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GLOSSARY

OF INTERNATIONAL ANTI-CORRUPTION STANDARDS WITH EXAMPLES OF NATIONAL LEGAL PRACTICE

DRAFT

This draft Glossary was prepared by Gemma Aiolfi and Zora Ledergerber of the Basel Institute on Governance. It is based on the initial draft prepared by Bojan Dobovšek of the Ljubljana University and takes into account the discussion at the Expert Seminar of the Istanbul Action Plan countries on International Anti-Corruption Standards on 21-23 February 2005 in Kyiv, Ukraine. OECD, Council of Europe and the UN ODC provided their inputs for this draft. Canadian government is the main sponsor for the project. The draft is presented at the ACN meeting 30-31 May 2005, Istanbul.

***Action required**: delegates are invited to provide suggestions for the finalisation of the draft Glossary during the meeting and written comments after the meeting.*

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1. INTRODUCTION

The Anti-Corruption Action Plan for Armenia, Azerbaijan, Georgia, Kazakhstan, the Kyrgyz Republic, the Russian Federation, Tajikistan and Ukraine was endorsed in September 2003 in Istanbul (these countries are hereafter referred to as the Istanbul Action Plan countries). During 2004 legal and institutional frameworks to fight corruption in the Istanbul Action Plan countries were reviewed. Recommendations endorsed in these reviews cover several aspects of the fight against corruption, including anti-corruption legislation. Country recommendations in this field require all countries to reform national legislation to meet the international standards in relation to the criminalisation of the offer and promise of a bribe, sanctions for active bribery, non-pecuniary benefits and bribery through intermediaries, responsibility of legal persons, rules for lifting immunities, and confiscation. In order to meet these commitments the Istanbul Action Plan countries have to undertake wide ranging legislative reforms as part of a sustained effort to reduce and prevent corruption, this is a major undertaking which requires **long term political will**.

In the light of the Action Plan's anti-corruption recommendations this Glossary aims to present the main provisions of three international anti-corruption conventions, namely, the OECD Convention on Bribery in International Business Transactions (hereafter the OECD Convention), the Council of Europe Criminal Law Convention on Corruption (hereafter Council of Europe Convention) and the UN Convention Against Corruption (hereafter UN Convention). Whilst not an exhaustive account of all the details in these conventions, the goal is to assist the Istanbul Action Plan countries to identify the **core legal principles** that are prerequisite when developing or amending legislation to combat corruption in line with international standards.

The three abovementioned conventions are not the only international or regional conventions dealing with corruption. For example, the EU originally addressed the topic in relation to protecting its financial interests[1]; the Inter-American Convention against Corruption[2] is an important **regional** treaty as is the African Union Convention on Preventing and Combating Corruption[3]. For the Istanbul Action Plan countries however, the OECD, Council of Europe and the UN Conventions are of **primary relevance**. The multitude of new legal instruments may appear to add complexity rather than clarity to an already complicated issue, however, when the conventions are set in the context of the institutions that spawned them and their histories, many of the reasons for their differences emerge. The conventions vary in scope, legal status, membership, implementation and monitoring methods.

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[1] Protocol to the Convention on the Protection of the European Communities' Financial Interests, Official Journal Co 313, 23 October 1996. On 19 June 1997, a second Protocol [OJ 97/C 221/02 19.7.97] to the Convention was adopted, which has provisions for criminalization of money laundering of proceeds generated by corruption and introduced liability to legal persons in cases of fraud, active corruption and money laundering, and providing for the possibility of confiscation of these proceeds or the corresponding property.

[2] Inter-American Convention against Corruption, 29 March 1996, 35 I.L.M. 724 (1996), in force since 20 March 1997.

[3] African Union Convention Preventing and Combating Corruption, adopted in Maputo Mozambique, July 2003.

Putting the differences between these conventions on one side, it is worth recalling that they all start from the premise that the serious problems and threats posed by corruption to the stability and security of society undermines the institutions and values of democracy as well as good governance and economic development which need to be tackled through a **combination of preventive and punitive measures**. Although the Conventions are diverse - particularly in identifying the acts that Sates Parties are required to criminalize - they also have much in common, for example: They all require criminalization of transnational bribery; they all envisage extensive preventive elements; and they all recognise the close connection between money laundering and bribery, to name but a few of the common elements.

This Glossary focuses on the legal provisions dealing with the criminalisation of bribery and corruption, which is not to discount the essential importance of *preventive measures* or the *role of civil society* in its widest sense as being of vital importance when addressing the topic at the national level. The development of a coherent anti-corruption strategy must include all these elements and full use should be made of the toolkits, technical and other assistance that the international organisations can supply to make such a strategy a sustainable reality to engender change.

In relation to all three conventions outlined here, reference should be made to the accompanying **Commentaries** (for the OECD Convention)[4], **Explanatory Reports** (for the Council of Europe Convention) [5], and **Interpretive Notes** (for the UN Convention)[6], which expand and offer explanations and examples to assist with understanding the texts of the conventions themselves. Also of relevance to the latter convention is the **legislative guide** for the Implementation of the UN Convention against Organized and Transnational Crime and Corruption and Protocols thereto, New York 2004. In addition, the UN is preparing a similar legislative guide for the Convention against Corruption, due for release by the UN in July 2005.

This Glossary starts with a brief introduction to each Convention before addressing the question of defining corruption, thereafter more detailed comparisons are made with respect to the specific criminal and other related provisions of each of the conventions. References to the Istanbul Action Plan Countries are incorporated where information is available and as appropriate.

[4] Commentaries on the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, adopted 21 November 1997.

[5] Explanatory Report to ETS 173 on www.conventions.coe.int/treaty/en/Reports/Html/173.htm .

[6] Report of the Ad hoc Committee for the Negotiation of a Convention against Corruption on the work of its first to seventh sessions, Addendum, Interpretative Notes for the official records (*travaux préparatoires*), of the negotiation of the UN Convention Against Corruption, A/58/422/Add.1 October 2003.

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

A confluence of events dating back to the Watergate scandal in the US in the 1970s[7] and reaching their apex with the end of the Cold War in the early 1990s lead to a multilateral approach to combat the 'supply side' of bribery being taken up by the Organisation for Economic Cc-operation and Development. The OECD in Paris had been addressing the subjects from various perspectives since 1989[8].

The outcome of these deliberations at the OECD was the first Recommendation in May 1994 on combating bribery in international business transactions[9]. This was followed by a Revised Recommendation in 1997 which, although a '**soft law**' instrument, provided for monitoring of the implementation of the Recommendation by Parties. The OECD Convention followed soon after in December 1997[10] .

Consisting of only 17 articles, the OECD Convention is the **most focused in scope** of all the treaties examined here, and addresses the bribery of **foreign government officials**. The main aim of the Convention is to require countries to forbid the bribery of foreign public officials in the same way that countries prohibit the bribery of their domestic officials. So this means that the Parties should enact national laws criminalising the bribery of foreign public officials with the focus on the *supply* of funds – the person who promises or gives the bribe, in contrast to the offences committed by the official who receives the bribe, which is regarded as an area for states to address in their domestic laws.

The Convention seeks to ensure a '*functional equivalence*' among the measures taken by the parties to sanction bribery of foreign public officials, without requiring uniformity or changes in fundamental principles of a party's legal system, so national legislation can be broader, but not narrower than the Convention. In practice this should mean that if properly implemented, a minimum standard of conduct and 'functionally equivalent' norms will be developed at the national level.

The **monitoring** of the implementation of the Convention is carried out by the OECD Working Group on Bribery through mutual examination of countries, which is characterised by a *peer-review* mechanism conducted by two other States Parties and

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7 The result of which was the passing of the Foreign Corrupt Practices Act 1977, amended 1988, USC Title 15, chap. 2B, making the USA the first country to address the issue of bribery by companies engaged in international business through national legislation.

8 Early attempts to address the topic at the UN had failed, see John Brademas and Fritz Heimann, *Tackling International Corruption - No Longer Taboo,* International Trade Corruption Monitor, p.1-1005-1012, April 1999.

9 Recommendation of the Council on Bribery in International Business Transactions, 27 May 1994.

10 The OECD entered into force 15 February 1999 and has been ratified by 35 countries, of which 30 are OECD member states: Australia, Austria, Belgium, Canada, the Czech Republic, Denmark, France, Finland, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Korea, Luxembourg, Mexico, New Zealand, the Netherlands, Norway, Poland, Portugal, the Slovak Republic, Spain, Sweden, Switzerland, Turkey, the United Kingdom, the United States; non-members, who have joined the OECD Convention: Argentina, Brazil, Bulgaria, Chile, Slovenia; Estonia is expected to ratify the Convention in 2005.

personnel from the OECD secretariat. The Phase 1 examinations are complete and have examined the compliance of the national legislation with the requirements of the Convention. Phase 2 is a more searching process and examines how the laws and rules are actually enforced to implement the Convention. These examinations have sometimes resulted in countries being subjected to further reviews, as may be necessary on specific topics; in the Phase 1 *bis* reviews (UK, Japan). There is a follow up mechanism to the Phase 2 reviews whereby countries report on the progress made to implement the recommendations made in the Phase 2 report.[11] In both Phase 1 and 2 the countries conducting the review submit detailed written questionnaires to appropriate authorities of the country under review and receive written responses. Phase 2 also includes an on-site visit to the country being reviewed, and under both Phase 1 and Phase 2 procedures a draft report is submitted to the OECD Working Group on Bribery for discussion, the country under review is given an opportunity to make its observations to the whole group, after sometimes extensive discussions the final report and recommendations are published in their entirety on the OECD Internet website.

1.2 Council of Europe Criminal Law Convention on Corruption

The Council of Europe's approach to preventing and punishing corruption derives from its mandate to facilitate transnational cooperation in criminal matters through harmonisation of economic criminal law. The aim of promoting judicial cooperation in Europe covers all forms of mutual legal assistance, extradition and the confiscation of the proceeds of crime. Against this background, a series of measures were taken by the Council of Europe to address this issue: In November 1996 the Committee of Ministers adopted a Programme of Action against Corruption. A resolution adopted by the European Ministers of Justice in 1997 recommended the Programme be quickly implemented and called for the early adoption of a criminal law convention. The Committee of Ministers of the Council of Europe adopted a resolution on 4 May 1998 authorizing the establishment of the Group of States against Corruption (GRECO), whilst the text of the Criminal Law Convention on Corruption was agreed in November 1998, and opened for signature by the member states of the Council of Europe and the non-member states that had participated in its negotiation, on 27 January 1999.

The Council of Europe Convention entered into force in 2003[12] and the monitoring of the implementation of the Convention is carried out by GRECO through **mutual evaluations**. GRECO includes 38 member-states[13], and is currently engaged in the second round of evaluations, at each round the country is examined against several of the 'Twenty Guiding Principles for Fight against Corruption'[14] and the implementation of the legal instruments, namely the Council of Europe Convention and the Civil Law Convention on Corruption and Recommendation R(2000) 10 on codes of conduct for public officials.

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[11] For all Phase 1 Reports and Phase 2 Reports to date see www.oecd.org .

[12] For references see www.conventions.coe.int/treaty/en/Treaties/Html/173.htm.

[13] GRECO member-states: Albania, Armenia, Azerbaijan, Belgium, Bosnia-and-Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Latvia, Lithuania, Luxembourg, Malta, Moldova, Netherlands, Norway, Poland, Portugal, Romania, Serbia and Montenegro, Slovak Republic, Slovenia, Spain, Sweden, FYR of Macedonia, Turkey , United Kingdom, United States.

[14] Adopted 6 November 1997. For more information see www.greco.coe.int/Default.htm.

The mutual evaluations are conducted by *ad hoc* teams of experts who are appointed on the basis of lists of experts proposed by GRECO members, to evaluate each member in each evaluation round. Evaluation teams examine replies to questionnaires, request and examine additional information to be submitted either orally or in writing, visit member countries for the purpose of seeking additional information of relevance to the evaluation and prepare draft evaluation reports for discussion and adoption at the plenary sessions.[15] Many of the country reports of the first and second evaluation rounds are available on the Internet[16].

The Criminal Law Convention is complemented by the Council of Europe's Civil Law Convention, which was the first attempt to define common international rules in the field of civil law and corruption. This Convention requires each party to provide in its domestic law for effective remedies for persons who have suffered damage as a result of corruption, to enable them to defend their rights and interests, including the possibility of obtaining compensation for damage. This somewhat neglected area but of growing importance encompasses the practical aspects of the enforceability of contracts tainted by bribery and the remedies and relief that may be available in these circumstances. It will enter into force after fourteen ratifications.

The Criminal Law Convention, like the other Conventions discussed here, is a non-self-executing instrument, so countries will have to pass criminal and other laws to implement the Convention's requirements, which are set out in 42 articles in five chapters. The Council of Europe Convention includes a broad range of offences and addresses *both the active and passive sides* of bribery of a public official, it also broke new ground at the time with its provisions on private commercial bribery and trading in influence.

1.3 UN Convention against Corruption

The recognition that a UN Convention against Corruption was needed came about after the topic had been addressed in the UN Convention against Transnational Organized Crime of 12 December 2000: The international community recognized the need for a global legally binding instrument *specifically* dealing with corruption. The resulting UN Convention was opened for signature at Merida on 9 December 2003. As at April 2005, 119 countries have signed and 22 countries have ratified, and it will enter into force 90 days after the 30th ratification.[17] A conference of the States Parties to the Convention will be convened within one year of the entry into force of the Convention for the purpose of promoting and reviewing its implementation.

The UN Convention comprising 71 articles divided into 8 chapters is the broadest in scope, most detailed and arguably the most complex international anti-corruption convention to date. It is similar to other treaties on the topic in that many of its provisions are not self-executing, but have to be implemented and enforced through national laws of participating states, although this is not the case for the international

[15] See Articles 10-16 of the GRECO Statute, and title II of the rules of procedure.

[16] See footnote 10 supra.

[17] For references see www.unodc.org/unodc/en/crime_convention_corruption.html.

cooperation provisions which are mostly self-executing and are attuned to existing conventions that deal with extradition and mutual legal assistance. The UN Convention places emphasis on the **prevention of corruption** and focuses on measures in relation to the *private sector* (for example, measures to enhance the promotion of corporate codes of conduct, accounting standards, corporate transparency and so on), and also the *public sector* (for example measures to enhance transparency in public administration, freedom of information, establishment of dedicated anti-corruption institutions and so on.).

One of the most notable and original features of the UN Convention is its Chapter V on **Asset Recovery** which is explicitly stated as being 'a fundamental principle of the Convention…'. The rationale for the asset recovery provisions is that their implementation will support the efforts of countries to redress the worst effects of corruption, whilst sending a message to corrupt officials that there will be no place to hide their illicit assets. Several provisions specify how co-operation and assistance will be rendered, for example in the case of embezzlement of public funds, the confiscated property would be returned to the state requesting it.

This Glossary focuses mainly on the provisions in Chapter III, Criminalization and Law Enforcement (Article 15-42) and with further brief references to relevant provisions in Chapters I and II of the Convention.

1.4 Other regional conventions and non-binding initiatives

As mentioned in the Introduction, there are several other regional conventions dealing with the topic of corruption and as an example the Inter-America Convention is briefly outlined below, as are the more recent developments by the European Union.

The first international treaty dealing with transnational bribery was the **Inter-America Convention**[18]which entered into force on 20 March 1997. It seeks to promote the development and strengthening of legal mechanisms in signatory countries to 'prevent, detect, punish and eradicate' official corruption and to facilitate cooperation amongst the signatories to combat corruption. Its 28 articles can be divided between the national measures States Parties have to adopt to combat corruption and those articles that aim to improve multilateral cooperation to enforce the domestic measures. Similar to the UN Convention in its range of language, some of the obligations are binding, others only conditional, whilst some simply exhort action.

The **EU**'s entry point in the fight against corruption was the protection of its economic interests in relation to fraud against its budget[19]. This focus was expanded when criminal justice policy became part of the remit of the EU. The EU adopted the **Convention on the Fight against Corruption** on 26 May 1997 which made active and passive corruption of officials punishable offences, even where financial damage to the EU is not affected. It covers the criminal liability for heads of businesses and contains provisions on jurisdiction, extradition and international cooperation.

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[18] Footnote 2 supra.

[19] Convention on the Protection of the European Communities' Financial Interests [OJ 95/C 316/03 27.11.95], adopted on 27 September 1996. The Convention draws on the basis of Article K.3 of the Treaty of the European Union.

In June 2003, the Commission adopted a **Communication**[20] on a coherent and comprehensive EU policy against corruption. It appeals to EU leaders to undertake more efforts against this form of crime. The Commission, in its Communication, calls for the detection and punishment of all acts of corruption, confiscation of illicit proceeds and reduction of the opportunities for corrupt practices through the establishment of transparent and accountable public administration standards. It appeals to Member States to enact swiftly all relevant supranational and international anti-corruption instruments, in particular the Conventions of the EU, the OECD and the Council of Europe.

A **framework decision**[21] criminalising corruption in the *private sector* was adopted by the Council on 22 July 2003. The Framework Decision requires Member States to criminalise active and passive corruption in the private sector as well as instigating, aiding and abetting such conduct. It also provides for Member States to apply effective, proportionate and dissuasive criminal penalties, with a maximum penalty of at least 1 to 3 years of imprisonment for active and passive corruption. Member States are also required to provide for liability of and penalties for legal persons, which shall include fines and may include temporary or permanent disqualification.

One of the first initiatives by a non-state actor to address bribery by corporations was the Paris based **International Chamber of Commerce**, with its Rules of Conduct on Extortion and Bribery in International Business Transactions, the first edition published in 1977. The ICC's Rules of Conduct were updated in 1996 and again in 1999, and focus on improving *corporate self regulation* programmes which should go beyond the first step of developing a code of conduct to making them fully effective with training and compliance programmes[22].

1.5 Introduction of international standards into national law

None of the conventions examined in this Glossary are self-executing; they require actions by states to implement appropriate legislation and measures to prevent and combat corruption. The standards set by these conventions often embody stricter approaches than those currently in force in many Istanbul Action Plan countries, recognizing this fact and initiating and sustaining change at the national level requires long-term political commitment. Whilst each international instrument permits some flexibility in implementation, the standards that have been set will not be lowered to accommodate national laws that are deficient.

Four models used by countries when criminalising the bribery of public officials and related corruption offences have been identified by the OECD, they are:

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[20] COM(2003) 317 final.

[21] Framework Decision OJ L 192/54 31.7.2003.

[22] ICC Rules on Bribery and Extortion in *Fighting Corruption, A Corporate Practices Manual*, edited by Francois Vincke and Fritz Heimann, ICC, 1999.

(i) reliance on existing legislation
(ii) extension of existing laws on domestic offences to cover offences committed abroad
(iii) amendments to domestic legislation to accommodate new offences
(iv) entirely new legislation

With respect to the first model, the OECD Working Group has noted that this has not been a common approach. One issue cited as problematic with this approach was that it may be difficult to be certain that the current legislation really does cover the offences envisaged under the international standards, particularly if there is little by way of existing case law.

In many countries laws addressing corruption of public officials already exist; it would therefore seem a logical and predictable method to extend them to the new offences as envisaged by the second model, particularly where they relate to offences committed abroad. This model has the advantage of permitting the judiciary to rely on existing case law developed in relation to domestic offences and offers a basis on which to establish the new offences. This method has been used by several countries. The most commonly identified risk attached to this approach is that certain *key elements of the offences* may be missing in domestic legislation making it difficult simply to extend them to offences committed abroad.

The third model has also been used by many countries when seeking to meet the international standards, with varying degrees of success. The rationale to this approach is similar to that of the second model: It is a logical approach which permits the judiciary to rely on established case law, may be quicker to implement than the fourth model and offers predictability. The caveats to this approach are the same as those mentioned above in relation to the second model.

The fourth model envisages drafting an entirely new legislation, entailing all the advantages and disadvantages that this approach will always involve. Nevertheless, several countries have taken this route, one issue that the OECD Working Group has focused on in its monitoring of these countries is the background and rationale for the new legislation. In the case of Japan for example, the law relating to implementation of the OECD Convention was adopted under the unfair competition law because bribery of foreign public officials was regarded as an economic rather than a criminal matter[23]. Poland took a combined approach, and established the administrative liability of legal entities under its Act on Combating Unfair Competition whilst the criminal offence of foreign bribery was dealt with by amendments to its domestic legislation under its Penal Code. Greece is an example of a country that has adopted specific laws for each anti corruption instrument it has ratified, in adopting this method, care needs to be taken to avoid duplication or inconsistencies.

In the light of the reviews of implementation of the OECD Convention, it appears that the most successful method - at least for the provisions of that Convention - has been the fourth model described here. This may be the most time consuming approach involving drafting a bill and getting it passed into law, but it offers the advantages of a clear and hopefully more accurate transposition of the international standards. If this approach is

[23] See Japan Phase 2 Report www.oecd.org/dataoecd/34/7/34554382.pdf .

taken then it needs to be coupled with awareness raising so that new laws are fully understood by the prosecutors, law enforcement, the business community, and the population at large.

Summary of Istanbul Action Plan countries participation in international conventions (as of April 2005)

International Conventions	*Armenia*	*Azerbai-jan*	*Georgia*	*Kazakh-stan*	*Kyrgyz Republic*	*Russian Federa-tion*	*Tajikistan*	*Ukraine*
OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions						Applied to join in 2000		
Criminal Law Convention on Corruption Council of Europe	Signed on 15/5/2003	Ratified on 11/2/2004 Entry into force on 1/6/2004	Signed on 27/1/1999			Signed on 27/1/99		Signed on 27/1/1999
Convention on Laundering, Search, Seizure and Confiscation of Proceeds of Crime Council of Europe	Ratified on 24/11/03 Entry into force on 1/3/2004	Ratified on 4/7/2003 Entry into force on 1/11/2003	Ratified on 13/5/2004 Entry into force on 1/9/2004			Ratified on 2/8/01 Entry into force on 1/12/01		Ratified on 26/1/1998 Entry into force on 1/5/1998
United Nations Convention Against Corruption		Signed on 27/2/2004			Signed on 10/12/03	Signed on 9/12/03		Signed on 11/12/03
United Nations Convention on Transnational Organized Crime	Signaed on 15/11/01 Ratified on 1/7/2003	Signed on 12/12/00 Ratified on 30/10/03	Signed on 13/12/00	Signed on 13/12/2000	Signed on 13/12/00 Ratified on 2/10/2003	Signed on 12/12/2000 Ratified on 26/5/04	Signed on 12/12/2000 Ratified on 8/7/2002	Signed on 12/12/00 Ratified on 21/5/2004

2. DEFINITIONS OF CORRUPTION

There are as many different definitions of corruption as there are manifestations of the problem itself, which has been described as a 'collection of phenomena'[24], these definitions vary according to cultural, legal or other factors and even within the scope of these definitions there is no consensus about what specific acts should be included or excluded, particularly in developing criminal laws. Nevertheless the term 'corruption' is used as a shorthand reference for a large range of illicit activities and whilst there is no universal or comprehensive definition as to what constitutes corrupt behaviour, the most prominent definitions share a common emphasis upon the **abuse of public power or position for personal advantage**. A commonly quoted definition is that used by the anti-corruption NGO, Transparency International (TI):

'Corruption involves behaviour on the part of officials in the public sector, whether politicians or civil servants, in which they improperly and unlawfully enrich themselves, or those close to them, by the misuse of the public power entrusted to them.'

This definition does not adequately address the problem of corruption in the private sector or to the role of the private sector in fostering corruption in the public sector, so some organisations use the shorthand definition of corruption as "the abuse of public or private office for personal gain." A more comprehensive definition offered by the Asian Development Bank is as follows:

'Corruption involves behaviour on the part of officials in the public and private sectors, in which they improperly and unlawfully enrich themselves and/or those close to them, or induce others to do so, by misusing the position in which they are placed.'

Narrower definitions may be appropriate to address specific behaviour as for example in the World Bank's definition in the area of procurement fraud; "the offering, giving, receiving, or soliciting of any thing of value to influence the action of a public official in the procurement process or in contract execution." Fraudulent practice is defined as "a misrepresentation of facts in or to influence a procurement process or the execution of a contract to the detriment of the Borrower, and includes collusive practices among bidders ... designed to establish bid prices at artificial, non-competitive levels and to deprive the Borrower of the benefits of free and open competition."[25]

Legal definitions differ from those used by social scientists, aid agencies or international organisations and **criminal law definitions** require particular care so that they are both clear and certain. Most countries have not opted for attempting to criminalise the general phenomenon of corruption but rather focus on specific types of conduct such as bribery, embezzlement, fraud and extortion. However, some states have used a broad definition of corruption to help raise awareness of the problem, or to assist in the detection of crime (for example the Korean Independent Commission against Corruption promotes reporting about "any public official involving an abuse of position

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[24] See UN Guide for Anti-Corruption Policies, UNODC, November 2003.

[25] See World Bank. 1997. *Helping Countries Combat Corruption: The Role of the World Bank*, Washington DC.

or authority of violation of the law in connection with official duties for the purpose of seeking grants for himself or a third party").

None of the Conventions examined here define corruption, instead they establish the parameters for offences for a range of behaviour. The Council of Europe Convention for example, establishes 14 offences including bribery offences, money laundering and book-keeping offences. Notwithstanding the lack of definitions in these conventions, there are however instances of definitions within international treaties on this topic, such as that found in Article 2 of the Council of Europe Civil Law Convention, the definition of 'corruption' which is applicable to that Convention is however, essentially a definition of bribery only.

3. ACTIVE AND PASSIVE BRIBERY AND OTHER CORRUPTION-RELATED OFFENCES

3.1 OECD Convention

As mentioned above, the OECD Convention is the most focused of all the conventions and addresses the bribery of a **foreign public official** in international business transactions, also referred to as the **active or supply side of bribery**. The elements of the criminal offence which Parties are required to adopt are set out in the following terms:

Article 1(1):
'Each Party shall take such measures as may be necessary to establish that it is a criminal offence under its law for any person intentionally to offer, promise or give any undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign public official, for that official or for a third party, in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business.'
Where a Party has made **money laundering** a predicate offence in relation to domestic public officials, **Article 7** states that it is to be applied to foreign public officials in the same terms.

3.2 Council of Europe Convention

The Council of Europe Convention establishes a range of offences of which many cross-reference to the requirement to criminalise the **active and passive bribery of domestic public officials**, set out in **Articles 2 and 3:**

Article 2
'Each Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law, when committed intentionally, the promising, offering or giving by any person, directly or indirectly, of any undue advantage to any of its public officials, for himself or herself or for anyone else, for him or her to act or refrain from acting in the exercise of his or her functions.'

Article 3 is similarly worded as Article 2, but addresses **passive bribery** of domestic public officials with the phrase, 'the request or receipt by any of its public officials…'

Article 4 refers back to both Articles 2 and 3 (so covers both active and passive bribery), and goes on to establish the offence of the bribery of members of domestic members of parliament (or legislatures) with the phrase, '…any person who is a member of any domestic public assembly exercising legislative or administrative powers.' This offence is extended to the international level by **Article 10**, 'any members of parliamentary assemblies of international or supranational organisations of which the Party is a member.'

Article 11 adds the offence of bribing judges and officials of international courts; 'any holders of judicial office or officials of any international court whose jurisdiction is accepted by the Party.'

Similar to the OECD Convention, the Council of Europe Convention also addresses the bribery of foreign public officials; **Article 5** extends the domestic offence to **'a public official of any other State'**, but is broader in approach than the OECD as it covers both active and passive bribery.

Whilst **Article 6** extends the basic offence to the bribery of members of foreign public assemblies: '…any person who is a member of any public assembly exercising legislative or administrative powers in any other State.' Here too the Council of Europe is broader in scope covering active and passive bribery and this is also the case with respect to **Article 9**, which states:

'any official or other contracted employee, within the meaning of the staff regulations, of any public international or supranational organisation or body of which the Party is a member, and any person, whether seconded or not, carrying out functions corresponding to those performed by such officials or agents.'

The Council of Europe Convention also establishes criminal offences in relation to **active (Art. 7) and passive bribery (Art. 8)** in the **private sector** (using the phrase 'in the course of business activity'), accordingly, Article 7: '…any persons who direct or work for, in any capacity, private sector entities, for themselves or for anyone else, for them to act, or refrain from acting, in breach of their duties.'

The offence of **trading in influence** draws on the preceding articles and establishes the criminal offence as follows:

Article 12:
'…the promising, giving or offering, directly or indirectly, of any undue advantage to anyone who asserts or confirms that he or she is able to exert an improper influence over the decision-making of any person referred to in Articles 2, 4 to 6 and 9 to 11 in consideration thereof, whether the undue advantage is for himself or herself or for anyone else, as well as the request, receipt or the acceptance of the offer or the promise of such an advantage, in consideration of that influence, whether or not the influence is exerted or whether or not the supposed influence leads to the intended result.'

Article 13 establishes the crime of money laundering the proceeds from corruption offences.

3.3 UN Convention

Chapter III of the UN Convention contains the criminalization and law enforcement articles, and these include the requirement to establish a broad category of criminal offences, comparable in many respects to those covered by the Council of Europe Convention. The active and passive aspects of the bribery of national public officials are set out in **Article 15**:

'(a) The promise, offering or giving, to a public official, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties
(b) The solicitation or acceptance by a public official, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties.'

The active bribery of foreign public officials and officials of public international organizations is addressed in **Article 16(1)** and the language mirrors that of the OECD Convention. The passive side of this offence in **Article 16(2)** is couched in less directive language and states that Parties 'shall consider adopting' legislation.

In **Article 17** the UN Convention also requires Parties to criminalise the misuse of property by a public official:

'…the embezzlement, misappropriation or other diversion by a public official for his or her benefit of another person or entity, of any property, public or private funds or securities or any thing of value entrusted to the public official by virtue of his or her position.'

Article 23 on the laundering of proceeds of crime is a mandatory provision, as is **Article 25** which criminalises the obstruction of justice.

The language mentioned above in relation to **Article 16 (2),** *('State Party shall consider adopting')* is also to be found in the UN Convention's article on trading in influence (**Article 18**); abuse of functions (**Article 19**); illicit enrichment (**Article 20**); bribery in the private sector (**Article 21**); and embezzlement of property in private sector (**Article 22**).

3.4 Commentary

It is clear that OECD Convention has the narrowest range of offences, but reservations with regard to the core offence are not possible. The Council of Europe Convention on the other hand, not only has a much broader scope of criminal offences, but also notably includes the passive side of the offence, but **reservations** are also possible. Thus under **Article 37 para.1,** a Party is able to:

'reserve its right not to establish as a criminal offence under its domestic law, in part or in whole, the conduct referred to in Articles 4, 6 to 8, 10 and 12 or the passive bribery offences defined in Article 5.'

Reservations are also possible in respect of **Articles 5, 9 and 11** Council of Europe Convention, which can be restricted to bribery related to acts 'in breach of duties' under **Article 36**. However, the active and passive bribery of domestic public officials (**Articles 2 and 3**) are binding and no declaration or reservation is possible. Member States of the Council of Europe Convention are limited overall to 5 reservations (**Article 37(4)**). Bulgaria, Czech Republic, Portugal and Poland have taken reservations to the offence of active bribery in the private sector under **Article 7**, as well as to the offence of passive bribery in the private sector under Article 8 (also Slovenia). Many countries have made a reservation to **Article 12** (trading in influence) not to make it a criminal offence (Denmark, Estonia, Finland, Poland and Slovenia).

Reservations to the UN Convention are in effect made possible through permissive language which enables Parties' to limit their obligations to implement the Convention. Thus, whilst some obligations are mandatory, others are softened by the use of phrases such as; '*where appropriate', 'shall consider adopting', as may be necessary'* and so on. The result may be that this Convention will produce an even more diverse assortment of national obligations than already exists within the international community. The Convention will not necessarily harmonise international standards, rather the UN Convention has laid the foundation for national measures without prescribing the precise approach to be taken to implement, giving states the freedom to adopt measures that may, or may not turn out to be consistent with those adopted by other states.

All the Conventions use the words '**offering', 'promising' or 'giving'**, each contemplating a slightly different action, or stage in the payment of a bribe. 'Offering' relates to the case where the public official has not solicited the bribe; the briber offers an advantage on his own initiative. 'Promising' indicates that an agreement has been made between the bribe payer and the recipient. In other words, the public official requests a bribe and the briber agrees to give it. 'Giving' covers the situation where the briber actually transfers the undue advantage, which could occur without there ever having been either an offer or promise.

In all three Conventions the offence of active bribery is conceived as an **intentional** offence, although where a person acts on the supposition that bribery is involved or 'wilful ignorance' this will also suffice (Austria, Spain, Germany, Switzerland, Belgium). **Article 28** of the UN Convention addresses this point: "Knowledge, intent or purpose (…) may be inferred from **objective factual circumstances**", this is a new provision in anti-corruption conventions and could be of great practical importance once it is implemented. The intent has to cover all the substantive elements of the offence (Italy, Argentina) and must be related to a future outcome; with the public official acting or refraining from acting according to the briber's intention. The offence is perpetrated whether or not the public official actually acted or refrained from acting as the briber intended (in other words, the actions of the briber recipient do not affect the criminal liability of the bribe payer). The Council of Europe Convention in **Article 18 (2)** also covers **corporate liability** that arises through **negligence** (due to lack of supervision),

whilst the question of indirect liability generally is left to domestic laws - not only those laws implementing the various conventions but also general criminal law principles.

3.5 Issues for the Istanbul Action Plan Countries

Differentiating between an offer and promise of a bribe as separate offences and the criminal law principles relating to the preparation of a crime or attempt are areas that the Istanbul Action Plan countries have to distinguish when developing their anti-corruption laws.

The difficulties of gathering evidence sufficient for a criminal prosecution, especially of offer of promise of bribe as separate offences, are cited as major obstacles for countries in the region. In this connection the measures foreseen in the UN and Council of Europe Conventions on witness protection (a mandatory provision under **Article 32** in the UN Convention), laws to protect whistleblowers, and mitigation for persons who cooperate with law enforcement are all important, practical, and supportive measures that will assist in the task of prosecuting corruption cases and should also be implemented with appropriate legislation.

4. DEFINITION OF A PUBLIC OFFICIAL

4.1 OECD Convention

Article 1 of the OECD Convention defines foreign officials broadly to include **any person 'holding legislative, administrative, or judicial office of a foreign country' or 'exercising a public function' as well as 'any official or agent of a public international organisation**.'[26] Bribes to employees and officers of state owned enterprises are covered by the OECD Convention[27]. This is an **autonomous definition** of foreign public official which means it does not rely on local law in the foreign public official's country, or on the domestic definition under the national law, or on a combination of the two approaches. Three categories of persons have to be covered:

- Any person holding a legislative, administrative or judicial office of a foreign country, whether appointed or elected;
- Any person exercising a "public function" "including for a public agency or public enterprise". "Public function" is defined further in Commentary 12 as including "any activity in the public interest, delegated by a foreign country, such as the performance of a task delegated by it in connection with public procurement";
- Any official or agent of a public international organisation, covering all public international organisations, not just ones to which the State Party is a member.

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[26] OECD Convention Art. 1(4)(a).

[27] Commentary 14 states: 'A 'public enterprise' is any enterprise, regardless of its legal form, over which a government, or governments, may, directly or indirectly, exercise a dominant influence...'.

"Foreign country" refers to all levels and subdivisions of government, from national to local, and is not limited to nation states, but includes any organised foreign area or entity, such as an autonomous territory or a separate customs territory.

4.2 Council of Europe Convention

The Council of Europe Convention is in sharp contrast to the OECD Convention when it comes to defining a public official, as here it is the **domestic law** which is to be applied, accordingly under **Article 1 (a)**;

'the national law of the State in which the person in question performs that function and as applied in its criminal law;'

Whilst **Article 1 (c)** permits restrictions to be made:

'in the case of proceedings involving a public official of another State, the prosecuting State may apply the definition of public official only insofar as that definition is compatible with its national law;'

The state prosecuting bribery of a foreign public official may restrict the definition of the "foreign public official" provided by the law of the foreign country, if the foreign law goes further than the domestic law of the prosecuting state. This means, if a country excludes from its national definition of "public officials" parliamentarians or military personnel, then this country can use for its offence of bribery of public officials this narrower definition. If on the other side, the notion of "public official" in the case of bribery of foreign public officials (Art. 5 of the Convention) is broader in the foreign State than in the law of the prosecuting state, the prosecuting country is not obliged to use this broader definition for the formulation of its own foreign bribery offence.

4.3 UN Convention

The UN Convention combines the OECD and the Council of Europe Convention approaches. It provides for an **autonomous definition** of public official combined with a reference to the definition under **domestic law** of the State Party. **Article 2** provides that "Public official" shall mean:
'any person holding a legislative, executive (interpretative note: includes the military branch), administrative or judicial office (interpretative note: office includes offices at all levels and subdivisions of government from national to local), whether appointed or elected, permanent or temporary, paid or unpaid, irrespective of that person's seniority;

any other person who performs a public function, including for a public agency or public enterprise, or provides a public service, as defined in the domestic law of the State Party and as applied in the pertinent area of law of that State Party;

any other person defined as a "public official" in the domestic law of a State Party;'

However, for the purpose of some specific measures contained in **Chapter II** '(on preventive measures), 'public official' may mean any person who performs a public function or provides a public service as defined in the domestic law of the State Party and as applied in the pertinent area of law of that State Party; and any person exercising a public function for a foreign country, including for a public agency or public enterprise.

Article 2 also defines "foreign public official" in the same terms as the OECD Convention with an **autonomous definition**: any person holding a legislative, executive, administrative or judicial office of a foreign country, whether appointed or elected and "official of a public international organization" as an international civil servant or any person who is authorized by such an organization to act on behalf of that organization.

4.4 Commentary

An important question here is the extent to which local law definitions of public officials correspond to the requirements at the international level. An autonomous definition means that it is self-contained in legislation and does not refer to other definitions in the domestic law or to the laws of a foreign country. Using a domestic law definition does not promote harmonization, whilst using an autonomous definition both simplifies compliance and promotes a harmonized approach. But even here care needs to be taken as the OECD country monitoring of this topic reveals: Some Parties have developed definitions analogous to the OECD's whilst others state they would apply it directly, or have adapted it through reference to state institutions or public functions, or by more general terminology, with the risk that precision is lost.

The Council of Europe Convention has a uniform definition of 'public official' for both the domestic and foreign offences that apply to public bribery and refers to the 'national law of the State in which the person in question performs that function and as applied in its criminal law' to determine the scope of the term (Article 1(a)). However, in relation to bribery of foreign public officials, the definitions are hedged so that a State prosecuting such a case that has a narrower definition than the country where the offence occurred, can apply its own definition thereby giving scope for discrepancies with the risk of rendering a prosecution ineffective.

The provisions in **Articles 9-11** of the Council of Europe Convention do not require the introduction of bribery offences for officials, parliamentarians or judges of international organisations unless the Member State has joined these international organisations or recognises the court's jurisdiction, this restriction is not the case for either the OECD or UN Conventions.

Another example of the difference the application of local law may make is with regard to officials of **state owned enterprises**. The OECD Convention covers officers or employees of state owned enterprises where the state exercises '**dominant influence**' over the decision making of the enterprises (see Commentary 14) which effectively acts as a control standard. The UN Convention does not define 'public enterprise' and this could lead to problems because some national laws will only treat companies as state owned enterprises when the State owns a majority of the equity, which may exclude

partially privatized entities where the State nevertheless still exercises control or has a significant influence in the management of the company.

Loopholes have been left by the conventions in that payments to **political parties**, **party officials** or **candidates** are not covered, although the private bribery provisions would extend to these categories under the Council of Europe Convention. In relation to the OECD Convention, this is an area that the Working Group on Bribery at the OECD is committed to reviewing in the future.

The mixed approach of the UN Convention whereby part of the definition is autonomous and part left to the national level may result in unevenness: The definition of foreign public official in national law may be broader than the definition of a domestic public official, because in following the OECD Convention for the definition of the foreign public official an autonomous definition has to be adopted, whilst the country can determine its own definition for its national public officials.

4.5 Issues for the Istanbul Action Plan Countries

In all the Istanbul Action Plan countries, the definition of foreign and international officials is not addressed adequately. For example, in Russia foreign and international officials may be covered by the article on 'commercial bribery', treating them as 'other organisers'. Whilst Georgia is preparing amendments to its Criminal Code to comply with the requirements of the UN Convention and will introduce a definition of foreign and international public official as a commentary to the national legislation (this is similar to the approach chosen by Lithuania - the definitions of foreign and international officials are introduced by a commentary to the national definition in the law on the civil service as persons who have equal responsibilities in another state, foreign organizations and court; or applicants for such posts); this approach should be used with caution, as a judge in one country cannot apply a foreign law in the prosecutions of a foreign official; thus a definition of a foreign public official has to be added into the Criminal Code.

The treatment of officials of public enterprises is also insufficiently specific and does not correspond to best international practice, taking Russia as an example, directors of state enterprises are treated as directors of private companies. There are discrepancies in the definition of public official when it comes to different types of work; such as the delivery of services as oppose to performing public functions, with the result that state employees such as teachers are not considered public officials in Tajikistan and state employed medical doctors not considered public officials in Lithuania.

5. DEFINITION OF ADVANTAGE AND ACTS OF OFFICIALS

5.1 OECD Convention

Article 1 (see 2 above for full text) requires that the offering, promising or giving of "**any undue pecuniary or other advantage**" is criminalised in national legislation. This phrase is not defined within the Convention but the OECD Commentaries explain that; '**Other improper advantage**' refers to something to which the company concerned was not clearly entitled, for example, an operating permit for a factory which fails to meet the statutory requirements.'[28] Further guidance is to be found in Commentary 7; 'It is also an offence irrespective of, *inter alia*, the value of the advantage, its results, perceptions of local custom, the tolerance of such payments by local authorities or the alleged necessity in order to obtain or retain business…'. The offence also applies regardless if the company concerned was the best qualified bidder or was otherwise a company that could properly have been awarded the business (Commentary 4).

The OECD Convention makes an exception (which the Parties are not obliged to follow), for 'small facilitation payments' (Commentary 9), many Parties have not done so (UK, Germany), those that do (USA) must demonstrate that the exception is strictly limited in application and cannot be abused. These payments must be small and aimed at inducing a public official to perform his/her functions, such as issuing licenses or permits. The Commentary notes that this action is generally illegal in the foreign country concerned and urges that this 'corrosive phenomenon' be addressed by that country.

Commentary 8 also makes an exception for advantages, 'permitted or required by the written law or regulation of the foreign public official's country, including case law.' Many countries have interpreted this more generously than the wording of this Commentary might suggest, and tolerate small gifts or courtesies of minimal value, so called socially acceptable gifts.

The OECD Convention further defines an act of the foreign public official: In order that the official act or refrain from acting in relation to the performance of official duties, in order to retain business or other improper advantage in the conduct of international business. The use of the words "in relation to" ensure that even acts outside the official's competence are covered (Also note that **Article 1.4(c)** of the Convention confirms that "in relation to the performance of official duties" includes "any use of the public official's position, whether or not within the official's authorised competence"); the OECD Convention also covers the case where the bribe is for the purpose of influencing the discretion of the official in a decision-making process (such as in public procurement). The offence must clearly cover omissions by the official.

A form of offence that has been widely adopted is one that differentiates between non-aggravated cases and aggravated cases. The aim of this dual approach is to impose more severe sanctions where the object of the bribe is to obtain an act of an official that

[28] OECD Commentary 5.

constitutes a breach of law or a duty. However, where foreign bribery is covered by two offences in this manner, one of the offences must cover non-impartial exercises of discretion, and the sanctions for both offences must be sufficiently "effective, proportionate and dissuasive". [29]

5.2 Council of Europe Convention

The Council of Europe Convention does not define the term "**advantage**" either, but it is addressed in the Explanatory Report, N° 37:

'The undue advantages given are usually of an economic nature but may also be of a non-material nature. What is important is that the offender (or any other person, for instance a relative) is placed in a better position than he was before the commission of the offence and that he is not entitled to the benefit. Such advantages may consist in, for instance, money, holidays, loan, food and drink, a case handled within a swifter time, better career prospects, etc.'

The Explanatory Report is not an exhaustive list and it is accepted that there can be other forms of undue advantages, such as sexual favours, the granting of honorary titles, etc. However, according to the Explanatory Report, minimal gifts, gifts of very low value or socially acceptable gifts, as they are not considered as "undue" advantages, are not included.

Under the Council of Europe Convention an offence should cover not only actions but also omissions by an official related to his official duties, including legal and illegal actions; in all business transactions. International offences related to foreign officials can be limited by declaration (**under Art. 36**), to cases of breach of duties and acts in within the discretion of the public official.

In relation to the offence of trading in influence, the difference between this offence and bribery is that the influence peddler is not required to "act or refrain from acting" as would a public official. The recipient of the undue advantage assists the person providing the undue advantage by exerting or proposing to exert an **improper influence over the third person** who may perform (or abstain from performing) the requested act. The Explanatory Report explicitly excludes accepted forms of lobbying from this offence (in some jurisdictions regulated by statute, such as the USA's Lobbying Disclosure Act 1995[30]).

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[29] Commentary 3 states; 'a [national] statute which defined the offence in terms of payments 'to induce a breach of the official's duty' could meet the standard provided that it was understood that every public official had a duty to exercise judgement or discretion impartially and this was an 'autonomous' definition not requiring proof of the law of the particular official's country.'

The Interpretive Notes to the UN Convention are couched in similar terms to Commentary 3.

[30] Codified at 2 U.S.C. §1601 et seq.

5.3 UN Convention

In the Articles dealing with bribery, trading in influence and abuse of functions (**Articles 15, 16, 18, 19, and 21**) the UN Convention whilst referring to the notion of "undue advantage", does not however define it. However, the Legislative Guide to the corruption offence in the UN Transnational Organized Crime Convention states that an 'undue advantage may be something tangible or intangible'.

Although the UN Convention contains a wider range of offences than the other conventions concerning acts of officials, the requirements of the offences are often directly comparable to the other conventions. For instance, **Articles 15 and 16**, (bribery of national and foreign public officials (passive and active)) correspond to the comments on the OECD Convention, (except of course the UN Convention extends to passive bribery).

With respect to international business, the Interpretative Note indicates that the conduct of international business includes the provision of **international aid**.

The provision on trading in influence is basically similar to that of the Council of Europe Convention but it should be noted that **Article 18** of the UN Convention is broader in that applies not only to direct transactions with public officials but also to dealings with *any other person.*

The acts of officials under **Articles 19** (abuse of functions) and **Article 21** (bribery in the private sector) cover both acts and omissions and refer to the breach of duties concept[31].

5.4 Commentary

None of the conventions define 'undue advantage'. However, from the guidance that is available and in order to give effect to the goals of the offences it is clear that **all types of advantages** are to be covered. This means not only **money** and other benefits that can be **assigned a monetary value**, but also **non-pecuniary advantages,** for example, an object that has no intrinsic worth, but is valued by the recipient for other reasons. Intangible benefits must also be covered, such as property that has rights attached to it like a patent, copyright, trademark, or property that has no intrinsic or marketable value but represents, or is evidence of value, such as certificates of stocks, bearer bonds, promissory notes and the like.

The exception outlined in Commentary 8 of the OECD Convention (which permits exceptions for advantages allowed by written law etc.) and the discrepancy in practice in many countries is an area that poses real problems for many transition and Istanbul Action Plan countries as they seek to combat **widespread petty corruption**. The routine giving of relatively low value gifts to public officials on a regular basis in order to develop 'goodwill' for the day when a favour may be needed is a well known phenomena in many developing and transition countries. This topic highlights the

[31] See footnote 29 supra.

problem of changing deep rooted social mores which are long held, and which may need to be tackled by a combination of sustained efforts such as awareness raising in the population, implementing codes of conduct for public officials and improved salaries, criminal law alone will not suffice.

As a counterbalance to criminalisation, the UN Convention recognizes the need for a multi-pronged approach and envisages preventive measures which include adequate remuneration for public officials, as well as measures to enhance transparency in public administration, and the adoption of codes of conduct for officials.

5.5 Issues for the Istanbul Action Plan Countries

In developing legal provisions that will conform to international standards, countries need to ensure that both **pecuniary and non-pecuniary benefits** are covered.

In some countries the *law* covers bribes in any form, but the *practice* covers only material bribes (Lithuania and Ukraine). The Criminal Code of Ukraine, for example, contains provisions for any form of bribe, but a resolution of the Supreme Court says that "only an object or its value" can be a subject of an economic crime like bribery. The Criminal Code of Kyrgyz Republic contains the offence of corruption for any form of bribery, but this offence has never been used in practice.

In several countries the law covers the public official through the offence of abuse of power, but the act of the bribe payer is not addressed (Azerbaijan, Georgia, Kyrgyz Republic, Tajikistan). In Russia an advantage is evaluated when it can be measured in monetary terms.

There are cases when the subject of the bribe was admission to a university, a licence for a specific type of activity, or another form which can be valued (Armenia); the challenge here is to establish a monetary value for legal acts, other examples cited included a positive article in a newspaper, or valuing an illegal act or service, such as bribing using illicit drugs or sexual favours as consideration.

The act of the official also presents issues for consideration, including distinguishing between the consequences of legal and illegal acts and acts within and beyond the duties or competence of an official. In some countries the acts must be illegal and against the interest of the public service (Armenia).

6. ROLE OF INTERMEDIARIES AND PAYMENTS TO THIRD PARTIES

6.1 OECD Convention

Article 1 states that the criminal offence at the domestic level must also cover the offering, promising or giving of a bribe when it is carried out through '**intermediaries**'. An intermediary means a middle-man, such as an agent but it could also be a legal entity such as a financial institution, or a subsidiary of a company.

It is important to distinguish between the liability of the bribe payer who uses an intermediary and the separate and distinct liability of the intermediary him or herself. The culpability of the intermediary and the other person should be investigated separately, in order to differentiate between the use of an unwitting person who is simply used to pay the bribe but who lacks the knowledge or intent to commit the offence, as against the intermediary who has knowledge and is an active player in the bribe payment who may also be a perpetrator or accomplice.

The use of an intermediary is payment *through* a third a party and not to be confused with payment *to or for* a third party. In the latter case the OECD Convention does not require the benefit to be paid directly to the public official but it can, as an alternative, be made to another natural or legal person.

6.2 Council of Europe Convention

The use of intermediaries in the commission of bribery offences is not expressly mentioned in **Articles 2 – 11** of the Council of Europe Convention, but it is covered by the express notion that the acts of bribery (promising, offering, giving, request, receipt) are committed '**directly or indirectly**'. This is clarified in N° 37 of the Explanatory Report: 'Irrespective of whether the recipient or the beneficiary of the undue advantage is the public official himself or a third party, the transaction may be performed through intermediaries'.

The Explanatory Report goes on to state that; 'the undue advantage need not necessarily be given to the public official himself: it can be given also to a third party, such as a relative, an organisation to which the official belongs, the political party of which he is a member. When the offer, promise or gift is addressed to a third party, the public official must at least have knowledge thereof at some point.'

6.3 UN Convention

Regarding the use of intermediaries, articles dealing with offences of bribery and trading in influence include the phrase "**directly or indirectly**". This issue is not discussed in the Interpretive Notes but the Legislative Guide to the corruption offences of the UN Transnational Organized Crime Convention expressly refers to it at No. 185 in relation to passive bribery.

Regarding **third party beneficiaries**, the UN Convention provides that the undue advantage may be for the public official or instigator of the act or for another person or entity.

6.4 Commentary

It is important to distinguish between the intermediary who is used as an unwitting tool and the intermediary who is complicit to bribery when formulating the offence. The

intermediary can be anyone and does not have to be someone connected with the public official. Many Istanbul Action Plan countries treat the role of the intermediary in bribery offences as that of an accomplice (Kyrgyz Republic), whilst there are often provisions covering bribery 'directly or indirectly' (Lithuania);

The third party beneficiary is a limitless group – and when implementing legislation the offence should *not* be confined to family members of the official, or to other direct connections he or she might have. The undue advantage could be conferred to a charity, a trade union, a business association, political party, or a friend and so on. Some countries (for example Germany, Switzerland, Sweden, Australia) have addressed this issue by using conditional language; payment 'may' be made to a public official or 'to another person', but many countries do not address the topic at all as it is taken for granted that this is covered by the main offence itself, regardless of where the undue advantage flows.

Where a country's laws make reference to an undue advantage as being given *directly* to a third party without it passing through the hands of the public official, the OECD Working Group examines the laws carefully to ensure the criminal offence requirements in relation to the public official are not being circumvented.

The effectiveness of the foreign bribery offence is enhanced if it covers cases where the foreign public official agrees or requests that the advantage be transferred to a third party, in other words the public official must at some point have knowledge of the transaction.

7. SANCTIONS

7.1 OECD Convention

Article 3 (1) of the OECD Convention states;

'The bribery of a foreign public official shall be punishable by effective, proportionate and dissuasive criminal penalties.'

In monitoring the States Parties' penalties it appears that the "average" sentence of imprisonment under domestic laws for foreign bribery is five years. In determining whether the sanctions are "**effective, proportionate and dissuasive**", the OECD Working Group looks at the Parties sanctions for fraud, extortion and embezzlement. Since the bribery of a foreign public official is an economic crime, the possibility for **monetary sanctions** should also exist, either concurrently with a sanction of imprisonment, or independently where imprisonment is not appropriate.

The OECD Convention further specifies in **Article 1** that the penalties for foreign bribery should be comparable to the sanctions for bribery of domestic public officials:

'The range of penalties shall be comparable to that applicable to the bribery of the Party's own public officials and shall, in the case of natural persons, include

deprivation of liberty sufficient to enable effective mutual legal assistance and extradition.'

Where extradition is concerned, the minimum sentencing threshold is usually set at one year's deprivation of liberty. This is the standard required by the Council of Europe Convention on Extradition, which all the European members of the OECD Working Group have adopted. Other State Parties not party to these European instruments apply a similar standard (for example Argentina, USA, Korea).

In the case that the legal system of a Party to the OECD Convention has not introduced criminal responsibility for legal persons, effective, proportionate and dissuasive non-criminal sanctions as monetary sanctions shall be applicable for legal entities (**Article. 3(2)**)

'In the event that, under the legal system of a Party, criminal responsibility is not applicable to legal persons, that Party shall ensure that legal persons shall be subject to effective, proportionate and dissuasive non-criminal sanctions, including monetary sanctions, for bribery of foreign public officials.'

In addition to criminal or non-criminal pecuniary sanctions, the Convention foresees the application of civil or administrative sanctions upon legal persons for an act of bribery of a foreign public official (**Article 3 (4)**).

'Each Party shall consider the imposition of additional civil or administrative sanctions upon a person subject to sanctions for the bribery of a foreign public official.'

These sanctions may be exclusion from entitlement to public benefits or aid, temporary or permanent disqualification from participation in public procurement or from the practice of other commercial activities, placing under judicial supervision, or a judicial winding-up order.

With regard to public benefit and aid, it may be noted that the OECD export credit agencies and export credit insurance agencies decided in 2000 to demand henceforth written statements from all companies applying for coverage, stating they have not, and will not, engage in bribery. If the offence of bribery is established, the agency will deny coverage or reject indemnity claims and may refer the case to the judicial authorities.

7.2 Council of Europe Convention

Article 19 of the Convention establishes Sanctions and Measures, which are to a great extent similar to the OECD Convention:

'Having regard to the serious nature of the criminal offences established in accordance with this Convention, each Party shall provide, in respect of those criminal offences established in accordance with Articles 2 to 14, effective, proportionate and dissuasive sanctions and measures, including, when committed by natural persons, penalties involving deprivation of liberty which can give rise to extradition.'

This qualification serves the purpose of providing **extradition** even if the relevant extradition laws or treaties allow the imposition of a minimum level of imprisonment. This provision does not mean that a prison sentence must be imposed every time that a person is found guilty of having committed a corruption offence established in accordance with this Convention, but that the Criminal Code should provide for the *possibility of imposing prison sentences* of a certain level in such cases.

Legal persons, whose liability is to be established in accordance with **Article 18** shall also be subject to sanctions that are "effective, proportionate and dissuasive", which can be **penal, administrative** or **civil** in nature. Paragraph 2 compels Contracting Parties to provide for the possibility of imposing monetary sanctions of a certain level to legal persons found guilty of a corruption offence:

'Each Party shall ensure that legal persons held liable in accordance with Article 18, paragraphs 1 and 2, shall be subject to effective, proportionate and dissuasive criminal or non-criminal sanctions, including monetary sanctions.'

While prescribing that imprisonment and pecuniary sanctions should be imposed for the relevant offences, the Article leaves open the possibility that other sanctions reflecting the seriousness of the offences may be provided for. The Council of Europe Convention leaves it to the discretionary power of each State to create a system of criminal offences and sanctions that is coherent with its existing national legal system.

7.3 UN Convention

The UN Convention envisages a wide range of sanctions, including disciplinary, administrative, civil and **criminal penalties**. Public officials are to be sanctioned for violating the code or standard established in accordance with the UN Convention with disciplinary or other measures, **Article 8 (6)** (entitled Codes of Conduct for Public Officials):

'Each State Party shall consider taking, in accordance with the fundamental principles of its domestic law, disciplinary or other measures against public officials who violate the codes or standards established in accordance with this article.'

Whereas in the private sector, **Article 12 (1)** states that the State Parties have to provide effective, proportionate and dissuasive civil, administrative or criminal penalties for failure to comply with measures for preventing private to private corruption, and the wording corresponds to that used in the Council of Europe and OECD Conventions:

'Each State Party shall take measures, in accordance with the fundamental principles of its domestic law, to prevent corruption involving the private sector, enhance accounting and auditing standards in the private sector and, where appropriate, provide effective, proportionate and dissuasive civil, administrative or criminal penalties for failure to comply with such measures.'

The UN Convention's main provision on sanctions in **Article 30** is different to the other two conventions. **Article 30 (1)** emphasizes that parties must ensure that the sanctions

imposed take into account the **gravity** of the respective offence. The type or level of sanctions is left to the State Parties to determine.

'Each State Party shall make the commission of an offence established in accordance with this Convention liable to sanctions that take into account the gravity of that offence.'

The gravity of the offence should also be taken into account when considering early release or parole of convicted offenders (**Article 30 (5)**).

Article 30 (6) ***et seq***. again refers to the non-criminal sanctions of the UN Convention which can be applied:

'Each State Party, to the extent consistent with the fundamental principles of its legal system, shall consider establishing procedures through which a public official accused of an offence established in accordance with this Convention may, where appropriate, be removed, suspended or reassigned by the appropriate authority, bearing in mind respect for the principle of the presumption of innocence.'

In addition, under **Article 30 (7)** procedures through which a criminal public official can be disqualified from holding office should also be considered:

'Where warranted by the gravity of the offence, each State Party, to the extent consistent with the fundamental principles of its legal system, shall consider establishing procedures for the disqualification, by court order or any other appropriate means, for a period of time determined by its domestic law, of persons convicted of offences established in accordance with this Convention from:
(a) Holding public office; and
(b) Holding office in an enterprise owned in whole or in part by the State.'

As has already been mentioned (see section 3.4 above) it is one of the predominant characteristics of the UN Convention that many of its provisions are not mandatory but leave a wide margin for State Parties regarding implementation. In relation to sanctions, all the provisions containing the term "**shall consider**", "**in accordance with the fundamental principles of its domestic law" or "where appropriate**" and are thus not mandatory. Hence, in relation to sanctions, the signatories of the Convention are only obliged to establish sanctions that take into account the gravity of the offence and to take into account the **gravity of the offence** when considering early release or parole of convicted offenders (**Article 30 (1) and (5)**). Measures against public officials who violate their code of conduct or, in the private sector, penalties for failure to comply with anti-corruption measures are not mandatory.

7.4 Commentary

The OECD and the Council of Europe Conventions take a similar approach to the topic of sanctions, with the stated aim of establishing effective, proportionate and dissuasive sanctions (this phrase is an also to be found in Article 5 of the European Union Convention of 26 May 1997), to include deprivation of liberty, to be sufficient for

mutual legal assistance and extradition and to cover legal persons (if not with criminal sanctions, then at least with non-criminal penalties, including monetary sanctions). The UN Convention on the other hand, calls for sanctions that take into account the gravity of the offence, which is narrower than the other conventions and is more focused on specific (or individual) deterrence rather than general deterrence, as may be suggested by 'dissuasive' sanctions. In addition, it should be noted that the UN Convention does not require sanctions to be severe enough to make mutual legal assistance and extradition possible, and does not stipulate deprivation of liberty. In the case of legal entities, sanctions only have to be imposed "where appropriate".

In many transition countries, crimes are classified by their gravity with corresponding maximum sanctions. In Lithuania, a bribe of less than US$ 50 is treated as a minor infraction and can be punished by a fine, a bribe higher than US$ 50 is a crime, which may be punished by dismissal, fine or imprisonment of 2-8 years, depending upon the sum involved and other factors, with the result that the average sentence is 5 years imprisonment. In Georgia recent practice shows higher levels of sentencing for corruption whereas in some countries there is a trend to 'soften' sanctions against economic crime in general but excluding bribery (Uzbekistan).

Some countries use additional sanctions, such as prohibition of employment in certain positions, fines and confiscation (Lithuania). Fines are not imposed by some states, such as Norway, with imprisonment apparently being preferred. On the other hand, in Turkey, a lower category of bribery offences does not attract imprisonment. Other states impose a fine on a natural person found guilty of active bribery as an alternative to imprisonment (Germany, Hungary). In France, the maximum available fines for natural persons is €150 000. In Germany natural persons are subject to a day-fine system calculated according to means, whilst the United States fines foreign bribery with a maximum of $ 100 000 for natural persons.

In some countries active bribery is considered a less serious crime according to the specific role of the public officials (Georgia, Denmark, Austria). In Georgia, the difference is enormous: 2 years maximum prison for the bribe payer (active bribery), 15 years for the public official who receives the bribe (passive bribery).

Most Parties to the OECD Convention have taken the penalties applicable in laws prohibiting domestic corruption, and applied them in identical terms to the bribery of foreign public officials. In the rare cases where, for some reason, either the implementing legislation (Slovakia) or another legal source (USA's Foreign Corrupt Practices Act) applied lower sanctions to foreign bribery than those applied to the domestic offence, the OECD Working Group on Bribery has called for a realignment. In the case of Slovakia, the non-aggravated form of bribery was punishable by a maximum penalty of two years imprisonment, in case of foreign bribery, but by a maximum of three years for bribery of domestic officials.

8. CONFISCATION OF PROCEEDS

8.1 OECD Convention

The confiscation clause in the OECD Convention is expressed – like in the Council of Europe Convention – in general terms (**Article 3 (3)**):

'Each Party shall take such measures as may be necessary to provide that the bribe and the proceeds of the bribery of a foreign public official, or property the value of which corresponds to that of such proceeds, are subject to seizure and confiscation or that monetary sanctions of comparable effect are applicable.'

The provision addresses the confiscation of what has been used (namely, the **bribe** in the hands of the briber) for the purpose of committing the offence of bribing a foreign public official; as well as the **proceeds** obtained as a result of the offence.

If it is not possible to effect confiscation in this manner, **monetary sanctions of comparable effect** must be applied. Commentary 21 to the Convention defines "proceeds" of bribery as the profits or other benefits derived by the briber from the transaction or other improper advantage obtained or retained through bribery".

The provision is not addressing other property unrelated to the offence, unless the actual bribe or proceeds are no longer available to be confiscated because, for instance, they have been transferred to a *bona fide* third person or have been spent. It is only then that it would be necessary to confiscate property of the same value or impose a monetary sanction of a comparable effect.

8.2 Council of Europe Convention

Article 19 of the Council of Europe Convention deals with sanctions and measures and includes the following paragraph on confiscation (para 3):

'Each Party shall adopt such legislative and other measures as may be necessary to enable it to confiscate or otherwise deprive the instrumentalities and proceeds of criminal offences established in accordance with this Convention, or property the value of which corresponds to such proceeds.'

In the wording of this paragraph, it is taken into account that the national legal systems may show differences as to what property can be confiscated in relation to an offence. Parties to the Convention are under no obligation to provide for the criminal confiscation of substitute assets as the words "otherwise deprive" allow for their civil forfeiture also.

According to the Explanatory Report No 93 *et seq* to the Council of Europe Convention, this paragraph must be examined in view of the background of the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds of Crime.

Article 1 of the Laundering Convention is instrumental in the interpretation of the following terms used in this Article:

"Confiscation' refers to any criminal sanction or measure ordered by a court following proceedings in relation to a criminal offence resulting in the final deprivation of property. "Instrumentalities" cover the broad range of objects that are used or intended to be used, in any way, to commit the relevant criminal offences. "Proceeds" means any economic advantage as well as any savings by means of reduced expenditure derived from such offence.'

Confiscation may be possible for objects that (directly) form the proceeds of the offence, or of other property belonging to the offender that – although not (directly) gained by the offence – equals the value of the directly gained illegal proceeds, the so called "substitute assets". The concept of 'property' has to be interpreted in this context, as including property of any description (material /immaterial, movable/immovable, legal documents etc.).

It is important to note that confiscation is applicable to both the passive and the active side.

In contrast to the respective provision in the OECD Convention the Council of Europe provision foresees as an alternative to the confiscation of proceeds with the **deprivation of instrumentalities**. Also in contrast to the OECD Convention, the Council of Europe Convention does not provide the possibility of imposing monetary sanctions instead of seizure and confiscation. Both Conventions have in common that it is not mandatory to implement provisions on confiscation, but only "as may be necessary".

Unlike the OECD Convention, the Council of Europe Convention addresses the procedural side as well, and proposes in **Article 23** a catalogue of measures to facilitate the gathering of evidence and the confiscation of proceeds. This article states:

'1. Each Party shall adopt such legislative and other measures as may be necessary, including those permitting the use of special investigative techniques, in accordance with national law, to enable it to facilitate the gathering of evidence related to criminal offences established in accordance with Article 2 to 14 of this Convention and to identify, trace, freeze and seize instrumentalities and proceeds of corruption, or property the value of which corresponds to such proceeds, liable to measures set out in accordance with paragraph 3 of Article 19 of this Convention.

2. Each Party shall adopt such legislative and other measures as may be necessary to empower its courts or other competent authorities to order that bank, financial or commercial records be made available or be seized in order to carry out the actions referred to in paragraph 1 of this article.'

8.3 UN Convention

The provisions in relation to confiscation of proceeds are very **extensive** in the UN Convention and are similar to those under the UN Convention on Transnational

Organized Crime which in turn were inspired by the UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988.

Article 2 of the UN Convention defines the various elements as follows:

'(d) "Property" shall mean any property derived from or obtained, directly, or indirectly, through the commission of an offence;
(e) "Proceeds of crime" shall mean any property derived from or obtained, directly or indirectly, through the commission of an offence;
(g)"Confiscation", which includes forfeiture where applicable, shall mean the permanent deprivation of property by order of a court or other competent authority.'

Article 31, entitled **freezing, seizure and confiscation**, is the main provision of the Convention in regard to confiscation at the national level. It states that each State shall enable the confiscation of proceeds of crimes, of property, equipment or other instrumentalities (para 1). Even proceeds that have been transformed or converted (para 4) or intermingled with legitimate property (para 5), as well as income and benefits derived from those proceeds (para 6) shall be liable to confiscation For the purposes of **Article 31** and of **Article 55**; "International cooperation for the purposes of confiscation", each State party shall empower its courts or other competent authorities to order that bank, financial or commercial records be made available or be seized and bank secrecy shall not provide legal grounds to decline to act under these provisions (para 7).

Article 54 (Mechanisms for recovery of property through international cooperation in confiscation) and **Article 55** (international cooperation for purposes of confiscation) deal with international cooperation in confiscation, for which the existence of powers to freeze, seize and confiscate at the national level are a prerequisite. These articles are to be found in Chapter V on **Asset Recovery**.

One of the core articles of this chapter is **Article 57** on the "**return and disposal of assets**", which goes further than any other Convention dealing with international cooperation related to the confiscation of the proceeds of crime. In other words, further than the abovementioned UN Conventions on Drugs and Organized Crime, and the European Money Laundering Convention. In particular, in the case of embezzlement of public funds and of laundering of embezzled public funds, State Parties are, in principle, obliged on the basis of a final judgment in the requesting State Party, to return the confiscated property to the requesting State Party (**Article 57 par. 3 (a)**). In the case of proceeds of any other offence covered by the Convention (like that of bribery), the property would be returned providing the proof of ownership or recognition of the damage caused to the requesting State on the basis of a final judgment, too (**Article 57 par. 3 (b)**). In all other cases, priority consideration shall be given to the return of confiscated property to the requesting State in order to return it to the prior legitimate owner or to use it for the compensation of victims.

To help countries implement these provisions, the UN has developed model legislation and analysis of best practices on asset recovery[32].

[32] See www.unodc.org/unodc/en/legal_advisory_tools.html.

8.4 Commentary

Taking into account the material nature of the offence, **seizure and confiscation** are two **essentia**l aspects in combating corruption. It is therefore obvious that measures resulting in the deprivation of property related to, or gained by the offence, should be available. For the confiscation to be effective, it must be available from the natural person convicted of the foreign bribery offence, as well as third persons, including a legal person which has received the proceeds. Otherwise the offender can avoid confiscation by using corporate vehicles (legal entities). In addition, for confiscation to be effective, the rules determining whether a third party is in *bona fide* possession of the bribe or the proceeds must be clear, and where *bona fide* possession is proven, monetary sanctions of a comparable effect must be available from the offender.

The use to which revenues from confiscation can be put is of practical importance: It is essential that the use of confiscated revenues be well regulated and transparent. In the USA for example, they cannot be used for paying salaries, but can be used for such programmes as witness protection and prevention of the misuse of drugs.

Confiscation of property as an *additional sanction* without link to the offence involved (such as confiscating property for the offence of murder) is not compatible with the protection of property as laid down in Article 1 of the First Protocol to the European Human Rights Convention. In the past this kind of sanction was common in all the Istanbul Action Plan countries. In Tajikistan confiscation is still used as an additional punishment for serious crime, but country recommendations require that this provision be changed. Other countries have abandoned the practice of confiscation as an additional punishment (Uzbekistan).

8.5 Issues for the Istanbul Action Plan Countries

The constitutions of some of the Istanbul Action Plan countries prohibit confiscation of a person's property on conviction of a crime. However, these constitutional provisions seem to address a very different principle – prohibition of the confiscation of *all* of a person's property, as well as confiscation of property that is not related to the crime for which the person has been convicted. So these are areas that need to be re-examined by the countries when developing their legislation in this field.

Confiscation of illegal property is allowed in the new Criminal Procedure Code of the Kyrgyz Republic, whilst many countries have provisions for the confiscation of the tools of crime (instrumentalities) (Georgia, Tajikistan).

Other countries make the link to damage (Azerbaijan, Uzbekistan, Tajikistan), however value based confiscation and **confiscation from third persons** are **new and not well defined** areas of legislation in the region, although in Georgia confiscation from third persons and value based confiscation are now possible.

Where a defendant has died, this may present problems for many countries in the region as technically there a criminal case cannot be prosecuted and the bribe cannot be confiscated from a third person unless a claim is made. Azerbaijan is considering broadening the powers of the prosecutor to be able to implement the UN convention in such cases.

9. DEFENCES AND IMMUNITIES

9.1 OECD Convention

Defences

Parties to the Convention implementing the foreign bribery offence are not permitted to establish a defence or exception not contemplated by the Convention. The Commentaries to the OECD Convention provide only two possible exceptions[33]:

Payments made to obtain services that are legally due, namely small facilitation payments (Commentary 9). Local custom and tolerance or the alleged necessity cannot be raised as a defence.

If an advantage is permitted or required by written law, regulation or the case law of the foreign country, then an offender might be exempted from liability (Commentary 8). Note for example that the USA, Canada and Australia all provide express defences under their legislation for these two concepts.

If a country chooses to adopt the exception under Commentary 8, it must be careful to ensure the exception cannot apply in cases where the law of the foreign public official's country simply does not establish an offence of foreign bribery, or domestic bribery for that matter. This approach was taken by Australia, and will be reviewed in the Phase 2 monitoring. In addition, some Parties have failed to stipulate that the advantage must be permitted in written law. Again, this is not considered in compliance with the OECD Convention.

Social custom is not a defence under the OECD Convention. Commentary 7 states that an offence is committed "irrespective of, *inter alia*, the value of the advantage, its results, perceptions of local custom, the tolerance of such payments by local authorities, or the alleged necessity of the payment in order to obtain or retain business or other improper advantage". If duress can be used as a defence, its application must be limited to cases where the bribe was offered, promised or given under the pressure of an unlawful and demonstrable threat of serious physical or psychological harm.

The applicability of general defences established under criminal codes or case law is acknowledged. But the use of the defences of 'necessity', 'extortion' or 'duress' cannot usually be raised even if a public official has exerted pressure. The General section of the Commentary states; 'The Convention does not utilize the term 'active bribery' simply to avoid it being misread by the non technical reader as implying that the briber

[33] See also section 5 above on this topic.

has taken the initiative and the recipient is a passive victim. In fact, in a number of situations, the recipient will have induced or pressured the briber and will have been, in that sense the more active.'

Specific defences and exceptions for active bribery, such as **blackmail, effective regret** and **provocation**, have sometimes been incorporated into the implementing legislation of Parties, usually because the defences and exceptions applicable to the domestic bribery offence were automatically extended to foreign bribery. If these go beyond general defences then they are regarded as being possible loopholes which could be used by a defendant to circumvent liability.

Immunities

The OECD Convention does not specifically refer to the issue of immunities. However, this issue arises in the context of the Phase 2 examinations, because immunity from investigation and prosecution of the bribery of a foreign public official are related to the effectiveness of the legal and institutional framework for enforcing the offence. According to **Article 1** of the OECD Convention, the offence can be committed by '**any person**' which would suggest that no one may be immune from prosecution, but the reality is that monarchs, or members of government may indeed enjoy immunity – from prosecution, the latter at least whilst they are in office.

9.2 Council of Europe Convention

Defences

The Council of Europe Convention allows the use of general defences. Advantages permitted by the law or by administrative rules (for example, allowing the acceptance of small gifts within certain limits) are not considered as "undue advantages" and therefore not as an illegal act of bribery. What constitutes an "undue" advantage is therefore of central importance in relation to the implementation of the Convention into national law.

"Undue" for the purposes of the Convention should be interpreted as something that the recipient is not lawfully entitled to accept or receive. For the drafters of the Council of Europe Convention, the adjective "undue" aims at excluding advantages permitted by the law or by administrative rules as well as minimum gifts, gifts of very low value or socially acceptable gifts. Socially acceptable gifts are permitted but there are no international standards to give guidance here.

Immunities

Art. 16 of the Convention deals with this aspect of exceptions:

'The provisions of this Convention shall be without prejudice to the provisions of any Treaty, Protocol or Statute, as well as their implementing texts, as regards the withdrawal of immunity.'

Thus **Article 16** acknowledges **customary international law** which is not excluded and may in particular, concern members of staff in public international or supranational

organisations (**Article 9**), members of international parliamentary assemblies (**Article 10**) as well as judges and officials of international courts (Article 11). **Withdrawal of immunity** is thus a prior condition for exercising jurisdiction, according to the particular rules applying to each of the above-mentioned categories of persons. The Convention recognises the obligation of each of the institutions concerned to give effect to the provisions governing privileges and immunities.

In addition, N° 6 of the Twenty Guiding Principles recommends that States should; 'limit immunity from investigation, prosecution or adjudication of corruption offences (i.e. diplomatic and domestic immunities) to the degree necessary in a democratic society'. The implementation of this Principle has been the subject of GRECO evaluations and recommendations.

In a different contest, immunity from prosecution is also possible under **Article 22** of the Council of Europe Convention. The topic of the protection of collaborators of justice and witnesses is addressed in this article, and in the Explanatory Report No. 108 it states:

'…in order to fight corruption effectively, "an appropriate system of protection for witnesses and other persons co-operating with the judicial authorities should be introduced, including not only an appropriate legal framework, but also the financial resources needed to achieve the result." Moreover, "provisions should be made for the granting of immunity or the adequate reduction of penalties in respect of persons charged with corruption offences who contribute to the investigation, disclosure or prevention of crime".'

9.3 UN Convention

Defences

The UN Convention refers to defences in **Article 30(9)** on prosecution, adjudication and sanctions:

> 'Nothing contained in this Convention shall affect the principle that the description of the offences (...) and of the applicable legal defences or other legal principles controlling the lawfulness of conduct is reserved to the domestic law of a State Party (...).'

The same article deals with immunities and jurisdictional privileges in paragraph 2:

> 'Each State Party shall take such measures as may be necessary to establish or maintain, in accordance with its legal system and constitutional principles, an appropriate balance between any immunities or jurisdictional privileges accorded to its public officials for the performance of their functions and the possibility, when necessary, of effectively investigating, prosecuting and adjudicating offences established in accordance with this Convention.'

Immunities

Article 37 (3) addresses the possibility for parties to grant immunity from prosecution to a person who provides substantial cooperation in the investigation or prosecution of an offence:

'Each State Party shall consider providing for the possibility, in accordance with fundamental principles of its domestic law, of granting immunity from prosecution to a person who provides substantial cooperation in the investigation or prosecution of an offence established in accordance with this Convention.'

9.4 Commentary

Defences

Defences are provisions in law which can be raised under certain circumstances by an accused person (natural or legal) to nullify or reduce liability and/or punishment. For a defence to be applicable, the person has must have committed acts constituting an offence, but will not be punished (or will receive a reduced penalty) for these acts because a defence exists. Whereas all countries recognize defences, their status and extent is not the same everywhere and not all countries know the same defences. For instance, while numerous countries have only general defences, some countries have specific defences available only for a limited list of offences.

Defences and exceptions that are not normally available should not be created inadvertently: For example, mistake in law as a defence would not normally pose a problem. However, it is important that the government does not issue misleading interpretations of the foreign bribery offence, that could then be relied upon by a company or individual who gives an advantage to a foreign public official. For example, in Japan, misleading information was given by a government publication concerning the availability of the defence for small facilitation payments, (Guidebook and Guidelines on the bribery of foreign public officials issued by the Ministry of Economy, Trade and Industry), thereby opening the way for offenders to raise the defence of mistake in law.

Specific defences and exceptions have also sometimes been incorporated into the implementing legislation of Parties – usually because the defences and exceptions applied to the domestic bribery offence, and the Party has simply extended the domestic offence to foreign bribery, including the defences and exceptions. These defences and exceptions can be misused and are regarded as serious obstacles to the effective implementation of the OECD Convention.

Such an example includes the purported defence of **blackmail** (the unlawful demand of money or property under threat to do bodily harm or injure property). Since a person who has given an advantage under threat of blackmail has not committed a crime – it is the blackmailer who is the perpetrator – there is no need to create an additional defence (originally permitted in Bulgaria, later repealed).

The OECD Working Group on Bribery considers blackmail as an inappropriate defence for bribery of foreign public officials, and provides scope for abuse. The Working

Group has further considered the defence of **effective regret** (namely, a person who has given a bribe shall not be punished if - of his/her own accord - he/she has informed the authorities) should only be considered at the sentencing stage of the process (was repealed in Bulgaria, was used in Czech Republic and Slovak Republic). This defence might play an important role in relation to the bribery of a domestic public official in that it enables the law enforcement authorities to pursue the domestic official who solicited or accepted the bribe, which is often seen as being more in the public interest from a domestic perspective than going after the briber.

Provocation of the giving or receiving of a bribe is not accepted by the OECD Working Group as a defence, (was repealed in Bulgaria). The defence is normally raised in cases of entrapment by the police, but the OECD Working Group is concerned it could be interpreted more broadly.

Another defence which was not contemplated by the OECD Convention, namely **unlawful disadvantage** refers to the situation where the advantage was given or promised upon the initiative of the official person in fear of unlawful disadvantage (Hungary – repealed). This can be very broadly interpreted to include cases where the official states, for instance, that he/she will award a particular contract without a bribe.

Similar concerns have been raised by the OECD Working Group in respect of the defence of ***concussione*** in Italy. Under Italian criminal law a person is not guilty of foreign bribery if a public official abuses his/her functions or power to oblige or induce the individual to give or promise money or other assets to the official. In such a case, instead, the official is guilty of *concussione*. The OECD Working Group believes that this defence may weaken the effectiveness of the Convention because it is not clearly limited in scope, and might apply where, for instance, a public official will not consider a tender for a public procurement contract without a payment.

Immunities

The purpose of immunities is to shield the beneficiaries of this status – normally high-ranking government officials, the monarch or president – from malicious or frivolous prosecutions, in order to protect their independence. Persons that may benefit from these protections include the President, monarch, members of parliament, members of the judiciary, prosecutors and investigating magistrates. The immunities normally only apply for the duration of the person's office, but due to the operation of the statute of limitations, the immunities can in practice result in a complete bar to prosecution. The process for lifting the immunities in certain circumstances generally involves a Parliamentary or Constitutional Court process.

Therefore, immunities from the investigation and/or prosecution of the bribery of foreign public officials can act as obstacles to the effective detection, investigation and prosecution of foreign bribery offences. The application of immunities to members of the judiciary as well as other members of the law enforcement apparatus, including prosecutors and investigating magistrates, can undermine the credibility of the law enforcement and judicial system, and undermine the respect for the legal institutions and the rule of law.

For these reasons it is essential that if immunities are afforded to certain officials, they are restricted to a system based on "functional immunity" – that is **immunity for acts carried out in the performance of the official's duties**. It is also essential that there is an effective and efficient system for lifting the immunities for serious crimes, including corruption-related offences, and the process for lifting immunities should be transparent and publicly accountable. Moreover, the immunities should cease to operate once the official is no longer in office.

In addition, the lifting of immunity must be supported by a mechanism to obtain evidence on which to base the request for lifting immunity: In other words it must be possible to obtain evidence for this purpose through normal investigative techniques such as the search and seizure of bank and financial records and the interviewing of witnesses.

Another measure that could be taken to ensure that the immunities do not prevent the eventual prosecution of the official (after he/she is no longer in office) is suspension of the statute of limitations while he/she continues in office.

9.5 Issues for the Istanbul Action Plan Countries

Defences

In some cases, a criminal procedure can be replaced by disciplinary procedure in case of low damage and insignificant size of the bribe (Georgia). Azeri legislation does not set the size of a bribe, but insignificant acts are not subject to criminal prosecution. In Lithuania acts of low importance can be released from responsibility, e.g. if the amount of a bribe is less than 50 USD, the act can be treated as an infraction, not a crime.

The Kyrgyz and Kazakh laws seem most stringent about gifts - the Kyrgyz law on civil service does not allow any gifts, apart from symbolic souvenirs at official events. The Kazakh law of the fight against corruption bans any gifts, apart from souvenirs. At the same time Article 311 of the Criminal Code provides for a defence for accepting gift up to 15 USD. For the first offence, disciplinary measures are used, thereafter penalties may increase up to dismissal from the position.

In Georgia, a gift in the amount of around 50 USD is allowed, if it is not linked to an act of an official and the number of gifts is not specified. In Azerbaijan, gifts above the amount of about US$50 and linked to the exercise of duties, should be returned to the State or their equivalent value.

Article 311 of Criminal Code of Armenia states that receiving a gift for a legal act already completed by the official is not a crime, and applies to gifts with a value not higher than 5 minimal salaries and no preliminary agreement about the gift giving. Armenia was recommended to change this provision.

During one year a Tajik official can accept a total amount of gifts up to 50 minimal salaries (8 USD x 50 = 400 USD), which on a relative basis seems very high.

There are areas of concern, which are not regulated in transition economies, such as gifts accepted by teachers or doctors, who are not considered civil servants (for example in Lithuania, doctors are not considered public officials and are allowed to accept gifts from their patients, if their value does not exceed 1 minimal subsistence allowance (about 50 USD)). The number of gifts is not limited.

Immunities

Most countries have rules for lifting immunities of members of parliament and judges (but immunities of judges are often hard to lift, such as in Azerbaijan where the Criminal Procedure Code states that the investigation of persons who enjoy immunities can be authorised by the court. But the courts are limited as to what they can order in terms of covert evidence gathering. In practice, there have not been any cases of lifting immunity of MPs for prosecution for corruption in Azerbaijan, although there were such cases for other types of crime.

In Uzbekistan, the Prosecutor General can lift the immunity of a judge if there is sufficient evidence.

The Judiciary Council of Tajikistan can remove the immunity of the judges for disciplinary investigations, but not for criminal ones.

In the Kyrgyz Republic immunities are functional in nature and do not present an obstacle for collecting evidence and investigation, and there have been cases when an investigation against MPs and judges required the lifting of immunity, and this was then carried out. On the other hand, cases were reported when the Parliament did not allow the lifting of the immunity of MPs.

In Georgia there is no immunity from investigation, but before the revolution, there were no cases, while recently more than 20 judges and several MPs were convicted when their immunity was lifted.

In Kazakhstan, every year several judges are prosecuted for corruption. Recently, a member of parliament was imprisoned for 5 years for corruption, and parliament agreed to lift immunity.

10. STATUTE OF LIMITATION

10.1 OECD Convention

Article 6 of the OECD Convention on the statute of limitations states:

‘Any statute of limitations applicable to the offence of bribery of a foreign public official shall allow an adequate period of time for the investigation and prosecution of the offence.’

In practice, the Working Group looks at the triggering event for the running of the limitations period and the circumstances under which the running of the period is suspended and interrupted (e.g. is it suspended or interrupted when the offender is abroad evading prosecution, and is it suspended or interrupted when mutual legal assistance has been requested but not yet fulfilled).

It is also important to consider whether there is an overall limitations period (e.g. Italy) which puts a limit on the length of the limitations period, including suspensions and interruptions. In addition, there may be a separate limitations period for investigations (e.g. Italy – where investigations may not take longer than 2 years), which in practice severely limits the overall effect of the statute of limitations. Moreover, all this must be considered in view of the complicated nature of bribery cases which may not come to light for many years, such as until a regime change occurs, or an official leaves his/her post. Complex evidence may need to be gathered such as in-depth accounting and financial analyses, and in many cases evidence from abroad will also need to be obtained.

In the OECD monitoring process discussions on the appropriate length (taking into account also possibilities of suspension and interruption) have taken place. Some national rules were not held to be sufficient (e. g. 2/3 years; sometimes even concern was expressed in relation to five years), and longer periods were recommended.

10.2 Council of Europe Convention

The issue of statute of limitation is not addressed expressly by the Convention. The general practice is about 5 years, 7-10 years in aggravated cases, excluding necessary suspensions or interruptions.

10.3 UN Convention

Article 29 contains the provisions of the UN Convention on the statute of limitations:

'Each State Party shall, where appropriate, establish under its domestic law a long statute of limitations period in which to commence proceedings for any offence established in accordance with this Convention and establish a longer statute of limitations period or provide for the suspension of the statute of limitations where the alleged offender has evaded the administration of justice.'

"Where appropriate" acknowledges the fact that some countries do not have statutes of limitations and article 29 does not require them to establish one.

The UN Convention takes a different approach to the OECD Convention and concentrates on two issues: The **time** in which proceedings shall be commenced (a 'long' period) and a longer time and/or the possibility of **suspension** in the case of

evasion. This means that this provision does not relate to all stages of investigation, prosecution and court proceedings.

10.4 Commentary

To date, the practical effects of statutes of limitation in the prosecution of corruption are not well studied, and would benefit from further analysis and statistical data showing for example the number of cases which had to be abandoned due to the application of the statue of limitation.
In common law countries it is not usual to impose any time limitations for the investigation, prosecution and adjudication of criminal offences, although where there is a discretion by the prosecuting authorities as to whether or not to commence proceedings in a corruption case (UK) the staleness of the case and the possibility of obtaining evidence will be relevant factors in the exercise of that discretion.

11. RESPONSIBILITY OF LEGAL PERSONS

The topic of responsibility of legal persons and corruption is a relatively new and still developing area for many countries - and not only for the Istanbul Action Plan countries, but for many other countries as well - it is recognised as a complex and controversial area. This it is covered in rather more detail with the aim of elucidating some of the main concepts underpinning the notion of the liability of legal persons and how they are tackled in the different conventions and jurisdictions.

11.1 Definition of legal persons

The UN Convention, the main text of the OECD Convention and its commentaries do not include a definition of 'legal persons'. The EU 2nd Protocol to the Convention on the Protection of the European Communities' financial interests (Article 1(1.4))and the Council of Europe Convention (Article 1(d)) provide for the same definition and put the onus upon domestic legislation to clarify the point:

> 'Legal person' shall mean any entity having such status under the applicable national law, except for States or other public bodies in the exercise of State authority and for public international organizations.'

(a) Private entities

Parties to the OECD Convention as well as EU countries include private incorporated companies as legal persons liable for bribery.

(b) Public entities

The exclusion of public entities in the EU and Council of Europe instruments is clarified in the Explanatory Report of the former[34]. 'State or other public bodies exercising State authority, such as ministries or local government bodies as well as public international organizations such as the Council of Europe' are expressly excluded from the scope of the definition of legal persons potentially liable for bribery. Furthermore, 'the exception refers to the different levels of government: State, Regional or local entities exercising public powers.' This exemption is included in the legislation of most EU and other OECD countries (for example: Belgium, Greece, Italy, Mexico (which excludes all public authorities) and the US. In France the liability is not applicable to the State but can be applied to local authorities).

The report states the rationale in the following terms: 'The reason is that the responsibilities of public entities are subject to specific regulations or agreements/treaties, and in the case of public international organization, are usually embodied in administrative law.[...] A contracting State may, however, go further as to allow the imposition of criminal law or administrative law sanctions on public bodies as well.' In relation to the question of how to treat state owned and state-controlled enterprises, the report states that the exclusion of public entities 'is not aimed at excluding responsibility of public enterprises.' It does not however define a public enterprise.

11.2 Standard of liability

The OECD and UN Conventions are similar in their approaches.

Article 26 UN Convention provides that:

> '1. Each State Party shall adopt such measures as may be necessary, consistent with its legal principles, to establish the liability of legal persons for participation in the offences established in accordance with this Convention.'

Article 2 of the OECD Convention provides that:

> 'Each Party shall take such measures as may be necessary, in accordance with its legal principles, to establish the liability of legal persons for the bribery of a foreign public official.'

The European provisions develop a more comprehensive approach to the required standard, and there is no significant difference between **Article 18** of the Council of Europe Convention (and Article 3 of the EU 2nd Protocol), which reads as follows:

'1. Each Party shall take the necessary measures to ensure that legal persons can be held liable for fraud, active corruption and money laundering committed for their benefit by

[34] Explanatory Report on the 2nd Protocol to the Convention on the protection of the European Communities' financial interests, Official Journal C 091, 31 March 1999.

any person, acting either individually or as part of an organ of the legal person, who has a leading position within the legal person, based on

- a power of representation of the legal person, or
- an authority to take decisions on behalf of the legal person, or
- an authority to exercise control within the legal person,

as well as for involvement as accessories or instigators in such fraud, active corruption or money laundering or the attempted commission of such fraud.

2. Apart from the cases already provided for in paragraph 1, each Member State shall take the necessary measures to ensure that a legal person can be held liable where the lack of supervision or control by a person referred to in paragraph 1 has made the commission of a fraud or an act of active corruption or money laundering for the benefit of that legal person by a person under its authority.

3. Liability of a legal person under paragraphs 1 and 2 shall not exclude criminal proceedings against natural persons who are perpetrators, instigators or accessories in the fraud, active corruption or money laundering.'

(a) "for the benefit of the legal person" criterion

According to the Council of Europe provisions (and also EU provisions), and in contrast to the OECD Convention, there are certain criteria to be met in order for a legal person to be held liable for bribery offences. There are three interpretations of these criteria at the national level. The first refers to the objective of the act: committed for the benefit of, or on behalf of the legal person. The second criterion is either used cumulatively with the first, or alternatively, requires that the act be 'in connection/relative to the business' of the legal person. Thirdly, in some jurisdictions the narrower criterion of the infringement of duties by the perpetrator is used. Each of these interpretations will be examined below.

(i) of benefit to the legal person

This is a common requirement in many jurisdictions (such as the US, Iceland, Italy and Canada where the phrase has been interpreted to mean 'by design, or result partly for the benefit of'). German law states that the 'legal entity [...] has gained, or was supposed to have gained, a profit'. Other countries like Belgium, France, Norway and Poland use the term 'on behalf of', drawing on the language of the Council of Europe explanatory report. Under French law, criminal responsibility will be incurred if the acts have been committed on behalf of the company in the broadest sense, namely in the course of activities intended to advance the organization, operation or objectives of the legal person, even where there is no resultant benefit or advantage. Greece, on the other hand, requires clear proof that the benefit is actually realized. Several States (Belgium, France, Italy, Norway and the US) justify this causal link to differentiate the situation where the natural person is acting purely in his/her own interest or even against the interest of the legal person.

(ii) in connection/relation to the business of the legal person

This requirement is found in some national laws either as an alternative (in Japan, Korea and the UK) or in addition (Canada, US) to the benefit to the legal person mentioned above. In the UK, the criterion finds expression in case law that states that the offence be committed 'in connection with the business of the legal person and 'within the scope of the authority of the representative.' Mexico adds the requirement that the offence must have been committed in the name or on behalf of the legal entity using means provided by the entity itself.

The distinction between (i) and (ii) above is not always clear. For example, Finnish law provides that the offence has to be committed 'in [the legal person's] operations', referring to the sphere in which the crime has to occur. This is further defined such that the 'offence shall be deemed to have been committed in the operation of a corporation if the offender has acted on behalf of, or for the benefit of the corporation': in other words, back to the aim of the offence.

(iii) infringement of duties

An additional criterion in some countries (Germany, Italy, Sweden) is the requirement of infringement of duties. German law states, as an alternative to acts committed on behalf of the legal person, that 'legal entities can be liable for fines, if a 'person' has committed a crime or an administrative offence by means of which duties incumbent upon the legal entity or association have been violated.' Italy refers to 'duties connected with the functions of the responsible person.' Finally, Swedish law provides that the illegal act committed when carrying out business activities 'entailed gross disregard for the special obligations associated with the business activities or to be otherwise of a serious kind'.

(b) the “leading person” criterion

The 'identification' doctrine underwent most of its development within the Anglo-Saxon tradition in a series of cases reported in 1944[35]. The process was first set in motion by a civil liability decision of the House of Lords in 1915 in *Lennard's Carrying Co. Ltd*[36]. The law in the UK up until the 1940s dealt with the criminal responsibility of corporations on the basis of vicarious liability. In contrast to strict liability offences (where the company was liable for the conduct of its employees without proof of any criminal state of mind) the courts began to extend vicarious liability to cover offences where some mental element was required. The culmination of the doctrine in *Tesco Supermarkets Ltd v Nattrass*[37]established that the principle of identification applied to all offences not based on vicarious liability. The House of Lords held that a corporation could be convicted of a non-regulatory offence requiring proof of *mens rea* if the natural person who had committed the *actus reus* of the offence could be identified with the company.

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[35] *D.P.P.v. Kent & Sussex Contractors, Ltd* [1944] 1K.B.146; *R.v. I.C.R. Haulage Co Ltd* [1944] K.B. 551 (1944) 30 Cr. App.R 31; *Moore v. I. Bresler Ltd* [1944] 2 K.B. 515.

[36] *Lennard's Carrying Co.Ltd. v. Asiatic Petroleum Co*., [1915] A.C. 705 H.L.

[37] [1972]A.C.153 ; [1971]2 W.L.R 1166 HL.

This criterion has been picked up in both civil law and common law systems (for example by France and Canada). The triggering of corporate liability requires that a relationship exist between the natural and the legal person. This can include the natural person him/herself or a person under his/her authority. Where the latter case arises the acts of the subordinate must have been made possible by 'the lack of supervision or control by a person having a leading position.' Some national laws provide a standard of liability that is based on both the EU and Council of Europe instruments and draws together the acts committed or condoned by management and personalized management failure, originally an approach of French law (for example, Australia, Finland, France, Germany, Greece, Italy and Poland). Canada and the UK confine themselves to the 'directing mind' definition, although the Canadian approach is relatively broader since it includes the board of directors, superintendent, the manager, or anyone else to whom the board has delegated the governing executive authority of the corporation. Canada is reportedly also considering the case where these senior company officers were aware of or willfully blind to criminal behaviour by their subordinates.[38]

Many countries accept that the misdeeds of any employee can trigger corporate liability. In some instances agents or other parties are explicitly included (for example, Denmark, Iceland, Korea, Switzerland and the US). Whereas the US employs a strict liability approach such that participation, acquiescence, knowledge or authorization by higher level employees or officers is relevant to determining the sanction, other States such as Finland, Korea, Japan, Switzerland and Sweden require that a standard of objective corporate liability be met. In Japan and Korea this has resulted in the burden of proof for the absence of negligence being put onto the corporation. Thus in Japan the principle is based on the premise that the company did not exercise due care in the supervision or selection of an officer or employee to prevent the criminal act.

The identification concepts within corporate liability have been criticized for being overly focused on the behaviour of senior officials.[39] Given the complexity of corporate structures and different modes of organization in today's multinational enterprises, the rather simplistic 'chain of command' model based on anatomical analogy is no longer a realistic metaphor. Decision-making may be more diffuse both geographically and/or functionally, making it more realistic to use an aggregation model that looks at combined and cumulative behaviour for the purposes of corporate criminal liability.[40]

The critique of the identification doctrine may be particularly apposite for acts of bribery by a company. The collective and cumulative behaviour of a range of employees may provide the corporate climate in which the payment of bribes may occur. Dispersing managerial responsibilities (such as authorizing purchases and payments, opening bank accounts, advising on tax arrangements, selecting and employing

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[38] See the Phase 1 and Phase 2 Reports on Canada conducted by the OECD Working Group on Bribery, available online at www.oecd.org/dataoecd/20/51/31643074.pdf.

[39] Celia Wells, *Corporations and Criminal Responsibility*, (2nd ed., OUP Oxford, 2001); B. Fisse, *Reconstructing Corporate Criminal Law: Deterrence, Retribution, Fault and Sanctions* (1983), 56 Calif. L.Rev. 1141.

[40] Gerry Ferguson, *Corruption and Corporate Criminal Liability*, Seminar on New Global and Canadian Standards on Corruption and Bribery in Foreign Business Transactions, February 1998, p. 14.

intermediaries as well as using under-regulated financial centres to effect payments to third parties) may make it difficult to pin the blame on a single directing mind[41].

In contrast to the 'alter ego' concepts, some jurisdictions have moved towards an objective focus on the fault of the corporation itself. Under the 1995 Australian Criminal Code a corporation can be held responsible for the acts of an agent, employee or officer, where, for crimes requiring a mental element, the 'fault element must be attributed to a body corporate that expressly, tacitly or impliedly authorized or permitted the commission of the offence'. Authorization or permission can be fulfilled in three ways: (a) the traditional identification liability; (b) by extending the imputation to acts and omissions of 'high managerial agents'; or (c) a 'corporate culture' 'that directed, encouraged, tolerated or led to non-compliance with the relevant provisions'.

Swiss law also provides a clear example of an objective approach in its law of October 1st 2003, which states that the crime has to be as a result of 'the lack of reasonable organizational measures'.[42]

(c) the link between proceedings against natural and legal persons

The UN Convention and Council of Europe instruments address the link between legal proceedings against the natural person and the legal entity

UN Convention **Article 26** provides that:

'Such liability shall be without prejudice to the criminal liability of the natural persons who have committed the offences.'

On this point the Council of Europe Convention is similar to the EU 2nd Protocol and states that:

'3. Liability of a legal person under paragraphs 1 and 2 shall not exclude criminal proceedings against natural persons who are perpetrators, instigators of, or accessories to, the criminal offence mentioned in paragraph 1.'

Both the EU and Council of Europe Explanatory Reports examine only one side of this equation (the consequences of the prosecution of the legal person on the prosecution of the natural person) but not vice versa. According to the EU Explanatory Report, measures taken against an entity for whose benefit a fraud has been committed by a manager, shall not exclude criminal prosecution of that manager. The Council of Europe Explanatory Report provides that, 'In a concrete case, different spheres of liability may be established at the same time, for example the responsibility of an organ etc. separately from the liability of the legal person as a whole. Individual liability may be combined with any of these categories of liability.'

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[41] See OECD Working Group on Bribery Phase 2 Review of Bulgaria at p.26, available online at www.oecd.org/dataoecd/8/19/2790505.pdf.

[42] Mark Pieth, *Die Strafrechtliche Verantwortung des Unternehmens* (ZStrR Band 121, p.353-375, 2003). Phase 1 examination of Switzerland by the OECD Working Group on Bribery, available online at www.oecd.org/dataoecd/16/45/2390117.pdf.

The OECD Convention is silent on this issue. However, if corporate liability is meant to be 'effective, proportionate and dissuasive' it would be hard to see how national laws could permit anything less than the UN or European instruments. In fact most of the OECD Convention members do not require the conviction of the natural person in order to prosecute or convict the legal person (Canada, Denmark, Finland, France, Greece, Germany, Iceland, Italy, Japan, Korea, the Netherlands, Sweden and the UK). The OECD has criticized two countries that require the conviction of an individual before proceedings against a corporation can commence.[43] The conviction of a natural person is a requirement to establish the liability of a legal person in Mexico and in Poland a final judgment against a natural person is a prerequisite to start proceedings against the legal person.

In several countries the culpability of the legal person does not preclude the individual responsibility of the natural person who intended to commit the bribery (Denmark, France (explicitly), and Greece, Japan and Mexico (implicitly)).

Under Finnish law, the prosecution of the legal person may be waived if the offender is a member of the management of the legal person and has already been sentenced (subject to the size of the corporation and the share held by the offender). A similar provision exists in Norway where the proximity between the natural and legal person is such that it may not be necessary to fine the company.

11.3 Commentary

Responsibility of legal persons for corruption is a complex and new area and not only for the Istanbul Action Plan countries, and as the description above indicates there is not one prescribed model that has to be followed. There is also no doubt that the criminalization of corporations is still a controversial topic and there are those who find it inappropriate to apply criminal sanctions to a corporate entity. On the other hand there are opinions that hold that corporations are an integral part of society and some wield enormous power in the world and should therefore be held to account for their actions including in terms of criminal culpability. It should also be stressed that the conventions do not oblige states to make liability a criminal matter: Administrative or civil responsibility are possible alternatives.

There is no doubt that the money management of corruption invariably makes use of corporate structures and entities to enable funds to be collected illicitly (so called slush or black funds), sometimes in other jurisdictions, thereafter the funds are accessed and corporate entities may also be used to facilitate the transfer of bribes. For these reasons the conventions envisage measures relating to book keeping and accounting, criminalizing money laundering and not permitting bank secrecy to obstruct criminal investigations.

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[43] See OECD Working Group on Bribery Phase 1 reports online at www.oecd.org/dataoecd/15/30/2388858.pdf and www.oecd.org/dataoecd/39/45/2020928.pdf. The critique was upheld by the Working Group in the Phase 2 evaluation in June 2004.

12. MUTUAL LEGAL ASSISTANCE

12.1 OECD Convention

One of the goals of the OECD Convention is to facilitate improved judicial co-operation between Parties in relation to the offence of active foreign bribery. **Article 9** links the criminalisation of the bribery offence under the Convention with the provision of effective mutual legal assistance and extradition. Art. 9 (1), sentence 1:

'Each Party shall (...) provide prompt and effective legal assistance to another Party for the purpose of criminal investigations and proceedings (...).'

It has to be noted that this is also the basis for mutual legal assistance involving prosecution of legal persons.

Paragraph 2 addresses the issue of identity of norms in the concept of dual criminality. Parties with statutes as diverse as a statute prohibiting the bribery of agents generally and a statute directed specifically at bribery of foreign public officials should be able to co-operate fully regarding cases whose facts fall within the scope of the offences described in this Convention. Art 9(2) states:

'Where a Party makes mutual legal assistance conditional upon the existence of dual criminality, dual criminality shall be deemed to exist if the offence for which the assistance is sought is within the scope of this Convention.'

According to Art. 9(3), mutual legal assistance cannot be declined for criminal matters within the scope the the Convention on the ground of bank secrecy:

'A Party shall not decline to render mutual legal assistance for criminal matters within the scope of this Convention on the ground of bank secrecy.'

From the point of view of responding to request for mutual legal assistance concerning the offence of bribing a foreign public official, there are two important issues:

Commentary 30 on the Convention states that Parties shall 'explore and undertake means to improve the efficiency of mutual legal assistance'. In addition to the measures already discussed, this should also involve initiatives to enter into more bilateral and multilateral treaties concerning mutual legal assistance for the foreign bribery offence.

12.2 Council of Europe Convention

Mutual legal assistance is addressed by instruments on international co-operation in criminal matters including the Council of Europe Conventions on Extradition, Mutual Assistance in Criminal Matters and its Additional Protocols. The Council of Europe Convention also provides for international cooperation in investigation and prosecution:

Mutual legal assistance is addressed in a general manner in **Article 25** (General principles and measures of international cooperation) and **Article 26** (Mutual assistance). These provisions are supplemented by a provision on spontaneous information, i.e. without request (**Article 28**). The rules of the Council of Europe Convention are like their counterparts in the OECD Convention subsidiary to other treaties and relevant national laws.

In connection with mutual assistance, **Article 26 (1)**, provides that parties shall afford one another the widest measure of mutual assistance by processing requests from appropriate authorities. This provision contains the additional requirement of processing the request promptly. **Art. 26 (1)**:

'The Parties shall afford one another the widest measure of mutual assistance by promptly processing requests from authorities that, in conformity with their domestic laws, have the power to investigate or prosecute criminal offences established in accordance with this Convention.'

Mutual assistance may be refused if the request undermines the fundamental interests, national sovereignty, national security or *ordre public* of the requested party, **Art. 26 (2)**:

'Mutual legal assistance under paragraph 1 of this article may be refused if the requested Party believes that compliance with the request would undermine its fundamental interests, national sovereignty, national security or *ordre public*.'

According to **Art. 26(3)**, State Parties to the Convention cannot invoke bank secrecy as a ground to refuse international cooperation:

'Parties shall not invoke bank secrecy as a ground to refuse any co-operation under this chapter. Where its domestic law so requires, a Party may require that a request for co-operation which would involve the lifting of bank secrecy be authorised by either a judge or another judicial authority, including public prosecutors, any of these authorities acting in relation to criminal offences.'

12.3 UN Convention

The UN Convention addresses mutual legal assistance in **Chapter 4 on International Cooperation and in Chapter 5 on Asset Recovery**. **Article 46** on Mutual legal assistance follows the rules laid down in the UN Convention on Transnational Organized Crime of 2000, which has a different scope of offences.

On the basis of the general article on "international cooperation" (Art. 43), Art. 46 is – with its thirty subparagraphs – nearly a convention on mutual legal assistance in its own right.

Paragraph 1 states that

'States Parties shall afford one another the widest measure of mutual legal assistance in investigations, prosecutions and judicial proceedings in relation to the offences covered by this Convention.'

The provision also covers legal persons (para. 2):

'Mutual legal assistance shall be afforded to the fullest extent possible under relevant laws, treaties, agreements and arrangements of the requested State Party with respect to investigations, prosecutions and judicial proceedings in relation to the offences for which a legal person may be held liable in accordance with article 26 of this Convention in the requesting State Party.'

The article further rules on the purposes for which mutual legal assistance is to be provided (para. 3), on transmitting information without further request (para. 4 *et seq*.), on requests made by State Parties not bound by a treaty of mutual legal assistance (para. 7, 9-29).

Para. 9 introduces new provisions concerning response to a mutual legal assistance request in the absence of dual criminality, requiring parties when considering a request for mutual legal assistance to take into account and give full effect to the purposes of the convention and to render assistance in the absence of dual criminality when assistance does not involve Council of Europercive action. The principle of dual criminality was a controversial issue during the drafting of the treaty. The negotiations led to a certain restriction in relation to the equivalent provision in the UN Organized Crime Convention. See Art. 46 (9) UNCAC:

'(…) However, a requested State Party shall, where consistent with the basic concepts of its legal system, render assistance that does not involve Council of Europercive action. Such assistance may be refused when requests involve matters of *de minimis* nature or matters for which the cooperation or assistance sought is available under other provisions of this Convention.'

This is real progress in relation to the rules in other instruments which are thereby supplemented.

In addition, the provisions of this article shall not affect obligations under other treaties on mutual legal assistance (para. 6) and mutual legal assistance cannot be denied on the ground of bank secrecy (para 8).

Chapter V on asset recovery contains provisions on the prevention of money laundering in the specific context of corruption (in addition to provisions on money laundering under **Article 14**) and on international confiscation of proceeds. **Article 57** defines the modality of returning confiscated property to a requesting state, depending on the nature of the offence (embezzlement of public funds, other offences).

In summary, the State Parties to the Convention agreed to cooperate with one another in every aspect of the fight against corruption, including prevention, investigation, and the prosecution of offenders. State Parties to the Convention are bound by the Convention

to render specific forms of mutual legal assistance in gathering and transferring evidence for use in court and to extradite offenders. State Parties to the Convention are also required to undertake measures which will support the tracing, freezing, seizure and confiscation of the proceeds of corruption.

12.4 Commentary

Mutual legal assistance is an international cooperation process by which States seek and provide assistance in gathering evidence for use in the investigation and prosecution of criminal cases, and, in tracing, freezing, seizing and ultimately confiscating criminally derived wealth. It covers a wide and ever expanding range of assistance. They include: Search and seizure; production of documents; taking of witness statements by video conference; and temporary transfer of prisoners or other witnesses to give evidence It differs from traditional cooperation between law enforcement agencies.

Law enforcement cooperation enables a wide range of intelligence and information sharing, including from witnesses providing they agree to give information, documents or other evidentiary materials voluntarily. If the witness is unwilling, Council of Europercive measures will be needed, usually in the form of a court order.

Mutual legal assistance also differs from extradition, although many of the legal principles underlying mutual legal assistance are derived from extradition law and practice. Extradition involves the surrender of a person from one sovereign jurisdiction to another and fundamentally affects the liberty and possibly life of that person. Accordingly, extradition law, practice and procedure typically enable less flexibility and room for discretion in granting a request than mutual legal assistance.

Observations in relation to the OECD Convention on this topic include the following: The availability of **effective** mutual legal assistance for the foreign bribery offences means that the mutual legal assistance must be provided **promptly**, and that the criteria for providing it, such as dual criminality and/or reciprocity, must be interpreted flexibly. In particular, the requirement of dual criminality should be considered satisfied if the country from which mutual legal assistance is requested has an offence of the active bribery of a domestic public official. Criteria such as dual criminality and/or reciprocity must be interpreted flexibly. In particular, the requirement of dual criminality should be considered satisfied if the country from which mutual legal assistance is requested has an offence of the active bribery of a domestic public official (i.e. when one of its own officials is bribed);

The country must be able to provide bank information without undue delays. In order to be able to do this, the country's legal framework needs an efficient mechanism for the obtaining of search warrants (when they are necessary for obtaining access to bank records) and the lifting of bank secrecy. Deadlines for the courts to decide on the **lifting of bank secrecy** can be useful for this purpose. If there is an appeal process for the lifting of bank secrecy, it should be clearly understood by the law enforcement authorities. It should also be clear what the standard of proof is for the lifting of bank secrecy so that the body responsible for lifting it cannot delay the process by requesting more and more information. It should also be possible to block the bank account in question subject to the body's decision on whether to lift bank secrecy.

With respect to delays in general in providing mutual legal assistance, it may be useful to appoint a central coordinating office responsible for responding to mutual legal assistance requests.

The availability of the authority to enforce **foreign confiscation** orders is also essential. And the country must be applying this authority in practice. Otherwise companies and individuals will be tempted to conceal their illegal proceeds in these countries.

If the country does not have the criminal or administrative liability of legal persons, it still must be able to provide mutual legal assistance upon request for cases where the requesting country is proceeding against a company for administrative or criminal liability for the offence of bribing a foreign public official. In addition, it should be able to provide mutual legal assistance even if the requesting country is not proceeding against a natural person (i.e. mutual legal assistance for legal persons should not be conditional upon the establishment of legal proceedings against some natural person).

Art. 9 of the OECD Convention contains with respect to the particular offence of bribery of foreign public official a very general provision for OECD Parties. It is not as such applicable to relationships between a Party and a non Party, although item 8 of the Annex to the Revised Recommendations creates the impression that this may be the case. Between countries which are Members of the Convention of the Council of Europe or of the European Union, including the Schengen Agreement, the basis is still the relevant treaty. Therefore Art. 9 is more important for those countries which are not a Party to these instruments of international cooperation. For them it is a supplementation of their own legislation allowing mutual legal assistance.