legislation submitted to the Chamber of Deputies on 22 January 1998 is accompanied by a report which draws attention to recent events elsewhere and to the work of international bodies such as the Council of Europe and the OECD, as well as the EU. It emphasises the need for vigilance and proposes new measures to fill in loopholes in existing legislation.

In particular, it notes that the existing texts do not penalise soliciting by public officials of rewards for corrupt actions unless the soliciting actually results in corruption; that gifts offered prior to an act of corruption are not penalised but require an agreement in advance; that individuals holding elected office are not clearly included; and that officials who are foreign nationals or who work for international organisations are not covered.

In addition, existing legislation does not provide for undue influence ('trafic d'influence') nor for corruption of employees in the private sector.

The draft laws presented seek to respond to these gaps in existing measures and are based largely on new French penal law, but using Belgian models on some points.

NETHERLANDS

Introduction

Until recently corruption and integrity were not important issues in the Netherlands. However, lately, this situation has started to change. For example, the news about the activities of a Member of Parliament as a commissioner of a company evoked considerable debate in the media as well as discussion in Parliament at the beginning of 1997.

Since the European Parliament resolution of December 1995 the main development in the area of combatting corruption in the Netherlands has been the drafting of an elaborate law regarding the integrity of public administration in relation to (organized) criminality. Before that time, a start had already been made with the development of preventive policies in government ministries.

A. Policy and legislation

Corruption is punishable under article 363 of the Penal Code: a public servant who accepts a gift or promise, knowing that this is only done in order to make him (not) do something or because he has (not) done something which is in defiance of his duty, will be sent to prison for at the most four years or will have to pay a fine of the fifth category.

With regard to sponsoring of and gifts to political parties in the Parliament *(Tweede Kamer)* only rules concerning self – regulation exist. Political parties receive subsidies and free broadcasting time from the government. But until now, financially they have mainly relied on members' subscriptions and on small donations.

The issue of secondary occupations of members of the parliament is, to a certain extent, regulated by article 57 of the Constitution. Only a minister or *staatssecretaris* who has resigned from office is allowed to be a member of one of the chambers of the *StatenGeneraal*. For all other public offices this article provides that they cannot be combined with membership of the *StatenGeneraal* or with one of the chambers. In addition, the Parliament has two written rules, which however are not compulsory. Firstly, a register of secondary occupations of the members has been kept since 1976. And secondly since 1984 parliamentarians are also asked to give notice of journeys abroad that are not paid by the state or by themselves.

A circular concerning the development of policies to prevent corruption and fraud was sent by the minister of Internal Affairs to all ministries in January 1995. It described possible measures and instruments that could be applied. In March 1996 the Audit Office reported that a sound policy on integrity had only been developed so far at three ministries. A study of the possibilities for punishing members of representative bodies when these behave reprehensibly concluded among other things that termination or obstruction of membership is only possible if the behaviour concerned is a criminal offence.

At the end of 1996 the laws on income tax have been modified in order to restrict the possibility

of deducting costs related to criminal activities.

B. Discussion and proposals

In 1997 there has been a political debate about the desirability of changing the formulation of article 363. However, the text has remained as it was, demanding proof of knowledge that the gift or promise concerned was *solely* made in order to get the public servant to do or not do something which is against his duties.

In October 1997 the government submitted a bill regarding an extension of the subsidies for political parties. This was considered necessary because the costs political parties have to deal with are increasing, whereas the amount of subscriptions is decreasing. The total amount of subsidies will be raised by over 20 percent. In addition to the existing subsidies for political scientific institutes, political education activities, and political youth organisations, subsidies are proposed for informing members, for maintaining contacts with affiliated parties abroad and for supporting educational activities. Political parties may employ the subsidies at their own discretion. Only with regard to scientific institutes and youth organizations is a certain distribution code applied in order to guarantee their independent position.

The new law on the integrity of public administration in relation to (organized) crime, which was mentioned in the introduction, is expected to be introduced in Parliament during 1998. It will comprise modifications to the law concerning the provision of information needed for administrative decision making, to subsidies and public contracts (creating reasons for exclusion from the right to tender) and, finally, to organization law and regulation (to create a legal basis for the policy instrument).

In the beginning of 1997, the Bureau of the Parliament was requested by a motion for resolution to study the possibilities for assessing Members' behaviour. The Bureau reported that this task could be done by the political parties, by colleagues and by the Bureau itself. Furthermore, it suggested that the two registers (see 'Policy and legislation') should be published in the *Staatscourant.* Subsequent motions demanding a code of conduct were rejected.

At a ministerial meeting of OECD in 1996, it was agreed to make bribery of civil servants abroad a crime. On this occasion, the Dutch delegation supported the recommendation that Member States should submit bills on this matter before April 1998 and that they should strive for these to come into force towards the end of this year.

PORTUGAL

A. Legislation

For a number of years the Portuguese Government has been committed to preventing and punishing all acts of corruption in government service. In 1994 the Portuguese Assembly adopted law No 36/94 which introduced measures to combat corruption and crime. Article 1 provides that it is the task of the Government Attorney's Office and the judicial police, via the Central Directorate for Combatting Corruption, Fraud and Economic Offences to take preventive measures against crimes involving: corruption, embezzlement and financial participation in business deals, maladministration in an economic entity in the public sector, fraud involved in obtaining or diverting subsidies, aid or loans. Other preventive measures are specified in the other articles of the abovementioned law.

In June 1993 Parliament also granted the Government legislative authorization in connection with using the financial system to prevent money – laundering. The aim of the legislative authorization was to allow Council Directive No 91/308/EEC of 1 January 1991 on prevention of the use of the financial system for the purposes of money – laundering to be transposed into national law (Laws No 16/93 and 313/93).

Corruption is a crime which consists in misusing the powers conferred by virtue of holding a certain office. Instead of being used for the intended official purposes, they are diverted to satisfy the purely private interests of the official concerned or third parties. Chapter IV of the Penal Code concerning crimes committed in the exercise of public duties punishes, inter alia, crimes involving: passive corruption for the purposes of committing an unlawful act (Article 373); active corruption (Article 374); embezzlement (Articles 375 and 376); financial participation in business deals (Article 377); extortion (Article 379). These provisions were revised in March 1995.

Penalties imposed for 'passive corruption' range from 1 to 8 years' imprisonment where unlawful acts have been committed. If the official concerned refuses the offer or returns the advantage proposed he may be exempted from punishment and the sentence may be reduced where he assists in the search for evidence. Up to 2 years' imprisonment and a fine may be imposed where corruption results in a 'lawful' act. Sentences of between 6 months' and 5 years' imprisonment are imposed for 'active corruption' (bribery of officials).

B. Enforcement

With a view to implementation, the Government reorganized the Central Directorate for the Investigation of Corruption, Fraud and Economic and Financial Crime, increasing its responsibilities for combatting corruption as regards planning, the gathering of information and actual investigations (Decree law No 299/94).

The Government Attorney's Office (*"Ministério Público"*) is the body responsible for representing the State, bringing criminal proceedings and safeguarding democratic legitimacy and interests determined by the law. Inter alia it is responsible for leading criminal investigations even

if they are carried out by other bodies and for promoting and cooperating in crime prevention measures (Law No 47/86, amended by Law No 23/92 Organic Law governing the Government Attorney's Office).The judicial police is a criminal police body which assists the administration of justice and is organized hierarchically under the Ministry of Justice and under the control of the Government Attorney's Office. As the body responsible for preventing and investigating crime, it is exclusively responsible, throughout Portuguese territory, for investigating, inter alia, crimes involving: fraud in obtaining or diverting subsidies, aid or loans; and for corruption. Government departments and public or private companies must provide the judicial police with any assistance for which a justified request is made.

The judicial police is authorized to have direct access to information on civil and criminal matters on the files of the Directorate general for Computer Services at the Ministry of Justice, as well as to information of relevance to criminal cases contained in the files of other bodies (Organic Law governing the Judiciary Police adopted in Decree Law No 295A/90 of 21 September and amended by Law No 36/94 of 29 September).

C. Transparency and anti – fraud measures

The DirectorateGeneral for Customs is a department in the Ministry of Finance whose aims include the prevention and punishment of customs and fiscal fraud and illegal trafficking. In order to achieve these aims, it requests the collaboration of the police and security forces and provides economic and social agents with practical information aimed at clarifying questions raised in the exercise of their duties (Decree Law No 324/93).

Financial control and checks on the sound management of public funds in government departments is of fundamental importance for ensuring legality and preventing corruption.

The Court of Auditors is the supreme body responsible for checking the legality and correctness of public revenue and expenditure, assessing sound financial management and finding out who is responsible for financial offences. The Court of Auditors has jurisdiction and financial control powers under the Portuguese legal system both on national territory and abroad. In carrying out its duties the Court of Auditors is entitled to cooperation from all public and private entities. The entities under inspection must provide the Court of Auditors with information on the offences to be judged by the latter (Law No 98/97).

D. Public contracts

An administrative contract is defined as a voluntary agreement establishing, modifying or cancelling an administrative legal relationship or a voluntary bilateral agreement which governs an administrative legal relationship which establishes, modifies or cancels a contractual obligation (Articles 178 et seq. of the Code of Administrative Procedure). The Court of Auditors is responsible, in particular, for checking beforehand the legality and budgetary acceptability of acts and contracts of any kind concerning expenditure or representing any kind of direct or indirect liabilities or responsibilities (Article 5 of Law No 98/97 Organic Law governing the Court of Auditors).

The purpose of prior control is to ascertain whether acts, **contracts** or other instruments governing expenditure or representing direct or indirect responsibilities comply with the law and whether the relevant charges can be borne by the appropriate budget heading (Article 44 of Law No 98/97).

No act, **contract** or instrument subject to prior inspection by the Court of Auditors may be executed or give rise to any payment before it has been approved or declared acceptable by the Court of Auditors (Article 45 of Law No 98/97).

E. Political parties

The activities of political parties are funded by their own revenue or by income from private financing and public subsidies. Financial donations from entities may not exceed a total of 1000 times the minimum national monthly wage. Financial donations from individuals may not exceed 30 times the minimum national monthly wage per donor. Anonymous donations may not exceed an annual total of 500 times the minimum national monthly wage.

Political parties must have an organized accounting system. It must include an annual inventory of the party's assets, separate accounts for the revenue and its origins and separate accounts for expenditure and for capital transactions. There should be specific lists, attached to the accounts, of donations made by entities and of real estate. Separate accounts are kept for election campaign revenue.

By the end of March each year political parties must send the previous year's accounts for inspection by the Constitutional Court, which issues an opinion on their regularity and legality within a maximum of six months. This deadline may be extended if the Constitutional Court needs to request further clarification. Political parties which do not comply with these obligations are fined at least the equivalent of 10 times the national minimum monthly wage and not more than 400 times the national minimum monthly wage. Candidates for the Presidency of the Republic, political parties, coalitions or the first proposer of each group of citizens putting forward candidates, as appropriate, are responsible for drawing up and submitting the accounts for election campaigns. Within a maximum of 90 days of the results being officially declared, each candidate must submit accurate accounts concerning the election campaign to the National Electoral Committee.

The National Electoral Committee ascertains, within a period of 90 days, the legality of the revenue and expenditure and the regularity of the accounts. If the National Election Committee finds any irregularity it must notify the candidate, who must then submit new, correctly draw up accounts within a period of 15 days.

Those who contravene these rules are fined, and the National Election Committee is the body responsible for imposing the fines. Appeals against decisions of the National Electoral Committee must be lodged with the Constitutional Court. (Law No 72/93 on the funding of political parties and election campaigns).

SPAIN

A. Legislation

The Spanish Criminal Code contains provisions on corruption, the sale of influence, misappropriation and fraud.

* *Corruption ('cohecho')(Art. 419427)*
A holder of public authority or public official who solicits or receives a gift or offer for carrying out in the course of his duties, for his own gain or for the benefit of others, an act or omission which constitutes an offence shall be liable to imprisonment for 2 to 6 years.

* *Sale of influence (Art. 428431)*
A holder of public authority or public official who influences another public authority holder or official, taking advantage of his duties or his position in the hierarchy to obtain a benefit for himself or for others, shall be liable to imprisonment for 6 months to 1 year.

* *Misappropriation (Art. 432435)*
A public official who appropriates for his own financial gain public money or property for which he is responsible by virtue of his duties shall be liable to imprisonment for 3 to 6 years.

* *Fraud and abuse of power (Art. 436438)*
A holder of public authority or public official who, in exercising his duties relating to public procurement or public payment, connives with the interested parties to commit fraud, shall be liable to imprisonment for 1 to 3 years.

B. Transparency

As regards the economic and financial situation and the interests of Members of Parliament, Section 160 of the Spanish electoral act creates a register for listing all the interests of members of the Spanish Congress. Members of Parliament must declare all their activities which may constitute grounds for incompatibility with their office or which bring them economic gain. Activities and property are declared on a form drawn up by the Speakers of the two houses of Parliament and must be entered in a register of interests (registro de intereses). Declarations must be made at the beginning and end of their term of office and whenever changes occur.

Following the decision of the Senate and the Bureau of Congress of 18 December 1995 (Mesas del Congreso de los Diputados y del Senado) the declaration of Members' activities must take place in the following order: public activities and duties; activities at the service of foreign countries; income from the public sector; private activities; other activities.

The declaration of property includes, for example, immovable property, bank deposits, securities, shares in companies and other transferable securities, works of art and antiques, etc.

The Electoral Act (Section 6 et seq.) sets out in great detail the grounds for incompatibility with

the office of member of one of the two houses of Parliament. The Act of 11 May 1988, on activities incompatible with the office of Minister or senior civil servant, defines the conditions under which the exercise of these duties is compatible with the exercise of other public or private activities; holders of these offices are required list precisely their activities, property and rights in a special register. There are penalties for omissions or false declarations.

C. Public contracts

The Act of 18 May 1995 on contracts concluded by the administrative authorities provides that these authorities must adapt to the principles of public notification, competition, equality and non – discrimination.

If the amount involved in the contract exceeds a certain sum, the contractor must obtain approval (clasificación) in advance; this approval is granted in accordance with certain criteria set out in the above – mentioned Act. A number of exceptions are provided for. A register of approved contractors (Registro Oficial de Contratistas) is kept by the Ministry of Economic Affairs and Finance.

Article 20 of the Act of 18 May 1995 prohibits certain persons from concluding with the administration contracts of the type governed by the Act, and in particular, under the conditions defined by individual provisions, the holders of certain unelected public posts and the members of the legislative assemblies and their immediate families.

D. Funding of political parties

Act 3/1987 of 2 July 1987 is shortly to be amended. A bill is in preparation in Congress for the end of 1998. The current law defines the sources of public and private funding for parties, and lays down a strict monitoring system. The Audit Board (Tribunal de Cuentas) is responsible for monitoring the funding of parties to guarantee that the activities of political parties are carried out in a regular, transparent and public manner.

SWEDEN

Introduction

A Commission of Inquiry of the government is currently investigating lobbying activity and a proposal for stricter rules in relation to public procurement is also under examination.

A. Legislation

The basic provisions are to be found in the Penal Code of 1962, as amended in 1977, 1986 and 1993. The Code distinguishes between bribery (active corruption) and bribe-taking (passive corruption), which are two different offences.

Chapter 17, article 7, provides that giving or offering a bribe or improper remuneration is an offence punishable by a maximum of 2 years imprisonment. Chapter 20, article 2, provides that an employee accepting a promise of or requesting any bribe or improper remuneration will be punished by fines or imprisonment also for a maximum of 2 years, but in the case of "serious" offences 6 years. The legislation also applies to public servants in central and local government, those governed by statutory regulations, armed forces, others vested with public authority and fiduciaries. It is therefore very widely drawn, covering corruption in both private and public sectors, to which the same rules of criminal responsibility apply.

The term "improper remuneration" is intended to be drawn widely, but its interpretation is seen as depending on custom and public opinion at the time. The term employee, applying to private and public sectors is also understood to include politicians performing public functions and services in government. Where illicit payments are made by a company the directors or employees are held responsible.

Results of the bribery (e.g. in terms of improper actions by public servants) are immaterial to the offence. Benefits exceeding SEK 300 may be held to be improper. The Public Prosecutor may initiate legal proceedings for cases in the public sector but will normally act only on notice of the employer concerned for private sector cases.

Bribery is included amongst the crimes for which a court may relieve a member of parliament of his or her mandate (subject to the internal procedures of the Riksdag).

B. Institute for the Prevention of Illicit Payments

A non-profit making organization established in 1923, the institute disseminates knowledge about legal provisions against corruption, publicises court cases and combats illicit payments through publicity campaigns.

C. Registration of MPs' financial interests

The Riksdag adopted an act in May 1996 on registration. All relevant information concerning Members' interests outside the Parliament is to be made public, but registration is voluntary. An MP can at any time withdraw from the register, but, if s/he enters it, the information must be complete and include:

- names of companies in which the member holds shares above a certain minimum level
- officially registered real property of a business character
- employer's name for any fixed position
- type of financial agreement for remuneration paid by employer during mandate in parliament
- type of financial agreement coming into effect after mandate completed
- type of business and name of firm for MPs with business interests exercised during mandate
- type of commitment for appointments in central or local government, which are not temporary
- type of benefit and name of provider for MPs receiving benefits of a material nature or secretarial or research assistance.

D. Supervision

As a part of the exercise of its supervisory powers, the Riksdag appoints "Parliamentary Ombudsmen" to supervise application of laws by the public administration. It also appoints twelve of its members to serve as delegates responsible for scrutinising the conduct of public affairs.

In addition the government appoints a "Chancellor of Justice" who exercises similar supervisory powers to those of the ombudsmen, but is responsible to the government. The Chancellor exercises such supervision over all civil servants, including both national and municipal officials, and takes action in cases of abuse.

E. Public contracts

The Public Procurement Act of 1992 established general provisions and special regulations for the award of public works and supply contracts and contracts in the fields of water supply, energy, transport and telecommunications. The Secrecy Act of 1980 provides that information regarding offers submitted may in no case be revealed to other persons until all offers have been made public or an agreement has been concluded.

UNITED KINGDOM

Introduction

Public concern in recent years has mounted in regard to the standards of behaviour expected of those in public positions. The financing of political parties is also under review and interest in this question has been sharpened following a recent case involving the tobacco industry and rules on advertising in sport.

The House of Commons established a new Committee on Standards and Privileges in 1995 at the same time as appointing a "Parliamentary Commissioner for Standards". The Committee has already produced 19 reports, largely on particular cases.

Current legislation involving the prevention of corruption is as follows:
1. – The Public Bodies Corrupt Practices Act 1889
2. – The Prevention of Corruption Act 1906
3. – The Prevention of Corruption Act 1916.

A government statement on prevention of corruption of 9.6.97 addresses the question of the need to amend and consolidate this legislation. It invites proposals especially on the creation of single offence of corruption to cover both private and public sectors; on the need to extend statutes to cover trustees and to include misuse of office; and on amendments to legislation to aid enforcement.

Debate in recent years has concentrated on the question of standards of behaviour for Members of Parliament, following a scandal in regard to payment to Members for the placing of Parliamentary Questions. Members of the House of Commons are required to complete declarations of interest, for which new, extended rules were established by the Committee on Standards and Privileges in July 1996, as part of a Code of Conduct for Members.

A Committee on Standards in Public Life chaired by Lord Nolan was also established outside Parliament in October 1994 and has now produced 3 reports. The first of these covered MPs and civil servants. The second concerned local public spending bodies in the fields of education, training and housing; the third standards of conduct in local government. This Committee is currently investigating the financing of political parties.

A. Legislation

1. – This Act *(see above)* creates the criminal offence of active or passive bribery of MPs or of officers or servants of a public body. Maximum penalties are:
- on summary conviction: 6 months prison or limited fine
- on indictment and conviction: 7 years prison and unlimited fine; plus repayment of money received to public body concerned; no election to public body for 5 years (on 2nd offence, loss of voting rights for 5 years plus no election ever)

2. – This Act creates a criminal offence for agents corruptly accepting or obtaining for themselves, or for any other person, any inducement or reward for doing, or forbearing to do any act, or for showing or forbearing to show favour or disfavour to any person in relation to their principal's affairs or business. It is also an offence for any person to give inducements or rewards to an agent.

It is an offence for any person to give any agent a false document in order to mislead a principal.

3. – This Act creates a presumption of corruption in cases where it is proven that money or other considerations have been paid to a person in the employment of a government department or public body by a person seeking to obtain a contract. The concept of public body is extended to include local and public authorities of all descriptions.

B. Enforcement

There is no body specifically responsible for monitoring or enforcing legislation in regard to corruption other than the police and the public prosecution service. However, a wide range of bodies such as Customs & Excise, the Inland Revenue, the Benefits Agency (of the Department of Social Security) and the Post Office are involved in combatting fraud in relation to public sector organizations.

C. Proposals

The questions raised by the government in the Home Office "government statement" of June 1997 concern essentially the adequacy of existing legislation in regard to the boundary between public and private sectors. As the statement points out this boundary has changed in recent years because of the privatisation of many functions that were previously considered public and also because of public participation in companies which are commercial entities.

The government also states in this document that the EU Convention and Protocol on Corruption do not affect the UK's statute law on corruption in any way and that work under way in the Council of Europe (on a criminal law convention in relation to corruption) and in the OECD (on bribery of foreign public officials) will not require significant amendment to the existing legislation of the UK. But it does continue:

> *"[…]However, the formulation of the offences under discussion in these fora may be helpful in determining whether any updating of the corruption statutes is necessary in addition to the consolidation exercise."*

The EU Convention of 26 May 1997 has not been published yet in the UK nor discussed by either House of Parliament.

The House of Lords and the House of Commons have established a Joint Committee on Parliamentary Privilege. One of the questions which will be examined by this committee is Parliament's response to the government's proposals and in particular the question of whether improper influencing or bribery of members of Parliament should be treated as a criminal offence.

ANNEX

Combating corruption in public procurement contracts

Introduction

Public procurement contracts have always been a fertile breeding – ground for corruption.

1. On the one hand they provide considerable opportunities for work for many firms. They represent a total of some 15% of the European Union's GDP, if one includes not only procurement contracts for public authorities (the State, local authorities, public bodies), but also those awarded by public service enterprises. In some sectors this percentage is even higher: building and public works, transport materials, telecommunications materials, energy. Obtaining these contracts is sometimes vital for firms in these sectors, particularly at local level and they may be tempted to stoop to any means to do so.

2. On the other hand, it is no doubt easier to find corruptible elements among public decision – makers than in business. Not that they are fundamentally less honest than businesspeople: it is just that there is a different relationship between the decision – maker and the body he represents. For a business, giving up its freedom to conclude contracts with the best – performing suppliers in favour of a mediocre one who happened to be in favour with the decision – makers would represent a serious risk to its economic and financial interests. Awareness of this interest among business leaders is strong enough to warn them off the temptations or to encourage them to supervise the actions of their subordinates. If they are the owners of the business, this goes without saying; if they are only its employees, it still applies, because they are then subject to supervision by the owners and are themselves dependent, often financially, on the firm's good results. Whether they are owners or employees, their personal financial situation is generally comfortable enough to render them proof against temptation.

   In a public body it seems that there are greater risks of the interests of the decision – makers diverging from the public interest. On the one hand the two can never precisely coincide, since decision – makers are never clearly in the position of owners. On the other hand, decision – making power is probably more concentrated and less supervised than in business, particularly at regional and local authority level. Finally, public decision – makers can be regarded as more vulnerable to temptation because their financial circumstances are modest compared to those of business leaders, and it is often politicians who are in need of significant sums of money to finance their lifestyle and the expenses which their career necessitates, usually to contribute to the funding of the party to which they belong.

   These long – standing corruption factors were reinforced by the climate of easy money or 'money cult' which inspired the 1980s and 1990s, and it is fair to say that the public procurement contracts sector occupied a prominent place in public awareness of the phenomenon of corruption which developed both at European and national level. At Community level this concern appears in the recent Commission communication on 'a Union Policy Against Corruption' (21 May 1997).

The Council of Europe also devoted a considerable part of its European Conference of Specialized Services in the Fight Against Corruption, held in Tallinn at the end of October 1997, to the public procurement contracts sector. Community legislation on public procurement contracts, which is now a very comprehensive body of law, could play an important role in this area. However, since most powers and instruments remain in the hands of the Member States of the Union, most of the measures taken have been at national level.

A. Opportunities and use of Community law

1. The anti – corruption dimension of Community law on public procurement contracts

Community legislation on public procurement contracts aims principally at applying to this sector the principles of the internal market, namely freedom of movement (goods and services) and competition rules. It does not contain any specific provisions for combatting corruption, which form part of criminal law and are thus the exclusive preserve of the Member States. It can, however, contribute indirectly to combatting corruption.

1. The relevant provisions

a. First of all there are the **stipulations regarding the good repute of bidders for contracts.** As the aforementioned Commission communication on 'a Union Policy Against Corruption' recalls, the various sectoral directives (on public works, supplies and services) lay down that national legislation may exclude from bidding for contracts persons who:
   - have been convicted of a breach of professional ethics
   - have been guilty of gross professional misconduct.

b. The **obligations imposed on the awarding bodies** may also help reduce the scope for potential corruption. The main requirements are:
   - that, as a general rule, contracts should be awarded by a call for tenders, with an exception being made for the negotiated procedure (contract by mutual agreement);
   - that notices of contract should be published in the Official Journal of the European Communities;
   - that the contract should be awarded to the person making the lowest, or most economically advantageous, bid;
   - that, following the conclusion of the contract, a written report should be drawn up containing minimum information, a summary published in the Official Journal of the conditions under which the contract was awarded, and each unsuccessful bidder informed of the reasons why his bid was not accepted.

c. Finally the **provisions concerning appeals** may also play a role. Directives 85/665 of 21 December 1989 (general rules) and 92/13 of 25 February 1992 (rules applying to public service sectors) require the Member States to provide effective and rapid procedures for appealing against decisions for the award of contracts which a bidder regards as harmful to it. It is true that these appeal procedures relate in the first instance to breaches of Community rules, but as such they may serve as a starting point for the detection and prosecution of corruption offences.

2. Shortcomings of these provisions

Community legislation is first of all inadequate in terms of its **scope.** It applies only to contracts in respect of sums above a certain very high level. It excludes the arms market, which is a significant sector. Nor, by definition, does it cover **the contracting out or delegations of public services**, by acts in which the public authorities (the State, local authorities) confer on public or private undertakings responsibility for providing a service in the public interest (electricity, gas and water supplies; railway, urban transport, post and telecommunications services). These acts are not public procurement contracts and it is traditionally considered that they should not be subject to the rules which, in the case of public contracts, narrowly restrict the administration's freedom to choose its contracting party: requirement to open the contract to competition (public notification) and to choose the financially most advantageous bid. It is considered that, since such contracts do not relate to the acquisition of goods and services for the operation of the administration (which is the aim of public procurement contracts) but to the operation of services essential for the public, the public authorities should have the greatest possible freedom to choose their partners.

Community legislation has followed this tradition, with one exception in the case of public works concessions. These concessions are distinct from public works contracts, whereby the public authorities contract out for the construction of buildings and other structures which are not linked to the operation of a public service. The aim of public works concessions is to award to firms the contract not only for building a public structure but also for operating it, which very often consists in providing a public service: for example a motorway, bridge or tunnel which the firm will provide for the public and on which it is able to make a profit by means of its takings from the public (tolls). In spite of this difference in nature, the Community legislation on public works contracts (Directive 71/305 of 26 July 1971) specifically mentions public service concessions, which are subject to two requirements relating to transparency:

- publication in the Official Journal of the Communities of a notice of intention to conclude a concession;
- a 52-day minimum period between the submission of this notice and the deadline for submission of bids.

This is obviously not very binding compared to the requirements of tendering and award to the lowest bidder which apply to public contracts, and it only relates to a single aspect of the public services contracting: public service concessions and leases, in particular, are not affected. The award of such contracts is a happy hunting ground for corruption, as spectacular scandals in several Member States have shown.

These shortcomings in Community legislation itself are compounded by failings in its transposition by the Member States (only three have so far transposed all the directives) and in its application.

The Commission is well aware of all these shortcomings and in its Green Paper of 27 November 1996 on 'Public procurement in the European Union: Exploring the way forward', it envisages the following main remedies:
- lowering the application thresholds;
- increased rate of transposition
- monitoring of enforcement.

II. The Community's measures against corruption

As recalled above, in the absence of any powers in criminal matters, the European Union cannot itself impose any penalti The Commission is well aware of all these shortcomings and in its Green Paper of 27 November 1996 on 'Public procurement in the European Union: Exploring the way forward', it envisages the following main remedies: es in the fight against corruption. However, it has put in place a number of indirect intervention measures, particularly in the public contracts sector.

1. In 1988 the Commission set up a **unit for the coordination of fraud prevention** (UCLAF). It is true that this body, which now has a staff of 125, cannot act in a completely autonomous manner, particularly since it has no police or judicial powers. These powers remain the preserve of the Member States. However, UCLAF can pursue investigations complementary to those of the national authorities, either at their request or at its own initiative.

2. The **Commission Green Paper on Public procurement** (27 November 1996) shows that the fair and transparent procedures for the award of contracts and the judicial appeal procedures provided for by Community legislation on public procurement limit the danger of fraud and corruption, even though this is not their primary purpose. One of its most striking proposals is to institute a personal liability for of national officials when they declare that Community public procurement law has been respected.

3. **Regulation concerning on – the – spot checks and inspections by the Commission for detection of frauds and irregularities**
   On 11 November 1996 the Council adopted a 'regulation concerning on – the – spot checks and inspections by the Commission for detection of frauds and irregularities detrimental to the financial interests of the European Communities'. It applies to all budgetary expenditure, thus including public procurement contracts funded from the European Union budget (including those concluded in the context of the trans – European networks and structural funds), but only in the case of serious irregularities, irregularities with a cross – border element or those involving operations by several Member States. Without impinging on the powers of the Member States, it permits the Commission to carry out on – the – spot checks at its own initiative, after first informing the relevant national authorities. In this context, the Commission inspectors have access to all relevant documents under the same conditions as national inspectors, and their reports have the same evidential value in administrative and judicial proceedings. In connection with public procurement, the checks include interviews with unsuccessful bidders.

These provisions thus offer the Commission greater scope for action. However, they do have two main limitations:
- generally, intervention is restricted to non-compulsory investigations, completely excluding any police or judicial constraint, such constraints remaining the sole preserve of the Member States;
- in the matter of public procurement, only contracts which receive Community funding are covered; thus national contracts, even those which reach the threshold for falling within the scope of Community legislation, are excluded.

4. A **protocol to the Convention on the protection of the financial interests of the European Communities** was adopted by the Member States in June 1997 to compensate for the lack in most Member States of an offence of corruption of European Union officials or officials from other Member States. It provides that active and passive corruption involving such officials shall be an offence in all the Member States if it is detrimental to the financial interests of the Union.

B. Some examples of national measures

These have been selected as the measures most clearly reflecting the desire to combat corruption specifically in connection with public procurement contracts, particularly by creating original mechanisms which differ from the usual police and judicial procedures.

I. The British Serious Fraud Office

Set up by the 1987 Criminal Justice Act, this constitutes a clear departure in UK criminal law. It powers are restricted to cases which are out of the ordinary, particularly by reason of their seriousness and complexity. In this sphere it acts on its own initiative both as investigator and prosecutor, roles which are traditionally divided between the police on the one hand and the Crown Prosecution Service on the other. It has special powers to act which are not shared by the ordinary criminal investigation and prevention bodies:
- It may ask anyone who has relevant information to reply to questions or produce documents: refusal to reply to such request or the provision of false or incomplete replies is a criminal offence;
- It may decide to refer to the Crown Court a case which has been brought before the Magistrate's Court, a referral which is normally made by the Magistrate's Court itself;
- Once the case has been transferred to the Crown Court, the court may begin the trial and settle some questions (particularly as to the admissibility of evidence) before the case is put to the jury.

II. The 'clean hands' inquiries in Milan

This vast judicial operation has been going on for almost 7 years (since the end of 1991) and has involved a very wide range of inquiries relating (among many others) to public procurement scandals. The main characteristics have been:
- concentration of investigation and prosecution powers ('pools' of prosecutors and substitutes);
- police placed directly at the disposal of the investigators;
- cooperation of extra-judicial experts;

- chains of confessions obtained, sometimes by plea – bargaining, from 'reformed offenders';

For more details, see the report by prosecutor Borelli for the Council of Europe referred to in the bibliography.

III. Legislative innovations in France

In the past few years two essential Acts have aimed, as their titles clearly show, to strengthen the instruments for fighting irregularities and corruption in connection with public procurement contracts and delegation of public services. These are:
- the Act of 3 January 1991 on the transparency and regularity of procurement procedures, making the award of certain contracts subject to rules of publication and competition;
- the Act of 29 January 1993 on transparency and the prevention of corruption in business and in public procurement procedures.

These acts have brought about substantial innovations in both fields.

1. Creation of the offence of favouritism

The 1991 Act introduced a new offence in the Criminal Code, that of 'granting unjustified advantage', commonly called 'favouritism'. It applies to persons holding public authority, and involves:
- procuring an improper advantage in the award of a public procurement or public service contract,
- an irregular act (contrary to current laws and regulations),
- denying freedom of access and equality of candidates.

2. The interministerial commission of inquiry on public procurement contracts

This commission, set up by the 1991 Act, is responsible for checking the regularity and impartiality of the procedures followed in concluding public procurement contracts. Cases may be brought before it by a variety of administrative authorities, and it carries out inquiries to uncover illegal activities (contravening legislation on public procurement contracts, the Criminal Code, competition law, etc.) in which field it has wide powers:
- administrative inquiries: right of access to all professional premises and documents;
- judicial inquiries (to investigate the offence of favouritism): search and seizure of documents.

However, the interministerial commission does not have the power to impose penalties: it merely draws up reports for the authorities which requested the inquiry. Administrative penalties are for these authorities to impose, and prosecution in criminal cases is the preserve of the public prosecutor.

For details of its operation, we refer to the report by Mr Samuel of the French Ministry of Justice (see bibliography)

3. Some constraints on public service delegation agreements

The 1993 Act supplements the arrangements for public procurement contracts by making some contracts concluded by semi – public companies subject to the requirements of public notification and competition. However, its main departure is in the field of public service delegation agreements. Before then, such agreements conferred complete freedom on the public authority in question (the State, a public establishment or local authority) both in the award and in the duration of contracts. The Act restricts this freedom in two respects:

a. Procedure for the award of contracts

The public authority is now required to public a minimum of information as to its intention of delegating a public service (the decree implementing the Act has stipulated an announcement in a legal gazette and in a specialized publication). Candidates who express an interest after this announcement has been published and who, after their suitability (professional and financial guarantees, ability to manage a public service) has been considered, are permitted to make a bid, must be sent a document setting out the goods or services required.

If the public authority in question is a local authority, it must also:
- put the principle of delegating a public service to a vote of its deliberative assembly;
- instruct a commission, constituted among the members of that assembly in such a way that the political minority is represented, to open the contract to bidders;
- put the final choice of the contractor to a vote of the assembly.

It may negotiate directly with a firm only if no other bid has been submitted or accepted.

b. Duration of contracts

Public service delegation agreements must now be of limited duration. They may be extended only in two cases:
- for reasons of general interest, and then only for a year,
- where the authority has instructed the other contracting party to carry out work which is necessary for the proper performance of the service but which is not specified in the original contract.

Where the authority in question is a local authority, extension must be approved by the deliberative assembly.

In the drafting of this document, the reports of the Council of Europe's Second European Conference of Specialised Services in the Fight against Corruption have been of great assistance, in particular the papers by:

- *Mr Borelli (Public Prosecutor at the Milan court)*
- *Mr Gillanders (Serious Fraud Office, UK)*
- *Mr Samuel (Ministry of Justice, Paris)*
- *Mr Kuhl (European Commission)*

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