

LEGAL INFORMATION NEWSLETTER

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We are pleased to provide you with the new issue of our legal information newsletter.

Topical legal questions are discussed and those related to issues that you might encounter.

We hope that you will find it of interest. We would welcome any comment you might have.

THE 1999 STRASBOURG CRIMINAL LAW CONVENTION ON CORRUPTION RECENTLY RATIFIED IN ITALY

Strasbourg Criminal Law Convention of 17.1.1999 and domestic Act 6.11.12 n° 90

INTRODUCTION - The Criminal Law Convention on Corruption recently ratified in Italy on 6 November 2012 was negotiated by the 46 Member States of the Council of Europe, along with the participation of a number of observers, including Canada, Japan, Mexico and the United States. It lays out what States Parties should do with respect to corruption in the areas of criminalisation and international cooperation.

The EU signatory parties considered that the aim of the Council of Europe was to achieve a greater unity between its members.

It was also recognised the value of fostering co-operation with the other States signatories to this Convention, convinced of the need to pursue, as a matter of priority, a common criminal policy aimed at the protection of society against corruption, including the adoption of appropriate legislation and preventive measures.

In addition, it was emphasized that corruption threatens the rule of law, democracy and human rights, undermines good governance, fairness and social justice, distorts competition, hinders economic development and endangers the stability of democratic institutions and the moral foundations of society;

Believing that an effective fight against corruption requires increased, rapid and well-functioning international co-operation in criminal matters was as well a reason leading to the adoption of this Convention.

OBLIGATIONS OF THE CONVENTION – The obligations of the parties to the Council of Europe Convention can be divided into five categories:

Criminalisation - The Convention obligates signatory States to establish as criminal offences active and passive bribery of domestic and foreign officials and members of assemblies, as well as bribery of officials of international organisations.

Active and passive bribery of private sector employees must also be made a criminal offence.

It further requires States to establish as offences trading in influence, money laundering and accounting offences connected with corruption offences.

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Money laundering - States are required to treat concealment of the proceeds of corruption as a money laundering offence, with certain limited exceptions.

Provisions regarding private sector - The Convention requires states to establish the liability of companies and to prohibit accounting practices used in order to bribe foreign public officials or to hide such bribery. Thus parties are required to prohibit the establishment of off-the-books accounts and similar practices used to conceal bribery.

International cooperation - Given that foreign bribery involves actors in different jurisdictions and that international financial channels are often used to carry out or hide international bribery, the Convention prescribes mutual legal assistance between countries and the exchange of information. It also makes extradition easier in relation to offences governed by the Convention and provides for seizure and confiscation of the proceeds of corruption.

Monitoring - The Convention provides for monitoring by GRECO, the Group of States against Corruption, which was launched by the Council of Europe in 1999 to monitor the compliance with Council of Europe anti-corruption standards established in several instruments. Technical assistance programmes are linked to the review process.

MEASURES TO BE TAKEN AT NATIONAL LEVEL – Entering into details the Convention requires that each signatory party shall adopt such statutory regulations as may be necessary in order to establish as criminal offences the following actions.

Active bribery of domestic public officials - 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.

Passive bribery of domestic public officials – Likewise adequate measures shall be adopted to establish as criminal offences under its domestic law, when committed intentionally, the request or receipt by any of its public officials, directly or indirectly, of any undue advantage, for himself or herself or for anyone else, or the acceptance of an offer or a promise of such an advantage, to act or refrain from acting in the exercise of his or her functions.

Bribery of members of domestic public assemblies - The above referred conduct, shall be considered a crime also when involving any person who is a member of any domestic public assembly exercising legislative or administrative powers.

Bribery of foreign public officials and members of foreign public assemblies – As well, each Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law the above referred conduct, when involving: 1) a public official of any other State, or 2) any person who is a member of any public assembly exercising legislative or administrative powers in any other State.

Active bribery in the private sector – Adequate legislative measures shall be adopted to establish as criminal offences under domestic law, when committed intentionally in the course of business activity, the promising, offering or

giving, directly or indirectly, of any undue advantage to 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.

Passive bribery in the private sector – Every necessary legislative measure shall be adopted to establish as criminal offences under domestic law, when committed intentionally, in the course of business activity, the request or receipt, directly or indirectly, by any persons who direct or work for, in any capacity, private sector entities, of any undue advantage or the promise thereof for themselves or for anyone else, or the acceptance of an offer or a promise of such an advantage, to act or refrain from acting in breach of their duties.

Bribery of officials of international organisations – Each Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law the conduct of active or passive bribery, when involving 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.

Bribery of members of international parliamentary assemblies – Legislative measures shall be passed to establish as criminal offences under domestic law the conduct of active or passive bribery, when involving any members of parliamentary assemblies of international or supranational organisations of which the Party is a member.

Bribery of judges and officials of international courts – Legislative and other measures shall be passed to establish as criminal offences under its domestic law the conducts of active and passive bribing involving any holders of judicial office or officials of any international court whose jurisdiction is accepted by the Party.

Trading in influence - 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, 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 above referred, 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.

Money laundering of proceeds from corruption offences - Each Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law the conduct referred to in the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Products from Crime (ETS No. 141), Article 6, paragraphs 1 and 2, under the conditions referred to therein, when the predicate offence consists of any of the above criminal offences established in this Convention, to the extent that the Party has not made a reservation or a declaration with respect to these offences or does not consider such offences as serious ones for the purpose of their money laundering legislation.

Account offences Legislative measures and other measures shall be implemented to establish as offences liable to criminal or other sanctions under its domestic law the following acts or omissions, when committed intentionally, in order to commit, conceal or disguise the above offences, to the extent the Party has not made a reservation or a declaration:

- a) creating or using an invoice or any other accounting document or record containing false or incomplete information;
- b) unlawfully omitting to make a record of a payment.

Participatory acts – Eventually, each Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law aiding or abetting the commission of any of the criminal offences established in accordance with this Convention.

JURISDICTION - Each Party shall adopt such legislative and other measures as may be necessary to establish jurisdiction over one of the above criminal offence of the Convention where:

- The offence is committed in whole or in part in its territory;
- the offender is one of its nationals, one of its public officials, or a member of one of its domestic public assemblies;
- the offence involves one of its public officials or members of its domestic public assemblies, who is at the same time one of its nationals.

CIRPORATE LIABILITY – Each Party shall adopt such legislative and other measures as may be necessary to ensure that legal persons can be held liable for the criminal offences of active bribery, trading in influence and money laundering established in accordance with this Convention, committed for their benefit by any natural 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 of such a natural person as accessory or instigator in the above-mentioned offences.

Apart from the above cases already provided for, each Party shall take the necessary measures to ensure that a legal person can be held liable

where the lack of supervision or control by a natural person referred to has made possible the commission of the criminal offences mentioned for the benefit of that legal person by a natural person under its authority.

Liability of a legal person shall not exclude criminal proceedings against natural persons who are perpetrators, instigators of, or accessories to, the mentioned criminal offences.

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

Each Party shall ensure that legal persons held liable shall be subject to effective, proportionate and dissuasive criminal or non-criminal sanctions, including monetary sanctions.

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.

SPECIALISED AUTHORITIES – Measures shall be adopted as may be necessary to ensure that persons or entities are specialised in the fight against corruption.

They shall have the necessary independence in accordance with the fundamental principles of the legal system of the Party, in order for them to be able to carry out their functions effectively and free from any undue pressure.

The Party shall ensure that the staff of such entities has adequate training and financial resources for their tasks.

CO-OPERATION BETWEEN NATIONAL AUTHORITIES – Measures shall be implemented so to ensure that public authorities,

as well as any public official, co-operate, in accordance with national law, with those of its authorities responsible for investigating and prosecuting criminal offences:

- by informing the latter authorities, on their own initiative, where there are reasonable grounds to believe that any of the mentioned criminal offences has been committed, or
- by providing, upon request, to the latter authorities all necessary information.

PROTECTION OF COLLABORATORS OF JUSTICE AND WITNESSES - Each Party shall adopt such measures as may be necessary to provide effective and appropriate protection for:

- Those who report the criminal offences established in accordance with Articles 2 to 14 or otherwise co-operate with the investigating or prosecuting authorities;
- witnesses who give testimony concerning these offences.

MEASURES TO FACILITATE THE GATHERING OF EVIDENCE AND CONFISCATION OF PROCEEDS - 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 the Convention and to identify, trace, freeze and seize instrumentalities and proceeds of corruption, or property the value of which corresponds to such proceeds.

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.

To be noted bank secrecy shall not be an obstacle to such measures provided for.

MUTUAL ASSISTANCE AND PUBLIC ORDER - The Member States 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 legal assistance 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*.

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 authorized by either a judge or another judicial authority, including public prosecutors, any of these authorities acting in relation to criminal offences

EXTRADITION – The criminal offences established in accordance with the Convention shall be deemed to be included as extraditable offences in any extradition treaty existing between or among the Parties.

The Parties undertake to include such offences as extraditable offences in any extradition treaty to be concluded between or among them.

Extradition shall be subject to the conditions provided for by the law of the requested Party or by applicable extradition treaties, including the grounds on which the requested Party may refuse extradition.

CENTRAL AUTHORITY - The Parties shall designate a central authority or, if appropriate, several central authorities, which shall be responsible for sending and answering requests made under this chapter, the execution of such requests or the transmission of them to the authorities competent for their execution.

Article contributed by Riccardo G. Cajola