COUNCIL OF EUROPE

CONSEIL DE L'EUROPE

Committee of Ministers
Comité des Ministres

CMD009337

Strasbourg, 9 October 1996

Restricted
CM(96)133

For consideration at the 575th meeting
of the Ministers' Deputies
(14-17 October 1996, A level, item 10.1)

MULTIDISCIPLINARY GROUP ON CORRUPTION (GMC)

PROGRAMME OF ACTION

AGAINST CORRUPTION*

* The original version of this document was adopted by the Multidisciplinary Group on Corruption (GMC) at its meeting from 25 to 27 September 1995 for the attention of the Committee of Ministers [doc. GMC (95) 49 final]. It was then submitted for opinion to the two Steering Committees under whose responsibility the GMC has worked, namely the European Committee of Legal Co-operation (CDCJ) and the European Committee on Crime Problems (CDPC). These opinions are reproduced in an Addendum to this document. This updated version takes into account the said opinions and the work already carried out by the GMC under the interim terms of reference which was given to the GMC by the Committee of Ministers in January 1996 at the 554th meeting of the Ministers' Deputies.

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PART ONE: SUMMARY[1] OF THE PROPOSALS MADE BY THE GMC

[1]. The following is only a summary of the proposals made in this Programme of Action. For further details it is referred to the detailed Work Programme. The purpose of this summary is to give a general idea of the main work which the GMC proposes to undertake within the first five years of its existence, and possibly beyond, depending on resources given to it.

A. WORK PRIORITIES

1. Under its interim terms of reference the GMC has started drawing up two international conventions against corruption, one "classical" convention to deal with matters of criminal law and one so-called framework convention which will have to be coupled with protocols or other appropriate legal instruments on specific topics. The relationship between the framework convention and the above mentioned criminal law convention will have to be determined at a later stage.

2. The topics covered by the framework convention include the questions of bribery of foreign officials and tax-deductibility of bribes to foreign officials. In any case, the framework convention will contain a monitoring mechanism as well as a mechanism to ensure that effective implementation of the provisions be made simultaneously in a number of countries. The work has top priority and is being carried out in close co-operation with the OECD to the extent it concerns bribery of foreign officials and tax-deductibility [see A.II.2 and A.IV of the Detailed Work Programme].

3. In the context of drafting the framework convention, the GMC studies the definition of corruption. In particular, the GMC proposes to concentrate its work on the main corruption offences. It should not be excluded that the GMC could draft a recommendation on the subject [see A.I and A.II].

4. The GMC considered, on the basis of a questionnaire answered by the members and observers of the GMC, the feasibility and necessity of drafting an international convention on civil remedies to fight corruption. Work on this feasibility study commenced in January 1996 and was finalised by the GMC in October 1996 [see A.V and C.XI.2].

5. The GMC also started drafting a European Code of Conduct for Public Officials. It expects to conclude this work in 1997 [see A.III.2 and B.I.1].

6. The GMC has organised in April 1996 an international conference where national authorities responsible for the fight against corruption exchanged experiences and examined ways for enhancing international co-operation. The general rapporteur of the conference as well as the GMC, in the light of this first experience, considered it necessary to hold such meetings annually. The GMC should continue to study the working methods of specialized bodies combatting corruption, their legal powers and technical means as well as the results obtained. After having concluded its study it should consider drawing up a recommendation or any other instrument on this matter [see B.II].

7. The GMC proposes to undertake a study of corruption of international civil servants and elected representatives, with a view to considering which response needs to be given to that problem area [see A.II.3].

8. The GMC proposes to undertake a comparative study of national legislation as regards the offence of trading in influence, in order to decide whether this offence should be subject to provisions in any of the above mentioned conventions and/or a specific recommendation [see A.II.4].

9. Taking into account the convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (ETS No 141), the GMC is also studying the question of laundering of proceeds from corruption, in order to decide whether this offence should be subject to provisions in any of the above mentioned conventions [see A.II.5].

10. The GMC proposes to consider the insertion of other offences related to corruption in the abovementioned conventions. It also considers the question of provisional measures and confiscation of the proceeds from corruption [see A.II.6 and C.VII].

11. The GMC proposes to study the issues of a reporting obligation for corruption offences, including the duty to report and transparency between tax authorities and investigative authorities [see C.IV and C.V].

12. The GMC proposes to assess the efficiency and adequacy of the existing instruments on international legal co-operation for the fight against corruption [see C.XI].

13. The GMC proposes to study the issue of liability of legal persons for offences of corruption and, in the light of such a study, consider a recommendation or a provision in a convention [see C.IX].

14. With a view to drawing up a recommendation, the GMC proposes to examine the question of the financing of political parties and its impact on corruption in the light of the work of the CAHDD. It gave an opinion to the CDCJ in that sense [see D.I].

15. The GMC proposes to promote training of officials involved in the fight against corruption, in particular in Central and Eastern Europe [see D.IV].

16. The GMC ensures appropriate co-ordination and co-operation with international organisations, in particular the OECD, the United Nations and the European Union as well as with non-governmental organisations [see B.II.2].

17. Hereafter the GMC makes a number of proposals concerning work which it should carry out but which has a lower priority. It will submit specific proposals to the Committee of Ministers in due time. The GMC considers drafting appropriate legal instruments - including recommendations, model codes, reports or guidelines - on the following subjects:

Administrative and constitutional law questions[2]

a) Corruption, administrative law and discretionary powers of the administration [see A.III.1].
b) Study of the role and responsibilities of members of the legal profession and in particular the role and independence of the judiciary [see B.I.5].
c) Take stock of existing norms on public procurement and, if appropriate, elaborate one or several recommendations [see C.I].
d) Recommendation on administrative auditing [see C.II.1].
e) Recommendation on disciplinary sanctions [see C.II.2]
f) Recommendation on black-listing of companies [see C.II.3].
g) Recommendation on administrative liability and corruption [see C.II.4].
h) Study of immunities to be carried out together with the Venice Commission [see C.VI].
i) Monitoring on-going work on financing of political parties and, in the light of this work, elaborate a recommendation on the subject [see D.I].
j) Study of the role of elected representatives and members of government [see B.I.2 and D.II].
k) Study of registers of interest and publication of income and property [see B.I.2].
l) Study of the role and responsibilities of officials of political parties [see B.I.3].
m) Study of the role and responsibilities of journalists, possibly organizing of a symposium together with the Steering Committee on Mass-media (CDMM) [see B.I.8 and D.III].

Civil law questions

n) A European Model Code of Conduct for Private Business [see A.III.2].
o) Study of the role and responsibilities of auditors (a workshop or seminar could be held first) [see B.I.6].
p) Study of the role and responsibilities of business people [see B.I.7].
q) Study of the role of off-shore companies, awaiting the results of the FATF study [see C.VIII].
r) Study, and, if appropriate, drafting of a recommendation on corruption, procedural law and civil remedies [see C.III].

Criminal law questions

s) Study, and, if appropriate, drafting of a recommendation on different means and procedures on how to obtain evidence relating to corruption, including the so-called "whistle-blowers" [see C.IV and V.].
t) Study of criminal law sanctions and measures [see C.X].

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[2]. Many of the following topics are of a multidisciplinary character. Only the main legal field has been indicated.

18. The GMC should initiate, organise and promote research aiming at the fight against corruption. It should, as the body responsible for questions concerning corruption, be closely involved in the carrying out of training programmes to fight corruption, in particular in the fight against corruption in Central and Eastern Europe. In 1996, upon specific requests by member and non-members States, its Secretariat has already started carrying out such tasks.

19. The GMC should explore ways and means for furthering international co-operation against corruption and make proposals. In that context the GMC could serve as a clearing house for transmission of information relating to corruption, training, prevention and research as well as promote and organise such activities, including publishing activities, as appropriate. For example, following the proposals made by the practitioners at the conference mentioned above in Paragraph 6, an information document listing the national authorities responsible for combatting corruption in States participating in the activities of the GMC was drawn up and will be kept updated by the Secretariat.

20. The GMC could at some stage organize a conference or a symposium on the role of the media in relation to corruption.

B. ORGANISATIONAL PROPOSALS

21. The GMC proposed to the Committee of Ministers that it be made an Ad Hoc Committee directly under the responsibility of the Committee of Ministers under the name of the Council of Europe Commission against Corruption (CECAC) and that three members of the CDCJ and the CDPC, respectively, of which one should be a member of the Bureau of the CDPC and the CDCJ, should take a seat in the GMC in order to ensure an appropriate co-ordination with the Steering Committees. These proposals were submitted to the CDCJ and the CDPC in 1996. Their opinions are reproduced in the Addendum to this document.

22. The GMC proposes to be able to benefit from the collaboration of, depending on the subject to be dealt with, the Parliamentary Assembly of the Council of Europe as well as international non-governmental organisations such as the International Chamber of Commerce, Transparency International and the International Bar Association. The requests for observer status made by the latter three organisations should be granted. The GMC should also have the possibility to request specialists to assist in its work, for instance, auditor's associations if questions of auditing are discussed. The GMC proposes to maintain a real multidisciplinary character in its work.

23. The GMC proposes that the Programme of Action, when adopted by the Committee of Ministers, be made public.

PART TWO: WORK OF THE GMC

A. CORRUPTION AS A PROBLEM OF SOCIETY

I. THE HISTORICAL PERSPECTIVE

1. Corruption has existed ever since antiquity as one of the worst and, at the same time, most widespread forms of behaviour which is inimical to the administration of public affairs when indulged in by public officials and elected representatives. In the last hundred years, it has come to encompass behaviour within the purely private domain.

2. No precise definition of corruption can be found which applies to all forms, types and degrees of corruption, or which would be accepted universally as covering all acts which are considered in every jurisdiction as constituting corruption.

3. Indeed some practices have at times and in certain circumstances been considered as manifestations of corruption while those very same practices have at other times and in different circumstances been considered as licit if not also laudable.

4. Naturally, with the passage of time, customs as well as historical and geographical circumstances have greatly altered public sensitivity to such behaviour, in terms of the significance and attention attached to it. As a result, its treatment in laws and regulations has likewise changed substantially.

5. In some periods of history, certain corrupt practices were actually regarded as permissible (for example, the acceptance by public officials of favours for the accomplishment of acts which did not conflict with their duty as officials), or else the penalties for them were either fairly light, or generally not applied.

6. In the past one considered corruption only with regard to public officials, be they members of the legislature, the executive or the judiciary. This is no longer the case today. A typical example is the offence of insider trading which could, at least in some countries, be considered as a form of corruption. While it is still perfectly legal for a person to act upon price-sensitive information given to him by a farmer in relation to the price of onions on the local market the following week, it would today constitute a criminal act if a person were to take advantage of confidential information given to him by a company director and which allows to foresee the evolution of the price of the company's shares on the stock exchange. While the advantage obtained in the first case does not cause any noticeable distortion on the market, the second kind of information is considered to have an iniquitous and grave distorting effect on the system. As companies on the stock exchange are not a mere private matter but entities of public concern, any distortion of the rules of proper behaviour with regard to their operation may today be classified, also, as a form of corruption, at least if taken in the widest sense of the word.

7. Indeed the law in relation to corruption is one of the laws which tries to enforce and enhance those rules that a society at a particular point considers proper for its orderly functioning.

8. In Europe, the French Napoleonic Code of 1810 may be regarded as the juncture at which tough penalties were definitively introduced to combat corruption through an act which did not conflict with one's official duties (generally defined as corruption in the wide sense), as well as through an act which did (corruption "proper"). Since then, this example has been followed by various other continental codes which nevertheless differ in several respects.

9. More recently, the deepening interest and concern shown in such matters everywhere have produced national and international reactions.

10. From the beginning of the 90s corruption has always been in the headlines of the press. Although it had always been present in the history of humanity, it does appear to have virtually exploded across the newspaper columns and law reports of a number of States from all corners of the world, irrespective of their economic or political regime. Countries of both Western and Central and Eastern Europe have been literally shaken by huge corruption scandals and some now consider that corruption represents the most serious threat their democracies and economic systems.

11. This illustrates that corruption needs to be taken seriously by Governments and Parliaments. The fact that corruption is widely talked of in some States and not at all in others, is in no way indicative that corruption is inexistent in the latter. In such countries corruption may be either non existent (which sems to be rather improbable), or so efficient and organised as not to give rise to suspicion. No system of government and administration is immune from corruption by those intent on the abuse of power.

II. WHAT IS CORRUPTION ?

12. The law does not deal with the concept at the empirical level, it rather deals with the suppression of certain activities that go against - hence corrupt - the proper functioning of public and private sector activities and governments.

13. Corruption is like a prism with many surfaces. It can be viewed from different angles, for example as a social issue or from the perspective of political science, economic and organisational theory or from the perspective of criminal, civil or administrative law. If corruption is viewed too narrowly only one side of the prism may be revealed, for example corruption as criminal behaviour. Awareness of this problem sometimes also results in an unduly broad definition of the concept, as where a number of general offences committed by people in the course of their employment come to be treated as corruption, for example theft, embezzlement, fraud and other acts which prejudice the employer. This is incorrect. In essence, corruption is not about putting one's fingers in the till but more about the abuse of power or improbity in the decision-making process. This definition can be refined still further, but it is in effect the lowest common denominator.

14. Corruption should not necessarily be equated with criminal corruption. Of course, corruption has always been a close companion of crime. This explains to a large extent the multiple forms it takes and the varied terminology used to describe it: bribery, graft, gift-taking, kick-backs, sharp business practices and so on. Likewise, both corruption and criminal corruption are expressions of the same attitude to morals, ethical principles and public function.

15. Corruption may also be seen as a phenomenon of the society and in that sense one may speak of *systematic* corruption of legal systems, economic management, the delivery of public services and policy making. Such corruption can skew incentives disastrously, undermine voluntary compliance, deter investment and render democracy ineffectual. It generates economic costs by distorting incentives, political costs by undermining institutions and social costs by redistributing wealth and power toward the rich and privileged. When corruption undermines property rights, the rule of law, and incentives to invest, economic and political development are crippled[3].

16. When one bribes a public officer, the primary concern of the law is not the corruption of the integrity of that officer, but the corruption of the system of proper government and proper administration. Indeed the law in many countries views differently the situation of a self-employed tradesman being promised a heavy tip for doing a job well, and the analogous situation of the same tradesman employed with a public department who does the job well after being promised the same substantial tip to perform so. In the latter case such a payment would not be called "a tip" but "a bribe". What the law considers in both cases is not the liberality of the giver or the enrichment or otherwise of the tradesman; but the fact that a tradesman employed with a public department should do a job well without the necessity of being offered extra remuneration by any person. The offering of bribes in such cases is deemed in itself a sufficient threat to the system, and consequently has been proscribed as the crime of corruption of a public officer.

17. The concept of corruption is wider than that of criminal corruption. This differentiation is important for the simple reason that no comprehensive and all-embracing strategy in the fight against corruption can ever be formulated, if one were to limit such measures to criminal corruption alone. Putting it differently, a corrupt practice or system might not as yet be considered by law an offence, but such an omission would not render it less corrupt in its character. It would only mean that under the current law or under a given system, no court action may as yet be taken to suppress it - it is not considered to be a crime and, of course, no punishment can ever be meted out.

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[3]. Klitgaard, in National and International Strategies for Reducing Corruption, Paper presented to the OECD Symposium, Paris March 1995.

18. Corruption of any kind and at any level of society seriously undermines the basic values on which society is founded. In particular it destroys the good faith that is required if government, politics and commerce are to function properly. In addition, corruption results in arbitrariness and uncertainty and amounts to a basic denial and contempt of the rule of law.

III. REASONS FOR CORRUPTION

19. The main contributing factors of corruption are the concentration of power, wealth and status, non-democratic or autocratic regimes, a cumbersome bureaucracy, excessive administrative controls and trade restrictions, monopolies, patronage, governmental concessions for economic, industrial and infrastructural development, a poorly organised and underpaid civil service, a weak judicial set-up and, as an over-riding general ingredient, a materialistic concept of success where power, money, status and ostentation play a leading, if not primary, role. Simple human greed is very often a main contributing factor to corruption.

IV. REMEDIES AGAINST CORRUPTION

20. Unless effective remedies to fight and eradicate corruption are such as to encompass it in all its forms - and not just the criminal aspect - the undertaking may well be inadequate. The parameters of what constitutes, or at least should constitute, criminal corruption are certainly more evident and palpable than those that are, or should be, the constitutive elements of corruption in the abstract.

21. The methods to combat criminal corruption usually follow the familiar pattern: detection, investigation, prosecution and punishment of the offender. The fight against corruption in its wider connotation involves a whole frame of mind, a change in outlook on values and ethical standards. Vigilance, transparency, publicity, proper institutional bodies are all valuable and necessary tools, but something deeper should also be looked for. A way has to be found which would expose the ugly and pernicious side of corruption and its harmful effects upon society in general and life in particular. Sound ethical standards should be reflected in public administration and in business in all its aspects. It must be shown that a clean society, upholding upright moral values and ethical standards, works. Emphasis must be placed on transparency, incentives, personal responsibility and accountability.

22. Corruption can be fought by negative punitive measures as well as by positive measures. The creation of a culture opposed to corruption through a good moral and civic education is no doubt the best approach in the fight against crime in general and corruption in particular. It is important for any State to instill in its citizens high moral values and ethical standards. These make them reject crime as evil and as something which should be abhorred. People trained in good moral values and ethical standards have a resistance to evil. On the other hand, the deterrent effect of

the criminal penalty for corruption cannot be ignored. Consequently punishment for corruption should be exemplary. The confiscation of the fruits of corruption will help teach that this kind of crime does not pay.

23. The chief problem with all forms of corruption is that it thrives on secrecy and silence. It represents one of the most significant segments of unknown crime or unreported crime. Official statistics, whether criminal or otherwise, seldom reflect this type of activity. One can sense it but not necessarily prove it. Transparency therefore becomes a key-concept in the fight against corruption, in particular in the public domain. As regards the volume of money, public procurement is by far the most important domain of corruption. Avoiding and sanctioning corruption in public procurement is thus one of the essential ingredients in the fight against corruption.

24. The human being is the product of cultures, habits, environmental circumstances, religion, media influence and ethics. All these influence his behaviour and determine his attitude to such matters like corruption. It is perhaps all and each of these areas that need to be addressed in the fight against corruption, if civilised societies want to correct and control corruption which threatens to erode social fabric. Education in the civic and ethical fields should face up to the challenge. Corruption is a manifestation of a degeneration of morality, a return to the instinct of egoism and greed. Instinct can only be tamed and controlled by an incessant educational programme in good moral behaviour and ethical standards, and in civic norms.

25. A society built on the positive values of strong morality and good ethical standards is a caring society which thrives on harmony and solidarity. Such a society is one with an aim, with a long term vision, such a society is one which believes that corruption upsets these values and frustrates its aims. History has taught us that it is belief in a purpose, rather than a strong hand that can really fuse and hold society together.

26. States should also do away with the double standards hitherto applied. While corruption is fought on the home front, the same corruption has been exported by the very same states to other countries where officials have been bribed by officials of other states and businessmen acting under the protection of foreign states.

27. At a Council of Europe level this Programme of Action proposes that the GMC should have the responsibility of initiating studies, making recommendations and drawing up legal instruments as appropriate. Moreover, the exchange of views and experiences in this field will help create and sharpen the awareness of the dangers faced by everyone and set up common strategies to resist them in order to defend the fundamental values of the Council of Europe, namely democracy, the Rule of Law and human rights.

B. PREVIOUS INITIATIVES

28. The General Assembly of the United Nations looked into the question of corrupt practices in international commercial transactions for the first time in its Resolution 3514 of 15 December 1975.

29. In the wake of this resolution, numerous other measures dealing wholly or partly with the subject of corruption were adopted by a very wide range of international bodies. An attempt to draft a convention outlawing corruption in international commercial transactions failed, mostly because of differences in the appreciation of North/South questions[4].

30. Some of the most recent work on corruption include the Report on Extortion and Bribery in Business Transactions, adopted by the Council of the International Chamber of Commerce on 29 November 1977 (this Report is currently being revised), the United Nations Conference in the Hague in December 1989, the Eighth United Nations Congress on the Prevention of Crime and the treatment of offenders, held in Cuba in August-September 1990, which adopted a specific resolution on "Corruption in government" and the Ninth Congress in Cairo in 1995 which devoted a great part of its work to questions of corruption, the seven International Anticorruption Conferences usually organised at two-yearly intervals (Washington 1983, New York 1985, Hong Kong 1987, Sydney 1989, Amsterdam 1992, Cancun, Mexico November 1993, Beijing October 1995), a Seminar on corruption in markets in transition in Budapest January 1994, the Interdisciplinary Colloquy held in Fribourg (Switzerland) from 3 to 5 February 1994 and an OECD Symposium on Corruption and Good Governance in March 1995. A most significant contribution was made by the OECD, which on 27 May 1994 adopted a Recommendation on Bribery in International Business Transactions and, in May 1996, a Recommandation on the Tax Deductibility of Bribes to Foreign Public Officials. On its side, the Organisation of American States adopted an Inter-American Convention Against Corruption on 29 March 1996. Important work concerning in particular fraud against the financial interests of the European Community is carried out within the framework of the European Union which adopted on 7 August 1996 a Protocol to the 1995 Convention on the protection of the European Communities' financial interests in order to specifically adress the problem of corruption.

C. TERMS OF REFERENCE OF THE GMC

31. The terms of reference of the GMC as adopted by the Committee of Ministers on 8 September 1994 and following the proposals of the European Ministers of Justice, meeting at Malta (June 1994) were as follows:

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[4]. UN Doc. E/104/1979 (25 May 1979), reprinted in I.L.M. 1025 (1979).

"Under the responsibility of the European Committee on Crime Problems (CDPC) and the European Committee on Legal Co-operation (CDCJ), to examine what measures might be suitable to be included in a programme of action at international level against corruption.

To examine the list of subjects mentioned in the Appendix to these terms of reference [this Appendix is here excluded] and to make proposals for the Committee of Ministers' attention before the end of 1995 as to the appropriate priorities to be set and the working structures, taking due account of the work of other international organisations and bodies with a view to ensuring a coherent and co-ordinated approach.

To examine in particular the possibility of drafting model laws or codes of conduct in selected areas, including the elaboration of an international convention on this subject, as well as the possibility of elaborating follow-up mechanisms to implement undertakings contained in such instruments.

To examine the possibility of organising or promoting research projects, training programmes and the exchange of practical experiences of corruption."

32. In January 1996 the Committee of Ministers, while taking note of the draft Programme of Action presented to it by the GMC, gave interim terms of reference to the GMC. It

"authorised the GMC, subject to the adoption of the said draft programme, to start in 1996 the following actions of the draft programme:

- work on one or several international instruments,
- a feasibility study on the drawing up of a convention on civil remedies for compensation of damage resulting from acts of corruption,
- work on a European Code of Conduct for Public Officials,
- holding of a meeting for national authorities responsible for the fight against corruption."

33. Taking into account the work currently performed by it under the interim terms of reference, the GMC proposes that the following terms of reference be adopted for its future work:

"To elaborate as a matter of priority a framework convention against corruption as well as other international conventions to combat corruption and a follow-up mechanism to implement undertakings contained in such instruments.

To elaborate as a matter of priority a draft European Code of Conduct for Public Officials.

To initiate, organise or promote research projects, training programmes and the exchange at national and international level of practical experiences of corruption and the fight against it.

To implement the other parts of the Programme of Action against Corruption, taking into account the priorities set out therein.

To take into account the work of other international organisations and bodies with a view to ensuring a coherent and co-ordinated approach.

To take into account any other matter which may be relevant in the fight against corruption.

To request opinions of the appropriate Steering Committees, and in particular the CDCJ and the CDPC, on any draft legal text relating to corruption.

These terms of reference should remain in force until 31 December 2000, subject to yearly considerations which may be made by the Committee of Ministers."

34. All members of the Council of Europe are invited to appoint experts in the GMC. In addition, the following States have been entitled to appoint observers to the GMC: Australia, Belarus, Bosnia Herzegovina, Canada, Croatia, Holy See, Japan, Mexico, New Zealand, United States of America. Further requests for observer status have been made.

35. The following international organisations and bodies were entitled to appoint observers to the GMC: The Commission of the European Communities, OECD, United Nations, ICPO-Interpol, European Bank for Reconstruction and Development (EBRD), International Commission on Civil Status. Requests for observer status were made by Transparency International, the International Chamber of Commerce, the International Bar Association and the World Bank.

D. MEETINGS OF THE GMC

36. The GMC has held four meetings so far (since February 1995).

37. Judge Vincent A. DE GAETANO (Malta) and Judge Carlo SAMMARCO (Italy) were elected Chairman and Vice-Chairman of the GMC, respectively. In conformity with Resolution (76) 3, the GMC decided to set up three working groups and that the Chairmen of those groups would, together with the Chairman and Vice-Chairman of the GMC, constitute the Bureau of the GMC. The working groups were the following: GMCP (penal law matters), GMCA (administrative and constitutional law matters) and GMCC (civil law matters).

38. The GMCP elected as its Chairman Mr Lee HUGHES (United Kingdom). The GMCA elected Mr Lorenzo SALAZAR (Italy) as its Chairman. The GMCC elected Judge Helmut NEUDORFER (Liechtenstein) as its Chairman. Various scientific experts have assisted the GMC in its work: Maître Paolo BERNASCONI (Switzerland), Chief Judge Torsten CARS (Sweden), Professor Karl MEESSEN (Germany), Professor Giorgio SACERDOTI (Italy) and Mr. Bertrand D.E. de SPEVILLE (United Kingdom).

E. RESOURCES AND PUBLICITY

39. The GMC should be given sufficient resources for meetings and enough staff to carry out the Programme of Action.

40. It is proposed that this Programme of Action be made a public document.

PART THREE: DETAILED WORK PROGRAMME 1996-2000

INTRODUCTION TO THE DETAILED WORK PROGRAMME

1. The Detailed Work Programme contains four substantive chapters. The first three chapters (A-C) deal with a number of civil, penal and administrative/ constitutional law aspects but are not totally limited to such aspects. Chapter D is of a different nature and covers topics which may be fitted within several chapter.The GMC was aware that any structure of a Programme of Action against Corruption could be criticized from different viewpoints and would present both advantages and inconveniences, partly depending on which concept of corruption that was used. In the context of the Council of Europe, it however considered that the Programme, as currently structured, presented a relatively logical and coherent approach and could serve as a basis for future discussion in detail of the various topics dealt with in the Programme.

2. Chapter A of the Detailed Work Programme deals with the distinction of what is allowed and what is forbidden - what could be termed a chapter on "law and ethics" or how to distinguish between what is legal and what is illegal, right or wrong, depending on whether a narrow definition of corruption is adopted or a broad one. The chapter deals with the most important distinctions between criminal, civil and administrative law and demonstrates clearly how the different definitions of what constitutes corruption depend on the approach which is taken. As the GMC is mainly a body which is dealing with corruption from the point of view of the law and regulations - although it has a firm foundation in moral values and ethical standards - the chapter does not purport to deal with a number of aspects which could be dealt with in an all-embracing Programme, such as with questions of civic education.

3. Chapter B focuses on the different institutions and persons, legal and natural, that have a role to play in the fight against corruption. These are the "actors" on the scene and it is the way they play their role which determines if the fight against corruption can be successful or not. It places the emphazis on the questions of personal rights and obligations, the ethical standards and discusses the functions of various institutions, such as specialized bodies set up to fight against corruption.

4. Chapter C is seen more from the side of procedure - be it civil, administrative or criminal procedure. It deals also with some aspects of sanctions for acts of corruption in the various field of law. Furthermore, it deals with the very important questions of international co-operation, including how shell corporations are used to build up funds to pay bribes abroad.

5. Chapter D is consacrated to topics which could well fit in with other chapters but which are of a more general nature, seen from a broader perspective. For instance, financing of political parties can in some countries be seen from the perspective of criminal law, in that the illicit financing has been made a criminal offence in those countries. The parties could also be seen as "actors" on the scene of corruption and thus the issue would well fit in under Chapter C. However, the entire

issue of financing of political parties needs to be seen from a broader perspective, as something which has to do with building of democracy and the Rule of Law and it cannot be seen as an isolated question of fighting corruption. Nevertheless, it is in the context of the fight against corruption where the issue is the most sensitive and it therefore has its natural place in the Programme. Similarly, the media has its role to play in the fight against corruption - and that role is very important - but media questions cannot be seen isolated from the general questions of the role of the media in the democratic society. It therefore merits to be discussed separately and the same argumentation is true for the role of lobby organisations. That the very important questions of research, training and exchange of practical experiences need separate discussion in a programme of this kind goes without saying.

A. DISTINCTION BETWEEN THE ALLOWED AND THE FORBIDDEN

I. DEFINITION OF CORRUPTION

Description of the topic and evolution of the law

Notwithstanding the apparent spread of the phenomenon of corruption (or perhaps because of it), it seems difficult to arrive at a common definition, inasmuch as it has been held that "no definition of corruption will be equally accepted in every nation"[5]. The definition has been discussed for a number of years in different fora and it has not been possible for the international community to agree to one single accepted common definition.

A definition is important as it lays the basis for any future work, both at national and international level, and will be a precondition for any agreement that can be reached on an international level.

Several different definitions have been discussed both at national and international level and by various scholars. The draft United Nations convention contained the following provisions in its Article 1:

> "Each Contracting State undertakes to make the following acts punishable by appropriate criminal penalties under its national law:
>
> a) The offering, promising or giving of any payment, gift or other advantage by any natural person, on his own behalf or on behalf of any enterprise or any person whether juridical or natural, to or for the benefit of a public official as undue consideration for performing or refraining from the performance of his duties in connexion with an international commercial transaction.
>
> b) The soliciting, demanding, accepting or receiving, directly or indirectly, by a public official of any payment, gift or other advantage, as undue consideration for performing or refraining from the performance of his duties in connexion with an international commercial transaction."

The Council of the OECD in the Recommendation on Bribery in International Business Transactions on 27 May 1994 adopted the following definition for the purposes of the Recommendation:

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[5] V. J. Gardiner, Defining corruption, in "Coping with corruption in a borderless world", proceedings of the conference held in Amsterdam in 1992, published by Kluwer, p. 33.

"bribery can involve the direct or indirect offer or provision of any undue pecuniary or other advantage to or for a foreign public official, in violation of the official's legal duties, in order to obtain or retain business".

The Recommendation contains a footnote which states that:

"The notion of bribery in some countries also includes advantages to or for members of a law-making body, candidates for a law-making body or public office and officials of political parties."

It should be noted that the provisions of the draft Convention and the recommendation are restricted to international commercial/business transactions.

On the other hand, if one takes a very broad approach to corruption, one can consider it to be "the degeneration of the principles on which a political system is founded"[6]. Professor Robert Klitgaard considers that corruption is "misuse of office for private ends" and Professor Spinellis discussed three different notions of corruption at the above-mentioned OECD Symposium, corruption in a narrow sense, a wider sense and the widest sense.

In view of these difficulties to agree on a common definition, it would seem that various international fora have therefore preferred to concentrate on the definition of "illicit payment", rather than on the wider notion of corruption which embraces the former, but does not exclusively consist of this.

Moreover, there is no general agreement - with the exception of civil servants - on the question of who is liable to receive bribes in the passive corruption offence.

As to persons other than civil servants, there is for the time being no stance on the question of extension of criminal law protection and responsibility. Does the law encompass elected representatives (also persons elected to international bodies such as the European Parliament)? Is there a difference between the local and national level? Should different rules apply to elected representatives? To Ministers? Are persons who, although not civil servants, perform functions which are of a public nature included? Should bribery between totally private entities be included? Can lawyers or other members of the legal profession, such as notaries, be bribed, at least to the extent they may be said to perform public functions?

Other questions which need to be considered in this context are: Are elected judges to be considered as public officials or should special rules apply? Should bribery of a member of the legal profession, such as a judge or a prosecutor, be considered to be an aggravating circumstance?

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[6]. Mény, La corruption de la République, 1992, 10, quoted in a paper presented by Professor Spinellis to the OECD Symposium in March 1995.

Even if no common definition has been found by the international community to describe corruption as such, everyone seems at least to agree that some political, social or commercial practices are corrupt. The qualification of certain practices as "corrupt" and their eventual moral reprobation by the public opinion vary however from country to country and do not necessarily imply that they are criminal offences under national criminal law. They may well be accepted or tolerated behaviours in certain parts of society, while in others they may be rejected officially (but still practised as necessary steps in obtaining something). As no common description can be easily found, these practices may all be covered by the vague term of "background corruption".

The GMC adopted, for its part, the following provisional definition:

> "Corruption as dealt with by the Council of Europe's GMC is bribery and any other behaviour in relation to persons entrusted with responsibilities in the public or private sector, which violates their duties that follow from their status as a public official, private employee, independent agent or other relationship of that kind and is aimed at obtaining undue advantages of any kind for themselves or for others".

The purpose of this definition was to ensure that no matter would be excluded which should be dealt with by the GMC in the future. Obviously, such a definition will not necessarily match the legal definition offered in most of the member countries, in particular not the definition given by the criminal law, but it has the advantage of not prejudiciously restricting the discussion within excessively narrow confines.

However, the GMC considered that this definition was too wide, for the purpose of discussing certain subjects. Within the context of drafting a convention or a recommendation, addressed to governments, the definition would necessarily have to be more precise. Moreover, if criminal law were considered, the definition would necessarily have to be more narrow and if prevention was discussed, a wider definition could be considered. The definition also is of importance to administrative law, for instance in the context of drafting codes of conducts for public officials and to the civil law, for instance in order to distinguish corruption from unfair competition.

The GMC therefore requested its working groups to constantly consider the definition within the framework of their discussions, with a view to arriving at common solutions. To this end, the penal working group drafted the "**Tentative list of corruption offences**" found in Appendix I to this Report, thus adopting a functional approach instead of seeking to define corruption in generic terms. It should be noted that this list needs further discussion and refinement. For instance, a common understanding on what constitutes "bribery" needs to be found. The purpose of drafting the list was to exclude certain offences from the discussions rather than to elaborate a list on which everyone could agree.

Related matters

This matter relates to all topics on the Programme of Action.

Priority

This matter is of **high priority** to the GMC.

Future action

The GMC should continue to study carefully the question of definition and in particular seek to refine the list of offences. The definition of what constitutes bribery is of essential importance to the future work, in particular in the context of the drafting of a convention, and the GMC should as a first step concentrate its efforts on this issue. In doing so, the GMC should first consider the more important corruption offences while not excluding from its discussions other types of behaviour. The GMC should consider this question with a view to the elaboration of one or several provisions to be inserted in a future convention or a protocol of a framework convention. The possibility of drafting a recommendation on this topic should not be excluded.

II. CRIMINAL LAW

1. Criminalisation of corruption at national level

Description of the topic and evolution of the law

When studying the European legislation it emerges that there is general agreement that there are two types of corruption which are basically two sides of the same coin, namely one perpetrator offering or promising the advantage (the active corruption offence) and the other perpetrator accepting the offer or the promise (the passive corruption offence). Usually, however, it seems that the two perpetrators are not punished for having participated in the other one's offence.

A relatively common feature of the offence in many countries is that it is usually already punishable at the stage of attempt - not only is it punishable to give or to accept an advantage (usually of an economic nature) but the offer or the promise or the acceptance is also punishable as a main offence. In practice, the difference is not so great since the attempt may be punished as severely as a main offence.

The advantages which are given are usually in the laws of the member States of an economic nature but may also be of a non-material nature in accordance with the legislation and practice of several countries. 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, loans, travel, food and drink (at least if it is of greater value), a case handled within a swifter time, better career prospects, etc.

The act of corruption may in several countries be an active one but it may also consist in the omission of acting.

The Criminal Codes of several of the member States of the Council of Europe make some distinctions, usually in the scope or the degree of the offence (misdemeanour or felony), depending on who took the initiative of committing the offence. A distinction is also sometimes made depending on whether the act which is sollicited is a part of the official's duty or whether he is going beyond his duties. For instance, corruption may be punishable if an official receives a benefit in return for dealing with a case more quickly, but could in such a case be limited to a misdemeanour since it was still his duty to handle the case. If he should not have handled the case at all, for instance a licence should not have been given, the official would be liable to having committed a felony which would carry a heavier penalty.

Several countries extend the scope of application to all public officials on the basis of the need to ensure fairness in the public service and the requirements of upholding confidence therein whereas some countries limit it to certain categories of

public officials and elected representatives, for instance judges, members of Parliament, prosecutors, etc. It is in the distinction of who may be considered as the perpetrator on the passive side - public officials, elected representatives, private business persons - that the legislation in the member countries differ most.

An offence which may be dealt with as a form of main corruption offence is the so-called "concussion", namely to receive or request what one knows should not be paid for rights, taxes, customs, interests or salaries (cf, for instance, article 243 of the Belgian Criminal Code). This form of "concussion" is to be distinguished from the "concussione" as it is known in the Italian law.

The phenomenon of *"corruzione ambientale"* in Italy seems to provide a suitable example of a behaviour typically seen as "corrupt" (the bribe-giver assumes that without bribing he would not have an equal/fair treatment by a public official) but which depends to a great extent on local cultural traditions and the social climate (*"ambiente"*). The issue of "background corruption" should therefore be studied against the cultural and social conditions of each country in order to be able to identify a possible common core of the phenomena covered.

If a wide definition of corruption is adopted, also offences such as insider trading would have to be dealt with.

Related matters

This topic relates to a number of others, but particularly to the definition of corruption (A.I), liability of enterprises for criminal offences (C.IX) and international co-operation (C.XI).

Priority

This topic is of **high priority** to the GMC.

2. Criminalisation of corruption of foreign public officials and elected representatives

Description of the topic and evolution of the law

Most national criminal laws punish the bribery of national public officials (here to be taken as including civil servants, elected representatives and members of governments, at the local and national level) but at the same time tolerate,or at least do not make it a specific criminal offence, that companies bribe foreign officials abroad. A careful study of the different national legislations reveals hovewer that a number of different approaches exist to this matter. The reasons for such approaches may vary from one country to another.

In the field of corruption of foreign public officials several legislative policies and techniques have been considered.

For instance, one country may as a policy provide that its criminal law protects only its own officials from bribery and not the officials of other countries, this being the responsibility of the latter countries. Policies like this have led the Council of Europe to adopt article 7, paragraph 2 of the Convention of Transfer of Proceedings in Criminal Matters.

Other countries may provide that at least one element of the offence must have occurred in its own territory before they may be able to take jurisdiction of the offence. Examples of this approach may be found in some common law countries such as the United Kingdom and the United States. A wide interpretation of this principle of territoriality makes it possible to take action in a number of cases. For instance, a telephone conversation between the branch office (the bribe-giver) and the mother company may suffice.

Some countries may furthermore make judicial assistance and prosecution of corruption of foreign public officials dependent on double criminality.

Some exceptions exist in the countries which have adopted a policy of criminalisation of bribery paid abroad, such as acceptance of so-called facilitating payments for routine government action (with the exception of payments which affect decision-making).

It should also be noted that the entire question of payment of bribes abroad is closely linked with the issue of jurisdiction and corporate criminal liability. Not even in countries which are familiar with principles of corporate criminal liability, one has in general considered to extend the so-called active personality principle to business entities abroad which are owned or controlled - wholly or partially - by domestic companies. The entire problem area of "lifting of/piercing the corporate

veil" is here posed in a context of international criminal law. Another question which may be discussed in this context is whether the foreign bribed entity is private or public.

Another solution of this issue is the possibility to punish the bribe-giver instead of extraditing him (extradition of own nationals may be prohibited by constitutional law) or to transfer the criminal proceedings against him or some form of "assimilation" procedure.

Notwithstanding the fact that the bribe-taker is punishable in his own country, tax deductibility of payments made with the purpose of bribery is permitted in a number of countries.

The entire issue is delicate. The use of double standards is not only beneficial to companies practising corruption but also to national commerce and employment interests. However, countries should become aware that the distortion of international trade and competition due to corrupt practices can only be harmful in the long term and they should therefore take measures to prevent it. Moreover, further consideration needs to be given to the negative effects on the consumer, for instance that such practices result in higher costs of production and therefore in higher prices.

The criminalisation of bribery and other corruption offences which involve foreign public officials may seem a suitable solution to deter companies from the use of these practices. The OECD adopted in 1994 a Recommendation in International Business Transactions which was the first international instrument which called on states to take concrete and meaningful steps, e.g. in criminal law, to deter, prevent and combat the bribery of foreign public officials.

The idea itself and its practical implementation nevertheless raise various objections in several countries. Criminal law is traditionally connected with state sovereignty and is seen as a means of protecting individuals, institutions and state interests within the national territory. As a result of this, the scope of application of criminal law usually stops at the national borders, in other terms the territoriality is the principal foundation of the competence of national criminal law enforcement authorities. Only in certain cases, for instance when a national interest is threatened in a foreign country, do states extend the application of criminal law to offences committed abroad, although such extension may not be considered to be an extra-territorial application of criminal law. As regards corruption, only a few countries have opted for the criminalisation of bribery offences committed by their own nationals abroad. A general reason for this policy stance could be that countries have not considered it appropriate to criminalise behaviour which are directed against foreign public interests - a well known principle of international criminal law. On the other hand, reasons of general international solidarity as well as of commercial viability may militate in favour of the criminalisation of foreign public officials.

Irrespective of the criminalisation of bribery of foreign public officials, countries may consider punishing bribery of foreign public officials abroad by using solutions offered by traditional international cooperation instruments (treaties on transfer of proceedings); some countries may however be reluctant to take any action at all in domestic law. In any case, it would seem that in order to achive some real progress in this area, a solution at an international level is called for. Such a solution would, for instance, need to define what is meant by a "public official". The draft UN Agreement contained in its Article 2 the following definition:

> "For the purpose of this Agreement:
>
> a) 'Public official' means any person, whether appointed or elected, whether permanently or temporarily who, at the national, regional or local level holds a legislative, administrative, judicial or military office, or who, performing a public function, is an employee of a Government or of a public or governmental authority or agency or who otherwise performs a public function;"

Related matters

This topic relates to a number of others, but particularly to the definition of corruption (A.I), liability of enterprises for criminal offences (C.IX) and international co-operation (C.XI).

Priority

This is of **high priority** for the GMC.

3. Criminalisation of corruption of international public officials and elected representatives

Description of the topic and evolution of the law

Officials of supranational and international organisations, especially those who have financial tasks (like the EBRD, the IMF, the World Bank, the European Commission) make decisions on the attribution of important sums of money or other subjects which may to a great extent affect national or private interests. Those officials are likely to become the object of attempts of corruption.

The acts performed in the exercise of the functions of an international civil servant are in most cases not covered by the scope of any penal law. The penal law of the host states of the institutions usually does not contain provisions for the corruption of international civil servants operating on their territory and most national penal laws do not cover the corruption of their nationals who are occupying posts as international civil servants abroad. Moreover, many international civil servants enjoy diplomatic status or are assimilated to such a status and enjoy thus diplomatic immunity. It is usually within the power of the Secretary General of the Organisation to lift such immunity and any specific rules of the headquarters agreement between the Organisation and the host State need to be taken into account. The problem is thus delicate.

These problems have in practice led to difficulties in conducting investigations for alleged offences of corruption, co-operation with the international bodies and even some difficulties in detection of corruption offences. In fact, the international bodies may often prefer to regulate the issue themselves instead of resorting to regular police investigations which may cause certain inconveniences to the Organisation.

For the time being only the staff regulations of the international or supranational organisations themselves allow for measures against corrupt officials. But most of those regulations do not contain specific provisions on corruption. Corruption can thus only be dealt with under general provisions, but it is doubtful whether the sanctions foreseen by those provisions can adequately compensate the losses incurred by the organisation, member states and other victims. In some few countries certain issues of criminalisation may be resolved by considering the international Organisation as a private entity, but this solution seems not apt for resolving the matter in general. At the level of the European Community, a decision of the Council of Ministers and a decision of the Luxembourg Court in 1989 concerning the protection of the financial interests of the Community have been interpreted in some countries as a duty to extend the criminal law to officials of the European Community.

Other problems may arise in connection with international elected representatives. Apart from the usual constitutional problems connected with investigations and lifting of parliamentary immunity, their statute may also differ

depending on the institution and the host agreement between the institution and the host country. MEP's are directly elected whereas members of the Parliamentary Assembly of the Council of Europe are at the same time MP's in their own country.

Related matters

Codes of conduct (A.III.2), role and responsibility of elected representatives (B.I.2), subsequent action to be taken with regard to contracts (C.I.2), responsibilities of the administration (C.II), means of obtaining evidence (C.IV), special procedures (C.VI), role of lobby organisations (D.II).

Priority

This topic is of **high priority** to the GMC.

4. Criminalisation of trading in influence

Description of the topic and evolution of the law

Trading in influence has been made a distinct criminal offence in some countries. In the meaning of most legislations which criminalised it, is it a tripartite offence where the person who is actually bribed for exerting his (real or pretended) influence is different from the person who is influenced in his decision/action; only public officials (elected politicians or civil servants) can be target persons. The main difference compared to the corruption offence is that the latter supposes a direct relationship between the two parties involved; this link does not exist in trading in influence. If the person who is influenced by the third party executes the request knowingly, he is punished; if not, only the bribe-giver (the requesting person) and the bribe-taker (the "influence-trader") are punished. In some countries all parties involved are punished while in others only the one who is "influenced"; the resulting decision/action - not the simple influence - constitutes the offence; "lobbying" must therefore be distinguished from trading in influence.

Although several countries do not criminalise this particular form of trading in influence, they may cover the offence, or at least parts of the behaviour, in their criminal codes through descriptions of the criminal behaviour which are similar. Such offences may, for instance, refer to "forbidden influence" or to "conspiracy".

Related matters

This topic relates to several others but in particular to role and responsibility of elected representatives (B.I.2), means of obtaining evidence (C.IV), special procedures (C.VI), role of lobby organisations (C.II).

Priority

This topic is of **high priority** to the GMC.

5. Criminalisation of the laundering of the proceeds from corruption

Description of the topic and evolution of the law

Money laundering has, with a few exceptions, only recently become a criminal offence in the member states. Several states have first considered laundering from the point of view of drugs and terrorist-related offences but have gradually expanded the scope of the predicate offence (i.e. the offence which generated the proceeds) to cover laundering of the proceeds from all serious or medium serious offences.

A tendency can be noted in the countries of Central and Eastern Europe to limit the scope of predicate offences to certain specific very serious crimes, which could exclude laundering of the proceeds from corruption from the ambit of international co-operation which requires in principle double criminality .

In almost all known cases of corruption the money has been laundered abroad, often in offshore countries or in countries which traditionally uphold a very strict bank secrecy. In order to be able to fight corruption efficiently, it is necessary to render the laundering of proceeds from corruption a criminal offence and to take measures to prevent laundering of the proceeds. Particular attention needs to be given to the issue of territoriality and jurisdiction.

Furthermore, it is essential to consider some of the money laundering techniques which are used frequently by companies in order to be able to pay the bribes - i e how the bribe-money is generated. In some States, use of such techniques might be considered to amount to laundering of proceeds from corruption although the act took place before the actual commission of the offence - the payment of the bribe. However, in most States such preparatory acts would be considered as "conspiracy" to the laundering offence or some form of preparatory act of the offence.

Some of the general problems relating to money laundering need consideration in this context as well, such as civil action against the offender, the relationship between criminal law and civil law, for instance as regards licit property which is intermingled with illicit property and the question of bona fide third parties (which could be political parties, for instance).

Related matters

This matter is related to bribery of foreign officials (A.II.2), fiscal aspects (A.IV), seizure and confiscation (C.VII), abuse of shell corporations (C.VIII), international co-operation (C.XI).

Priority

This topic is of **high priority** to the GMC.

6. Criminalisation of other offences connected with corruption

Description of the topic and evolution of the law

The offences dealt with under this heading are of a different nature than those dealt with under I-V. They are not "classical" corruption offences in the sense that they are criminalised in many countries of Europe although they are related to corruption, cf the Appendix. These offences are however connected with corruption, at least if taken in its widest sense. Therefore, for the sake of completeness, it seems appropriate to deal with these offences in the Programme of Action against Corruption although the behaviour might not be criminalised in all countries. The purpose of including these offences is not to exclude them already from the start from the future discussions of the GMC.

An offence which could be dealt with in this category is the offence of "ingérence" (cf for instance article 245 of the Belgian Criminal Code and 432-12 of the French Penal Code). The typical aspect of this offence is that the offender takes or receives a personal interest in something, for instance in acts or in a company with which he is involved in the administration or surveillance tasks or where he has the duty to carry out payments. As the offence has to do with the influence which can be exerted it could be considered to be a kind of "influence peddling" but it should be distinguished from the offence of trading in influence. The notion of "taking of illegal interest" is wider in certain countries.

Financing of political parties and buying of votes is criminalised in certain member countries. It therefore merits its own treatment in the Programme of Action. The financing of political parties is also dealt with as a special item in the Programme. As to insider trading, the Council of Europe has already concluded an international convention on the subject but this convention does not contain any definition. It would merit its own discussion. The offence of "concussion" is closely linked with some forms of corruption.

Related matters

This matter is related to trading in influence (A.II.4), role of elected representatives (B.I.2), role of auditors (B.I.6), abuse of shell corporations (C.VIII), financing of political parties (D.I).

Priority

This topic is of **high priority** to the GMC.

Future action in respect of the offences under 1-6

The GMC should continue to study carefully the question of acts which should be included in the definition of the main corruption offences. The definition of what constitutes corruption is of essential importance to the future work and the GMC should as a first step concentrate its efforts on this issue with a view to the elaboration of one or several provisions of a convention or a framework convention with protocols.

As to the corruption of foreign officials, the GMC should, when determining which offences would be included in a future convention or framework convention, explore the possibility of reaching a consensus in respect of the need to criminalise the corruption of foreign officials. In any case, a high number of ratifications or some other mechanism would need to be found in order to safeguard legitimate interests of international competition. Discussion of this topic should be conducted in close co-operation with the OECD.

As to the corruption of international civil servants and elected representatives, as a first step, a comparative study of the state of the problem should be made, in close co-operation with the concerned organisations. It should be assessed which national laws are applicable to the cases contemplated here and what the sanctions foreseen by the staff regulations of the main international organisations are. A recommendation could be elaborated but this should not exclude the insertion of any provision on the subject in a future convention or protocol to a framework convention.

As to trading in influence, the GMC should make a study on the application of trading in influence or similar offences in the member States, including statistical data. A recommendation could be elaborated but this should not exclude the insertion of any provision on the subject in a future convention or protocol to a framework convention.

As to the laundering of the proceeds from corruption, the GMC should consider this question while taking into account the provisions of the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, with a view to the elaboration of one or several provisions to be inserted in a future convention or a protocol of a framework convention. In this context, one could consider to limit the possibility of entering reservations to the Laundering Convention so as to exclude the possibility of reservation for corruption as a predicate offence. Moreover, it is necessary to consider in this context whether the corruption offence (as a predicate offence) needs to be considered *in concreto* or *in abstracto.*

As to the other related offences, the GMC should consider whether they could be included in its future work on a convention or whether a recommendation could be drafted to deal with one or several of the related offences.

III. ADMINISTRATIVE LAW

1. General questions

Description of the topic and evolution of the law

In administrative law, what is allowed and what is forbidden is not always clear. That is why codes of conduct exist to bridge the gap between the law and its specific application to practical cases. The law may give some guidance but it is not always possible to draft it in such precise terms as to give it a specific normative content. Moreover, the law does not always forbid what the public does not like - something may be "forbidden" from an ethical standpoint but still tolerated (or at least not prohibited) by the law.

Administrative law also is directed towards several different categories of persons, both internally - to the administration itself and its public officials - and externally, to the public. One therefore needs to distinguish between such rules as are mainly drafted towards the public (for instance procurement rules on tendering for a public contract) and such rules which are mainly drafted for "internal" use, for instance codes of conduct for public officials. However, a number of administrative rules and regulations may serve both purposes of internal and external use.

The administrative rules and regulations go further than criminal law. Criminal law rules need to be drafted precisely and clearly and should not, at least in theory, give much scope for interpretation. Administrative rules can be less precise - and must sometimes so be - as a certain measure of discretion on the part of the administrative authorities is necessary[7]. When the authority is exercising its discretionary prower, it must, inter alia, not pursue a purpose other than that for which the power has been conferred, it must observe objectivity and impartiality and principles of the equality before the law. If not, it risks that the decision could be corrupt.

In order to combat corruption, access to information is also of importance[8]. In principle, everyone shall have the right to obtain, on request, information held by public authorities and effective and appropriate means shall be provided to ensure access to information. Limitations to these principles may only be made as are necessary in a democratic society for the protection of certain well-defined public or private interests.

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[7]. See also Recommendation No R (80) 2 concerning the exercise of discretionary powers by administrative authorities.

[8]. See Recommendation No R (81) 19 on the Access to Information Held by Public Authorities.

It is also necessary to take into account the interrelationship between administrative law and the criminal and civil law. Often, the administration may be in a better position to act speedily, for instance in cases of suspect corruption, than the investigating authorities and the courts. Therefore, a decision by administrative authorities may affect subsequent proceedings and one risks to have a different outcome.

Related matters

This topic is related to, among others, codes of conduct (A.III.2), public procurement (C.I), responsibilities of the administration (C.II).

Priority

This topic is of **medium** priority to the GMC.

Future action

The GMC should study the general questions of the corruption and administrative law and in particular how discretionary powers may affect corruption and, in the light of such studies, could consider the matter with a view to the elaboration of a recommendation on the topic.

2. Codes of conduct

Description of the topic and evolution of the law

(i) Common considerations

In the discussion concerning corruption over the past years, the adoption and implementation of codes of conduct has been considered to be of crucial importance. They may eliminate any ambiguity inside and outside the service or the company about what is the general attitude of the administration or the company towards corruption and they clearly express what is expected from every employee in that respect. However, voluntary regulation of behaviour by codes of conduct cannot replace legal norms and external control (by authorities or business auditors). Corruption can in fact occur despite subscription to a code of conduct. Accordingly, the public sometimes suspect that companies use much publicised codes of conduct mainly as a means for marketing. An effective implementation of the codes is therefore of utmost importance.

Codes of conduct have many names and purposes. They may, for instance, be called "codes of ethics" or "codes of business practice" or they may take the form of administrative regulations. Usually, codes of conduct describe guidelines binding employees to act in a certain manner whereas codes of practice are often addressed to clients rather than to members of the institution for whom the code is drafted. The codes of practice lays down standards as ones that clients have a right to expect, rather than as ones that members of the profession are instructed to uphold.

The GMC will use the generic term "code of conduct" although it should be emphasized that certain distinctions sometimes need to be made, depending on the purpose of the code. For instance, a code of good practice may be drafted for purposes of giving detailed guidelines to the employed on how to act in certain situations related to the work. Such a code may be of a totally different character than a normal code of conduct.

The codes may be adopted for various reasons and for various categories of public persons, such as public officials, judges, prosecutors, business people, auditors, members of other professions as well as elected representatives and members of government, both at the national and local level.

Codes of conduct fill in the gap between often abstract legal regulations as to the principles of behaviour on the one hand and the requirement of guidance in numerous difficult situations of an employed person's day-to-day life on the other hand. They seek to eliminate the "grey zones" of uncertainty by offering either directly applicable instructions on how to cope with a given situation, or indications on where and how to receive such instructions. They can offer specific guidance in situations where the employed person may feel that he has to deal with a conflict of

interest. Codes of conduct dealing with issues of corruption may be very detailed. For instance, in one member State examples may be found where the codes deal with such issues as acceptance of flowers or chocolate boxes and the exact value of gifts which may be accepted.

The legal basis for adoption of the codes may vary. Some are adopted as a result of legislation whereas others are adopted on a purely voluntary basis. Some codes of conduct exist which have the status of a semi-public instrument, although drawn up by private entities. An example may be found in the banking field where a due diligence code has been elaborated. Other such codes have been drafted for accountants or for lawyers. Most codes are drafted to protect the interests of the company or the profession but some may be elaborated with a view to introducing clean practices in entire sectors of the industry. Examples may be found where entire employer's associations or larger companies in a specific sector undertake to abstain from corrupt practices.

Codes of conduct can have an important signal effect for both the public and all those who could be expected to receive bribes or trying to bribe the employed person. For these reasons, it is important that the codes be made public.

In several cases, both as regards public officials and in respect of codes for the business community, the code may be seen as part of the employment contract and they may in such cases be signed by the employee. After signing any misconduct can be interpreted as a case of breach of contract. On the other hand, codes for independent professions and codes for elected representatives or members of government may be of a different character.

The codes may be applicable only to the active service and form part of the employment contract as such, but some codes may contain provisions relating to situations which become relevant when the employed person or the elected representative has left his work or his post. Such codes may, for instance contain provisions on under what circumstances a person may take up a post in a company with which he has had dealings in his previous position ("*pantouflage*"). Such provisions may be found both in codes for public officials and for politicians.

The codes usually contain principles concerning diligence, efficiency, confidentiality, independence, impartiality and fairness. They can contain detailed guidance in respect of what is acceptable in a normal day-to-day situation in respect of a specific post. The sanctions for disobedience of the codes vary as well, ranging from administrative sanctions such as reprimands to dismissal and other disciplinary measures. Some codes may not provide for any sanctions but may simply make reference to existing criminal codes in respect of corruption offences although to a great extent the efficiency of the code may be dependent on the sanctions which are provided. The scope for taking disciplinary measures is of course wider than the scope for criminal law measures. For certain categories of persons, for instance members of Parliament or the government, special types of sanctions apply. The

codes may be used in administrative, civil and criminal decision-making as a reference document, in particular in assessment of what may be fair or appropriate in a given situation.

In order for a code of conduct to be widely accepted and complied with by the public officials, the staff or the branch in question, it is advisable to consult the persons concerned during the preparation of the code.

The elaboration of a European Model Code of Conduct for public officials could be of utmost importance in the fight against corruption, in particular in the context of the emerging democracies of Central and Eastern Europe. Elaboration of Codes of conduct for other categories of persons, such as members of government or elected representatives can be of importance to set European minimum standards in ethics. Elaboration of other codes could be of interest, for instance, to the business community.

(ii) Special questions

a. concerning public officials

Given the very varied tasks accomplished by modern public administration, with staff with different backgrounds and from dishomogenous social groups, the need to codify rules of conduct is now greater than in the past, when a more homogenous staff carried out similar activities and shared similar values.

The specific statute of the civil service need to be taken into account when codes of conduct are considered, in particular when the codes should be used, inter alia, as a means of combatting corruption. Public service requires integrity from the public officials. They are not only in the service of the government, taken in a narrow sense, but should also carry out their duties as a service to the society at large. The requirements of the public official are therefore to a certain extent different from the requirements which may be placed on an employee in the private sector.

Special consideration need to be given to the senior civil service and to members of the government who may or may not be at the same time elected representatives. These categories may require specific rules as regards to their integrity and in other respects.

It should be noted, though, that a code of conduct cannot replace a statutory law on the status of public officials.

b. concerning elected representatives

The questions regarding elected representatives are of a delicate nature. In general, the elected representatives are responsible to their electorate and/or to their Party. But at the same time, they may be seen as representing public interests which may require accountability, transparency and integrity. Tradition plays a great role

in the evolution of the situation in the member States and changes to present situation are often carried out after very careful consideration.

In the context of combatting corruption, special attention needs to be given to questions of immunity, relations with the Party, sanctions and conflicts of interest.

c. concerning other persons

The codes of conduct differ depending on which category of persons one discusses as the aim of each code and, consequently, its content need to be examined on a case-by-case basis. Aims of codes for judges or prosecutors must necessarily differ from those drafted for auditors or private business. As the aims and legal situation differ, so do the sanctions which may apply in the particular case. Therefore, careful study needs to be undertaken in respect of each code in order to distinguish its special features.

Related matters

This question is related to most of the other matters on the Programme, but in particular to public procurement (C.I), responsibilities of the administration (C.II), financing of political parties (D.I) and role of lobby organisations (D.II).

Priority

This topic is of **high priority** to the GMC.

Future action

The GMC should consider this question with a view to the elaboration of recommendations on the subject. Such recommendations could contain a draft European Model Code of Conduct for Public Officials as well as a draft European Model Code of Conduct for Private Business or similar instruments. This should not exclude the insertion of any provision on the subject in a future convention or a protocol of a framework convention. Work on the latter should be undertaken together with the appropriate non-governmental organisations active in the area, such as the International Chamber of Commerce.

Further studies should be undertaken with a view to considering whether there is a need to elaborate draft model codes for certain professions, such as judges, auditors or prosecutors, while taking into account work which has already been undertaken. As a second step, it should be considered whether a draft European Model Code of Conduct or Code of Ethics should be elaborated for elected representatives and for members of government, at local and national level. Such work should be undertaken in co-operation with the Parliamentary Assembly of the Council of Europe. The Council of Europe expert committee for administrative law (CJ-DA) could become closely associated with part of this work. Representatives of the concerned categories of officals should be associated with the preparation of any model codes of conduct.

An important task for the GMC would be to compile examples of codes of conduct which have been elaborated in different countries and in international fora and ensure that information about such codes be disseminated.

The further study of this matter should in particular consider whether legislative action may be taken to support the elaboration of codes of conduct and how an appropriate follow-up and implementation of the codes may be undertaken.

Further studies should be undertaken with a view to considering whether there is a need to elaborate draft model codes for certain professions, such as lawyers, notaries or for entire sectors of the industry.

IV. FISCAL ASPECTS

1. National level

Description of the topic and evolution of the law

At national level, tax-deductibility of bribes does not seem to constitute a serious problem to the member States. But tax evasion may constitute a good means for companies to create illicit funds which are not in the records of companies, which may be used, and have been used, in practice to pay bribes. Another method may be over-invoicing. For countries which do not know the system of "value-confiscation" and can only seize and confiscate direct proceeds of corruption, taxability of proceeds of corruption may provide an answer. In some countries, information received in the course of tax audits may not be used in criminal proceedings or passed on to the investigative authorities. A reporting obligation for tax authorities on suspect cases of corruption could be considered.

This question seems not to have been dealt with before at international level.

Related matters

Laundering of the proceeds from corruption (A.II.5), role of auditors (B.I.6), abuse of shell corporations (C.VIII).

Priority

This matter has, as a whole, a **medium priority**. Some questions, connected with other matters in the Programme, however have a **high priority**, in particular the issue of a reporting obligation for tax authorities.

Future action

The issues of a duty to report and of transparency between tax authorities and investigative authorities should be dealt with within the context of future discussions on a convention or a framework convention. Other matters may be considered at a later stage.

2. International level

Description of the topic and evolution of the law

Tax-deductibility of bribes could be considered the main problem in this area. Companies sometimes pay bribes in order to receive contracts or to have services rendered in connection with carrying out contracts. These bribes are often disguised as commissions to foreign agents. Where such bribes or disguised commissions are tax-deductible - which is the case in several countries - serious questions of public morality arise.

The legislation - and in particular its implementation - may favour the deductibility directly or indirectly, for instance through lack of control, indirecly allowing for standard deductions to be made without any verification or without requiring any justification of deductions made. Therefore, if one wants to tackle this problem, it is important not only to consider the formal rules but also their implementation.

For reasons of public policy, everyone can agree that tax-deductibility of bribes should be avoided as a matter of principle. However, the practice of many States has developed to allow tax-deductibility, either directly or by requiring low standards of proof. This has created distorsion of competion between States where deductibility is allowed and States which do not permit such deductibility. Only an international common approach may remedy the situation.

Another problem in this area relating to international co-operation is that information gathered by tax authorities may not be passed on to investigating authorities abroad. Therefore, the rule of speciality need to be examined in this context. This principle prohibits the use of information for other purposes than the ones for which the information was transmitted.

It should be noted that the issue of tax-deductibility may be linked with the question of criminalisation of bribery paid abroad although there are examples of countries which, in principle, have made it a criminal offence to pay bribes abroad but nevertheless in practice allow tax-deductibility for such bribes. Such double standards are surprising - to say the least - but show the realities of a complex problem.

This question has been discussed by the OECD since 1989 and the OECD has drafted a recommendation, which includes a monitoring mechanism relating to the topic. A certain tendency can be noted to make tax-deductibility of bribes paid abroad illegal. The OECD work is progressing well and brings promises for the future.

Related matters

Criminalisation of corruption of foreign officials (A.II.2), role of auditors (B.I.6) and abuse of shell corporations (C.VIII).

Priority

This matter is of **high priority** to the GMC.

Future action

The GMC should study carefully the on-going work of the OECD. Following the expected results of the work of the OECD in 1995, the GMC should, in close co-operation with the OECD, consider this question with a view to the elaboration of a provision to be inserted in a future convention or a protocol of a framework convention. In any case, a high number of ratifications or another mechanism would be needed in order to safeguard legitimate interests of companies exposed to international competition. Discussion of this topic should be continued in close co-operation with the OECD.

V. CIVIL LAW

Description of the topic and evolution of the law

Civil law is directly linked with criminal law and administrative law. If an offence such as corruption is prohibited under the criminal law, a claim for damages can be made which is based on the commission of the criminal act. Victims might find it more easy to safeguard their interests under civil law than to use the criminal law. Similarly, if an administration does not exercise sufficiently its supervisory responsibilities, a claim for damages may be made. But the civil wrong may go further or may be of a different character. It could be based on contract or on situations where no contract exist - a tort. It could also be based on other concepts of the law such as for instance principles of unfair competition.

Corruption can in some countries be seen as a kind of unfair competition. A contract is awarded not through the fair competition by equal competitors on the market but through payment of secret commissions. In several countries the legislation relating to unfair business practices could be used to come to grips with corruption. Business activities contrary to good business practice or otherwise improper in relation to another businessman is prohibited (see for instance, Sec 1 of the Finnish Act on unfair business practices). Moreover, contracts obtained by corruption may be invalidated as "*contra bonos mores*".

Related matters

Codes of conduct (A.III.2), public procurement (C.I), civil remedies (C.III).

Priority

This topic is of **high** priority to the GMC.

Future action

The GMC should study the civil law aspects of the fight against corruption with a view to gaining a better understanding of the problem. The GMC should consider this question with a view to the elaboration of one or several provisions to be inserted in a future convention, a separate convention on civil remedies to fight corruption or a draft protocol in a framework convention. The GMC should consider whether it is more appropriate to elaborate a report or a recommendation, depending on the results of the further study needed. The study should be undertaken on the basis of a questionnaire which should be sent out to all members of the GMC.

B. INSTITUTIONS AND CATEGORIES OF PERSONS WITH SPECIAL ROLES AND RESPONSIBILITIES AS REGARDS CORRUPTION

I. SPECIAL ROLE AND RESPONSIBILITIES OF SOME CATEGORIES OF NATURAL PERSONS

1. Public officials

Description of the topic and evolution of the law

This topic raises the issue of what group of persons should enjoy the protection of the criminal law in respect of bribery and who should be criminally responsible. The discussion in this context has to do with the definition itself of bribery, in particular which persons in public life are to be considered as "public officials" and thus able to act on the passive side of the main bribery offence. If such persons are encompassed by the bribery offence, their functions could be considered to enjoy the "protection" of criminal law.

The public officials are in most countries the main object of bribery and need therefore special attention. A number of points in this Programme of Action are therefore of special importance to public officials, such as drafting of codes of conduct or the rules relating to responsibilities of the administration.

Public officials are attached more closely than politicians to the civil service and have a special interest in maintaining the "clean character" of the service. They are supposed to know the legal limits of their activities.

Furthermore, in certain situations, public officials may need physical protection against persons who seek to corrupt them. In others, their reputation may have to be protected against slander or other means of intimidation by corruptors. Not only the public officials themselves, but also members of their family may have to be protected.

2. Elected representatives and members of government

Description of the topic and evolution of the law

There is no general agreement in Europe that elected representatives, at local or national level, should have the protection of the criminal law and at the same time assume criminal responsibility for their acts, such as receiving bribes, although the majority of states include both elected representatives and members of governments in the definition of the corruption offences. Difficult questions of a constitutional

nature are raised in this context. In some States the theory is that it is enough that political responsibility to the electorate is sufficient and that the use of the criminal law is not necessary.

The first difficulty arises in seeking to define the persons which should be dealt with under this heading. Such persons take part in politics and they hold some kind of public office after having been elected in general elections or appointed by political parties or they are persons appointed, directly or indirectly, by a political party.

These persons are engaged in the struggle for power and they have a wide possibility of free decision-making (under democratic control) during the use of their power. It is evident that the risks of corruption, as well as the responsibilities, are great in these circles. In these circumstances, it may be difficult to distinguish between undue benefits and advantages obtained as a result of a political compromise. Moreover, there are special difficulties attached with the detection of corruption offences with these persons.

The establishment of registers of interest and publication of income and property of elected representatives and members of governments have become increasingly common in the member states. In some states it has been extended to senior public officials. Some states also have adopted codes for elected representatives and members of government, including post office codes.

The subject is difficult and needs careful consideration. Arguments may be raised against registers and publication, for instance invasion of privacy, difficulties to control or no guarantee for honesty. On the other hand, these measures may lead to the restoration of public confidence in the political system and may protect the MPs and Ministers from attempts to corrupt them.

3. Officials of political parties

Description of the topic and evolution of the law

The political parties, and consequently their officials, who may or may not be members of government or elected representatives, have an important role to play in the fight against corruption. Several of the corruption scandals which have broken out in recent times concerned the leading figures of political parties. The argument which has been invoked is that the political leaders have not taken graft for their personal profit but on behalf of the Party. Thus no personal enrichment has followed (at least not directly) which would make any offence against legislation on illicit party financing or other kinds of corruption offences less serious or not criminal. In particular the role of the Party leader and the Treasurer of the Party have been discussed in this context.

4. Lobbyists

Description of the topic and evolution of the law

The role of lobby organisations is to publicly exert influence on politicians and other decision makers. The role of lobbyists is therefore of a sensitive nature as the border line between exertion of influence (which is legal) and trading in influence (which in many countries is illegal) is not always easy to distinguish. As lobbyists have become increasingly a part of the democratic culture of several countries, their role and responsibilities need to be studied with a view to gaining a clear understanding of their place in democracy.

The main argument in favour of lobbying is that it can help citizens approach their representatives for the solution of practical problems, although in practice much lobbying is being done on behalf of those already possessing some sort of power, and can afford the cost of the lobbying. As it is not possible, however, to totally do away with such organised use of influence, rules and limits for it must be drawn up in order to draw the difficult line between lobbying and corrupting. This does not mean that lobbying necessarily in itself is something evil. It merely suggests that the role of the lobby organisations, and of the lobbyists themselves, need to be carefully considered from both sides. Indeed, some lobby organisations have themselves sought to establish such rules, sometimes in co-operation with the involved institutions, in order to set certain ethical limits to lobbying activities. The drawing up and implementation of such rules should be encouraged.

5. Members of the legal profession, including the judiciary

Description of the topic and evolution of the law

The legal profession plays an important role in the fight against corruption. It is of paramount importance for the trust of the public in public functions that, for instance, judges are independent and impartial and should in no way become involved in corruption or be seen as representing special interests. The special role and responsibilities of judges in particular needs therefore careful consideration but the role of prosecutors should not be neglected. Members of the private legal profession such as solicitors have their own deontology and special codes which include sanctions.

Should restrictions be made on, for instance, judges to become politicians and later return to the judiciary? Should special rules be adopted governing the relationship between lawyers and judges aiming at preventing situations which may lead to corruption? What is the role of the supervisory organs of the judiciary in the fight against corruption? Can rules concerning, for instance, anonymity be adopted to ensure that pressure on judges is avoided? Should there be special rules for judges

or prosecutors concerning disclosure of membership in organisations and associations or should they even be forbidden to participate actively in the political life or forced to resign if they stand for elections or offices?

6. Auditors

Description of the topic and evolution of the law

The auditor, both in private business and the auditor of the administration, has an important role to play in the fight against corruption, for instance by reporting suspicious transactions which may indicate that corruption has occurred or suspicious book-keeping measures made by a private company as well as suspicions concerning illegal acts carried out by public officials.

However, an obligation to report suspicious transactions would be difficult to reconcile with the traditional role of the auditor, in particular in private business as the auditor usually is remunerated by the company. The auditor has a duty of confidentiality to the company or to the administration for that matter, and if a duty of reporting suspicious transactions of corruption would be imposed on auditors, such a duty could come into conflict with the auditor's duty of confidentiality. It is therefore of considerable importance to legislate in precise terms in respect of the duty to report and to protect through legislation any auditor who complies with this duty. Any report on a suspicious transaction made in good faith should not lead to disadvantages, including liability of any kind, of the person who made the report.

Nevertheless, auditors should be required to identify, and check, transactions which are termed as "useful expenditure" and should be able to clearly identify transactions carried out for the purpose of bribing officials.

It could be questioned whether a statement should be made in audit reports to the effect that a company has undertaken its duties as defined in its code of conduct. For the fight against corruption, it is of particular interest to study the entire issue of "ethical auditing".

The question of negligence for auditors who have not carried out their duties to detect corrupt payments should be considered. There should be express requirements concerning professional competence for auditors to discover corrupt payments and special training should be undertaken for auditors to ensure that they are able to do so.

For private auditors in particular, joint and several liability may pose a problem and need to be considered further.

7. Business people

Description of the topic and evolution of the law

Business people have a special role and should assume a special responsibility in the fight against corruption. They are among the most important "actors" on the stage. Business people may be corruptors in the active corruption offence or the corrupt persons in the passive corruption offence, in countries which criminalise corruption among private entities. Their role and responsibilities as opinion-makers is not negligeable and business people may contribute to promoting codes of ethics and codes of conduct.

8. Journalists

Description of the topic and evolution of the law

The framework for guaranteeing media freedom including the rights and freedoms of all those engaged in the practice of journalism is secured by Article 10 of the European Convention on Human Rights as well as by a range of media law and policy instruments which have been adopted within the Council of Europe. Particular reference should be made to the political Declaration and Resolutions adopted at the 4th European Ministerial Conference on Mass Media Policy (Prague, 7-8 December 1994).

Investigative reporting on the cancer of corruption is dependent on the right of media professionals to have access to information. Guaranteed access rights obviate the needs for journalists and editors to have recourse to subterfuge and clandestine methods of obtaining information, which bring them into conflict with legal and ethical principles.

The scope of protection of sources varies in the legal systems of the member States. The exposure of corruption by the media quite often depends on information communicated by third parties and the guarantee that their names will not be revealed by investigating journalists. Consideration might be given to the potential for harmonising the level of protection of sources around a set of minimum guarantees. The issue of "whistle blowing" is also relevant in this respect.

The fundamental function of journalism in a democracy implies that all those engaged in its practice act in an ethical and responsible manner, in particular by not abandoning their independence nor their critical approach. However, in an increasingly multimedia environment characterised by a trend towards ownership of media organisations by economic groups unrelated to the media, it might be useful to reflect on the increased difficulties which journalists, editors, broadcasters, etc experience in resisting economic and commercial pressures.

Related matters for 1-8

Thess matters relate to the definition of the corruption offences (A.I), codes of conduct (A.III.2), public procurement (C.I), means of obtaining evidence (C.IV), protection of whoever helps justice (C.V), special procedures (C.VI), role of lobby organisations (D.II), role of massmedia (D.III).

Priority for 1-8

Part of this topic is of **high priority** to the GMC (definition of the persons encompassed by the corruption offence) and other parts (elaboration of recommendations) of a **medium priority**.

Future action for 1-8

The GMC should continue to study carefully the question of persons to be included in the definition of the main corruption offences. The definition of what constitutes bribery including a definition of the active and passive corrupt persons, is of essential importance to the future work and the GMC should as a first step concentrate its efforts on this issue. The GMC should consider this question with a view to the elaboration of one or several provisions to be inserted in a future convention or a protocol of a framework convention.

The GMC should assess the question of the role of elected representatives and members of government with a view to the elaboration of a recommendation or one or several provisions to be inserted in a future convention or a protocol in a framework convention.

The question concerning registers of interest and the publication of income and property is of central importance to public confidence and ultimately trust in democracy itself. It should be considered, as a medium priority, to draft a recommendation on the subject of transparency regarding members of government and elected representatives. Any work undertaken by the GMC should be carried out in close co-operation with the relevant Committees of the Parliamentary Assembly.

The GMC should consider the question of the role and responsibilities of auditors in co-operation with auditor's organisations with a view to arriving at a common understanding of the problems. It should be considered if a provision could be inserted in a future convention or a draft protocol in a framework convention or if a recommendation could be drafted in the matter. In view of its complexity the GMC should, as a first step, not devote any significant resources to this issue. It could however consider carrying out a workshop or seminar to make member states further acquainted with these particular problems. Such a seminar should be carried out in co-operation with the appropriate NGO's interested in this matter.

The issue of the role and responsibilities of officials of political parties is sensitive and needs study in the context of the constitutions and legal traditions of each State. In some States there is no definition of what constitutes a political party.

The GMC should study this issue in particular in the context of financing of political parties with a view to making a recommendation on the subject.

Several of the questions mentioned above in relation to the protection and responsibility of special categories of persons such as the members of the legal professions, would seem to be an appropriate subject for a recommendation. The GMC should carry out a study on the situation in member States regarding the possibilities for members of the judiciary and prosecutors to become members of political parties or to hold office. The GMC should study this matter with a lesser degree of priority. When it undertakes the study, it should ensure that judicial independence be fully preserved, and take into account work which has already been carried out, such as the Recommendation No (94) 12 on the independence, efficiency and role of the judges.

The role and responsibilities of business people should be studied with a view to finding ways and means of involving the business community better in the fight against corruption. Such work should be undertaken together with the appropriate bodies representing the various categories of persons.

The GMC should devote a symposium to the study of the issues concerning the role and responsibilities of journalists in the fight against corruption. The participants would need to be drawn from the representative associations of journalists, editors, publishers, broadcasters, etc. The preparation of a symposium (or similar event) would need to be worked out in close co-operation with the Steering Committee on the Mass Media (CDMM).

II. SETTING UP OF SPECIALIZED BODIES RESPONSIBLE FOR THE FIGHT AGAINST CORRUPTION

1. National level

Description of the topic and evolution of the law

As corruption offences are often complex and based on mutual interests of the parties involved, their prevention, investigation and prosecution is not only difficult but can raise highly sensitive issues given in particular that they may concern high-ranking public officials or elected representatives. Coping with such matters is not always evident to the normal structures designed to prevent, investigate and prosecute ordinary offences, not involving the senior levels of the administration of the State.

Another fundamental problem is how to collect reliable evidence on corruption offences. Traditional coercive powers do not seem to function in these cases; special investigating techniques or powers, including telephone tapping, use of under-cover agents etc may be necessary for successful gathering of evidence.

Training and information relating to corruption may also militate in favour of setting up specialized bodies.

Some states have sought to resolve such problems by either setting up independent special new bodies or by appointing special independent prosecutors or by setting up specialized bodies withing already existing structures, such as within the police, the prosecuting services or at interministerial level. Another reason for setting up of such specialized bodies is that some States want to show the importance they attach to the fight against corruption thus giving fight against such crime a "higher profile". Moreover, where specialized bodies exist, they may facilitate the tasks of prosecutors or investigating judges.

At the Conference of the Ministers of Justice in Malta, one Minister proposed that such specialized bodies should be set up in each member State and that the GMC should serve as a clearing house between such bodies.

These specialized bodies may perform different duties and may have different functions depending on the legal traditions of the states (federal States may not always be suited to have certain types of specialized bodies) or the reasons why they were set up. They may for instance be given tasks relating to information gathering, education and training, media actions, disclosure of criminal offences as well as criminal investigation and prosecution. If they perform investigative duties, they may enjoy special powers and operate in such cases often under special confidentiality rules. In some States entirely private bodies such as institutes have been set up, for instance by Chambers of Commerce or larger companies. The tasks of such bodies

are usually to assist in training, to give advice on the interpretation of legislation and to assist in drafting of codes of conduct.

The setting up of these special bodies combatting corruption, whether they are independent or not, private or not, seems to have become a trend at the international level. Some countries seem to have experienced positive results. Specialized bodies have been set up, for instance, in France, Malta, Singapore and Hong Kong. The United States often uses the system of independent prosecutors, who have their own (nearly unlimited) resources and who are appointed to investigate specific cases, in particular as regards allegations of corruption against senior officials of the State administration.

In any case an appropriate funding to ensure that the bodies may perform the tasks for which they were set up is necessary. It is in all cases needed to consider carefully the place of these bodies in the organisational structure of the State administration. In some cases a high position in the State administration are important elements of their independence.

In the context of the setting up of specialized bodies, one should consider the role which may be played by the principle of "opportunity", whereby prosecutors have a discretionary power not to begin criminal proceedings in certain, often minor, cases, in the fight against corruption. This is a well known and lawful solution under several criminal procedural laws in order to lighten the workload of the criminal justice system. Recent examples in certain countries have, however, shown that this principle may be misused in practice, under pressure from internal or external hierarchy, notably to prevent prosecution of politicians in corruption cases, although it should be noted that pressure may be exerted also in systems which adhere to the principle of mandatory prosecution.

Related matters

This matter relates to all topics on the Programme of Action but in particular to the definition of corruption (A.I), means of obtaining evidence (C.IV) and research, training and exchange of practical experiences (D.IV).

Priority

This topic is of **high priority** to the GMC.

Future action

The GMC should continue to study the working methods of specialized bodies combatting corruption, their legal powers and technical means as well as the results obtained; it should organise regular consultations with those special bodies which have been set up in member States. Such a consultation with national authorities should take place in 1996 and could be foreseen every second year. Training of staff of such bodies should be promoted, in particular in Central and Eastern Europe.

Further research on the phenomenon of corruption should be promoted through such national bodies. After having concluded its study, it should consider if it is appropriate to draw up a recommendation or any other instrument in the matter.

2. International level

Description of the topic and evolution of the law

So far, at the international level traditional ways and means of co-operation have been used in corruption cases. Forms of co-operation include mutual legal assistance and transfer of proceedings, passing in most cases through central authorities. These procedures may sometimes be time-consuming as well as costly and therefore inefficient. Direct contacts between specialized bodies, including judicial authorities, at an early stage could facilitate better communication and more efficient co-operation. It should therefore be considered ways and means to improving traditional co-operation in cross-border investigations as well as other means of co-operation between different authorities, such as voluntary disclosure of information.

Another problem is that some specialized bodies may be judicial authorities whereas the body to communicate with in another State may be an administrative authority. The different bodies may therefore have different powers and functions in their own country. They may nevertheless be called upon to co-operate which in some cases could cause difficulties.

Moreover research, training and prevention of corruption need a co-ordinated approach at the international level.

Related matters

This matter relates in particular to corruption of foreign public officials and of international public officials (A.II.2 and 3), means of obtaining evidence (C.IV), international co-operation (C.XI) and exchange of practical experiences (D.IV).

Priority

This topic is of **high priority** to the GMC.

Future action

The GMC should take stock of what ways and means exist to further co-operation at the international level against corruption, including the criminal law conventions elaborated by the Council of Europe, and make proposals for the future. In that context the GMC could in the future serve as a clearing house for transmission of information relating to corruption, training, prevention and research as well as promote and organise such activities, as appropriate. It should establish and maintain contacts with all relevant national bodies. The GMC should, while taking due account of the work done by other international organisations, ensure that a coherent and co-ordinated approach be taken at an international level in the fight against corruption.

C. PREVENTING, REVEALING, INVESTIGATING, SANCTIONING AND INTERNATIONAL CO-OPERATION IN CASES OF CORRUPTION

I. PUBLIC PROCUREMENT

1. Procurement procedures

Description of the topic and evolution of the law

As regards the volume of money, public procurement is by far the most important domain of corruption. Avoiding and sanctioning corruption in public procurement is thus one of the essential topics.

The main remedies are attribution procedures which render corruption as difficult as possible (by, for example, the splitting of decision competences between several persons or administrations, submission procedures which put all competitors on an equal footing, the requirement of very detailed estimations by competitors, good technical knowledge of the personnel of the public auditors who scrutinise the offers, etc.) and a very high degree of transparency at all stages of the process, including after the procedure has been terminated. Additional remedies include the reliability checks on administrators involved in the decision making in public procurement, etc.

However, both technical, political, social and economical difficulties complicate the matter. On the technical side problems are related to the fact that public procurement contracts are often big and concern medium-term or long-term operations which cannot be perfectly foreseen from the outset. Thus, it is difficult to compare tenders, not to mention the assessment of the know-how of competitors. Moreover, offers which seemed cheaper initially can become much more expensive in the course of events as the contractor invokes all kinds of changes in circumstances in order to justify requests for price adjustment. A further question which needs to be addressed in this context is whether a distinction should be made between public procurement contracts and contracts concluded entirely between private entities and if so-called black-listing of companies involved in corruption should be undertaken as a measure to combat corruption?

A general problem in this area is if there is any difference between contracts obtained by corruption in public procurement and such contracts between entirely private entities. For instance, is it necessary to view the problem-area of unfair competition differenly whether the contract is public or concluded between private entities or is it necessary to have special rules for certain situations? Should for instance public officials involved in public procurement be forbidden to take up jobs in companies which have bid in public procurement (a form of prohibition of "*pantouflage*" or "feathering one's nest")?

The EC Council consolidated Directive 93/36 coordinating procedures for the award of public works, public supply and public service contracts aims at eliminating restrictions but also to coordinate national procedures for the awarding of public procurement contracts. It obliges both public authorities and utilities to procure works, supplies and services on a commercial and non-discriminatory basis and it provides bidders with remedial action in case of non-compliance with the directives.

Moreover, rules have been elaborated by the United Nations and by the EBRD.

2. What to do with public contracts obtained by corruption?

As regards the social, economical and political difficulties one has to be aware that it is sometimes difficult to stop the performance of a public contract once one discovers that it was obtained by corruption, because the additional delay for obtaining the required goods or service would adversely affect major public interests. Furthermore, ending the performance of such contracts or even ordering their stay pending (complicated) court decisions, could cause job losses and trigger social unrest. In such cases the concern of fighting coruption might not always be warranted by the population and be outweighed by other concerns. On the other hand, this issue needs to be considered in the wider context of the benefits for the society which may be drawn in a resolute fight against corruption; such a general policy may sometimes entail difficult decisions. It is obvious that this issue is delicate and needs further consideration.

Other issues which need to be addressed in this context relate to nullity of contracts and the question if there is a distinction that should be made between public procurement contracts obtained by corruption and contracts concluded between purely private entities.

Related matters

This matter relates to "background corruption" (see at A.I), criminalisation of corruption of foreign public officials (A.II.2), protection and responsibility of public officials, elected representatives and members of governement (B.I.1-2), setting up of specialized bodies (B.II), responsibilities of the administration (C.II), means of obtaining evidence (C.IV), financing of political parties (D.I).

Priority

This matter is of **high** priority for the GMC.

Future action

Work should start with a thorough stock-taking of existing norms and ongoing activites in other fora, in particular with a view to assessing the need for the Council of Europe to elaborate its own norms in the field, taking into account the specific

needs of the member States of the Council of Europe. Such work should be carried out in co-operation with other bodies with special competence in this field and especially with the Commission of the European Communities and the special Committee on public procurement of government representatives set up within the framework of the Council of the European Union. This should allow for a decision on which questions the GMC wishes to work itself and on which questions it will refer to and back-up other instances' work. When the appropriate questions have been identified, for instance black-listing of companies, the GMC could elaborate any appropriate recommendation in this field, without excluding the insertion of any provision on the subject in a future convention or framework convention.

II. RESPONSIBILITIES OF THE ADMINISTRATION

1. Administrative auditing

Description of the topic and evolution of the law

Administrative auditing is of importance in that it detects corruption within the administration although that is only one of the aims of the auditing; it also allows for identifying victims of corruption, once acts of corruption have been revealed. The auditor has a crucial role to play in the fight against corruption, for instance by reporting suspicious transactions, book-keeping measures or administrative decisions made by a public official.

For the sake of combatting corruption, administrative auditing should be made mandatory for the administration. An administration which does not have an adequate internal auditing mechanism could be held liable for negligence in case corrupt practices remain undiscovered over a long period of time. Moreover, the public will hold the administration in higher esteem if it shows itself capable of detecting and effectively combatting corruption, than if all cases of corruption which occur within the administration are only revealed by others, like the police or the press.

It is a matter for discussion whether a statement should be made in audit reports to the effect that the administration has undertaken its duties as defined in its code of conduct. Moreover, one could study express requirements concerning professional competence for auditors to discover corrupt acts and special training should be undertaken for auditors to ensure that they are able to do so.

Administrative auditing has to be carried out simultaneously at various levels. It may be carried out within each administration or by an external independent administrative body. Several models exist in Europe. For instance, in one country the Auditor General makes a report to Parliament. In other countries the administrative body is an administrative court. It is, though, questionable whether this last form of control still falls within the ambit of "administrative auditing". Budgetary control is becoming an increasingly important tool in the fight against corruption.

One of the main difficulties of internal administrative auditing is that purely hierarchical control is not sufficient. The superiors can be themselves corrupt and, in any case, one has to protect the administrator who takes a major personal risk in denouncing corruption within his own service or administration.

It should be added that administrative auditing can also cover certain liberal professions (like doctors) who in many countries are under administrative supervision as regards possible forms of malpractice and abuse.

Many member States have set up special, independent auditing bodies or organs but the issue is delicate and needs careful consideration in each state in the light of its constitutional and other legal traditions. For instance, if special or specialized bodies are set up, their role and place in the administration of the State needs consideration in order to guarantee that they may be able to perform their functions with independence and impartiality.

Related matters

Role and responsibility of civil servants, legal professions and of other professions (B.I.1-3 and 5-6), setting up of specialized bodies responsible for the fight against corruption (B.II), public procurement (C.I), civil remedies (C.III), means of obtaining evidence (C.IV), special procedures (C.VI).

Priority

This topic is, although of importance, of **medium priority** to the GMC.

Future action

Provisions on adequate administrative auditing procedures can be considered with a view to the elaboration of a recommendation. This should not exclude the insertion of any provision on the subject in a future convention or framework convention.

2. Disciplinary measures against officials

Description of the topic and evolution of the law

When internal auditing procedures reveal that an official's practice is contrary to his duties, as defined by law or in codes of conduct, sanctions may be imposed on that official by the administration itself. Such sanctions are taken pursuant to special procedures. These procedures more or less protect the official's right of a defense, but it is not always that they offer as many procedural guarantees as court procedures do. This is why tough disciplinary sanctions may pose problems with regard to fair trial requirements in a state governed by the rule of law and the respect for human rights.

Moreover, the fact that someone may find himself punished by both administrative and penal as well as civil sanctions could in some countries be considered incompatible with the principle of "ne bis in idem". Experience has shown that this is a delicate matter and difficult to resolve in view of the different legal traditions of the member States.

But there are also cases where no other punishment than a disciplinary sanction can be taken (for instance, because there is no offence under the criminal law or because prosecution is time-barred). In such circumstances disciplinary sanctions are essential.

Another important measure which may be taken following suspicions of corrupt behaviour is suspension. It is imposed pending the result of an investigation which it is supposed to facilitate. Suspension is not a sanction, as long as the official remains paid, but a provisional mesure ("*mesure conservatoire*") which in some States may be decided as a part of a criminal proceeding. Depending on the outcome of the investigation the official will either receive a disciplinary or some other sanction or may return to his or her post with no formal disadvantages.

Disciplinary sanctions can not only be imposed while an official is still actively on duty, but also afterwards, in the case of breach of post-employment duties (such as confidentiality, etc.). For the fight against corruption the possibility of post employment sanctions is important in order to avoid a more subtle form of corruption where the official is granted employment, consultancy contracts or other advantages after his employment with the administration ("*pantouflage*").

Disciplinary sanctions can take various forms such as loss of employment, downgrading, blame, admonition, retention of salary, withdrawal of advantages linked with the post or the function ("fringe benefits", bonus, services, cars, etc).

Related matters

Codes of conduct (A.III.2), role and responsibility of public officials (B.I.1), means of obtaining evidence (C.IV), special procedures (C.VI).

Priority

This topic is of **high priority** to the GMC.

Future action

The GMC should elaborate a recommendation on this matter. This should not exclude the insertion of any provision on the subject in a future convention or framework convention.

3. Sanctions and measures against private persons

Description of the topic and evolution of the law

The adminstration can take a whole range of administrative sanctions against private persons[9]. Some of them may severely affect the interests of the persons concerned, mainly their financial interests. In cases of corruption, it may well be that the administration takes its measures first whereas criminal proceedings take longer to conclude. This poses problems of proof and a risk that different proceedings may arrive at different conclusions. On the other hand, administrative decisions take into account other criteria than those by criminal courts.

Again, the difficult question of multiple sanctioning under administrative, penal and civil law may in certain countries pose problems with the principle of "ne bis in idem". There can also be contradictory findings of the administrative authorities and the criminal courts. Such decisions may cause disadvantages for the social perception of the practice in question.

On the other hand, one expects the administration to rapidly react in cases of corruption. Many different forms of sanctions exist in the member States. For instance, companies which have corrupted or tried to corrupt officials are no longer admitted to participate in public procurement procedures (constitution of black-lists), persons convicted of corruption offenses are barred from practising certain professions such as lawyers, notaries, accounting auditors etc.

As regards the exercise of functions within a political party by a person once convicted of corruption, difficult questions of constitutional law may oppose the desirability, from the point of view of fighting corruption, of intervention by the public authorities in political activities. In some systems, such questions are dealt with by the courts; others consider that the political parties themselves should deal with the matter.

Moreover, administrative sanctions offer the possibility of sanctions against the legal persons benefitting from the corrupt practices of their executives who alone can be held responsible under penal law.

Related matters

This matter relates to "background corruption" (see under A.I) and trading in influence (A.II.4), role and responsibility of legal professions (B.I.5), role and responsibility of other professions (B.I.6-8), setting up of special bodies responsible for the fight against corruption (B.II), public procurement (C.I), special procedures (C.VI).

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[9]. See Recommendation No R (91) 1 on Administrative Sanctions.

Priority

This topic is, although of importance, primarily of **medium priority** to the GMC but some parts are of **high priority** (black-lists of companies or public officials and administrative prohibitions to continue business).

Future action

The question of black-lists regarding public procurement should, as well as the different forms of sanctions, as a matter of priority be dealt with under item C.I. As to the other related matters, the GMC should consider making a specific recommendation, taking into account the general background of Recommendation No. R (91) 1 on Administrative Sanctions.

4. Public liability

Description of the topic and evolution of the law

For three reasons it is necessary to make - as far as possible - the administration liable for damages arising out of acts of corruption by itself or by its officials: (a) because it is only fair to repair damages done by an unlawful act of the administration to a private person (for example, an unsuccessful competitor who spent money on preparing an offer but who was not awarded the contract because the official who made the decision was corrupt); (b) because effective liability of the administration is essential for the confidence which citizens can have in the proper functioning of a democratic state; and, most importantly, because (c) full administrative liability will foster internal control within the administration (see above administrative auditing) and have a deterring effect on officials who would understand that they run major risks of being punished in case of corruption.

Two major cases of public liability can be distinguished: The first category concerns liability of the administration itself, and the second category concerns liability of the individual agent. A less frequent case would concern a sub-category of the first category; when the administration has had to assume liability for a fault committed by one of its public officials and it exercises any possible rights to recover damages from its employee. Such questions would need to be considered within the legal framework of employer's responsibility.

In many cases the public liability and the liability which can be attributed to private entities would be considered in accordance with the same legal rules. However, public liability will necessarily have to distinguish the special requirements of the public service and may, for instance in cases of corruption, lead to different requirements in respect of the standards needed for the assessment of negligence.

Liability of the administration will be for tort, i e in cases where there is no contractual relationship between the administration and the individual requesting damage, and can be envisaged either for the illegal act of its employee whose decision was motivated by corruption or for the administration having been negligent in not detecting and putting an end to such practices. The argument in such cases would normally be that the administration has failed its supervisory duties and is therefore liable ("Amtshaftung").

The liability of the individual official can take several forms: direct liability vis-à-vis the private person on the grounds of the official's own unlawful behaviour (or maybe even for not having fulfilled his obligation to report a case of corruption he was aware of); personal responsibility under penal law, financial liability to the employer who requests damages - either under labour law or under a special statute - in the relationship with the administration who employs him or liability in the form of disciplinary sanctions (see above).

Related matters

Role and responsibility of public officials (B.I.1), public procurement (C.I), responsibilities of the administration (C.II), means of obtaining evidence (C.IV), special procedures (C.VI).

Priority

This topic is of **high priority** to the GMC.

Future action

The GMC should assess which forms of administrative liability are best suited to fight corruption. It will have to take stock of the existing practices in this field and then indicate which forms of administrative liability seem most adequate for the prevention and sanction of corruption, while taking account of Recommendation No R (84) 15 relating to public liability. Moreover, the GMC will have to clarify which kind of damage should be repaired under administrative liability. In the light of the findings, the GMC should consider any appropriate actions which should be taken and in particular the elaboration of a recommendation on the subject. This should not exclude the insertion of any provision on the subject in a future convention or framework convention. The GMC should consider ways and means of involving the CJ-DA closely in its work.

III. CIVIL REMEDIES

1. Substantive law

Description of the topic and evolution of the law

This area is of great complexity and has seldom been considered in the area of fight against corruption. Nevertheless, it has great potential to become one of the measures which may be used more frequently in the future, besides criminal law, to fight corruption. One of the main situations to take into account is the compensation for damages where a public official has been bribed in public procurement. Another situation of particular relevance is where an employee or an officer of a company has been bribed by an employee of the bribe-giving company; so-called bribery between private entities which has been made a criminal offence in several member States.

A number of different parameters need to be taken into account in such cases. Compensation may be asked for by the state or by the local government, which may claim to be the "victim" of the offence or by competitors who were not given the contract or by the employer of the bribe-taker, if it is a private company and if - as the case may be in some countries - bribery of private companies is a criminal offence. The situation of the company for whom the bribe-giver worked should also be taken into account. Is the company a victim of the offence or, on the contrary, liable to pay damages to other interested parties? Moreover, it is necessary to consider that bribery takes place sometimes through the use of a middleman/agent, who will be the person actually passing over the bribe and who would accept a commission which would include the bribe as a business expense.

Another area of problems relates to how to assess damages; should they be calculated on the basis of the loss or on the basis of the profit: *damnum emergens, or lucrum cessans*? What is the legal situation when there is no proof of loss or profit relating to the contract which was obtained by bribery? May some kind of exemplary damages be requested and, if so, by whom? What happens to the bribe itself? May moral damages be awarded and if so, to whom and on what grounds? Can moral damages be awarded to the administration as a "victim" of corruption because it has lost prestige?

Another important question is the problem of the contract which was obtained by bribes. Is the main contract null and void in itself (it is clear that the contract to pay bribes is null) or is it at the discretion of the government to void the contract? Should a distinction be made between public procurement contracts and contracts concluded entirely between private entities?

A particular problem lays in the fact that public procurement contracts should not always be void because it would lead to loss of jobs or suspension of the works.

Another related topic is the relationship between this issue and the question of unfair competition. Could corruption be considered to be a kind of unfair competition? Can laws against unfair marketing practices be used? How do administrative sanctions such as conditional fines of Market Courts interact with the civil remedies? To what extent are or should the laws on unfair competition be applicable to bribery? Could new ways be found to combat corruption, such as the introduction of treble or exemplary damages, although such damages are considered alien to European legal traditions?

Related matters

This matter is related to codes of conduct (A.III.2), role of auditors (B.I.6) and public procurement (C.I).

Priority

This topic is of **high priority** to the GMC.

Future action

The GMC should continue to study the question of damages as a means to fight corruption. The GMC should consider this question with a view to the elaboration of one or several provisions to be inserted in a future convention, a separate convention on civil remedies to fight corruption or a draft protocol in a framework convention. The GMC should consider whether it is more appropriate to elaborate a report or a recommendation, depending on the results of the further study needed. The study should be undertaken on the basis of a questionnaire which should be sent out to all members of the GMC.

2. Procedural law

Description of the topic and evolution of the law

Where action has been taken by competitors of the company which has received a contract by bribery, they may seek injunctive relief. In some countries such relief may be sought before courts charged with the regulation of marketing practices. Such a provisional measure may not always be the most appropriate way to deal with the issue as jobs may be dependent on the outcome. In this context, it should be studied how independent associations, responsible non-governmental organisations may be given a role to fight corruption in the same manner as has been done in some countries in respect of offences committed against the environment.

Moreover, in some countries measures might be taken by prosecutors or investigating judges in the course of criminal investigations which may have the same effect as provisional measures. It should be considered if there are alternative ways of dealing with this issue.

Related matters

This matter is related to public procurement (C.I).

Priority

This topic is of **medium priority** to the GMC.

Future action

The GMC should consider this question with a view to the elaboration of a recommendation or a report. This should not exclude the insertion of any provision on the subject in a future convention or framework convention.

IV. MEANS OF OBTAINING EVIDENCE RELATED TO CORRUPTION

Description of the topic and evolution of the law

Most corruption offences, in particular bribery, are consensual by definition and are motivated by mutual interest. As a result of this, law enforcement authorities have major difficulties to collect reliable evidence on these offences. Traditional means and ways of obtaining information which subsequently may serve as evidence, such as confession by the suspect and testimony by witnesses are rare, if they exist at all. The use of traditional coercive powers, in particular search and seizure of documents, presupposes in most countries, before being authorised by the competent judicial authorities, that sufficient "background" information is already available to the police.

Often the police need to be able to search for financial records, commercial documents or information held by financial institutions. Certain rules may sometimes be an obstacle to such searches, in particular where the information sought is found abroad. In such cases, it is necessary to find ways and means to create efficient and rapid international co-operation.

Most procedural laws restrict the scope of offences in respect of which highly intrusive coercive powers and measures may be used by the police. Human rights instruments also set standards which limit the use of these powers and measures.

The legislator has experimented with different solutions to improve possibilities to gather evidence (such solutions were not necessarily introduced to fight corruption offences): the use of additional, although highly intrusive and costly measures such as telephone tapping, bugging and electronic surveillance was authorised in some countries to gather information and possible evidence in relation to corruption offences; in a limited number of serious cases, police and intelligence services used under-cover agents and "agents provocateurs" to conduct mainly illegal transactions with suspects of corruption offences; in other countries special denunciation-promoting procedures were authorised, offering repentant offenders involved in corruption low-rate punishments or the abandoning of investigation in exchange for information and testimony; anonymous witnesses or reports, corroborated with other evidence, have been considered in some countries; the precise definition of the criminal offence has also contributed, in countries where systemic corruption exists, to making the gathering of evidence easier, by, for instance, not punishing the bribe-giver who paid the bribe under the impression that it had to be paid or by imposing a lower sentence. Such a criminal law approach might make the reporting of the offence easier as it would not imply any self-incrimination.

The gathering of evidence requires, however, in most countries compliance with a set of procedural rules which aim at guaranteeing that only legally obtained evidence is used before courts and that confidential data is protected.

Where civil law remedies are used for seeking damages relating to corruption, the law needs to provide for sufficient ways and means for litigants to obtain evidence and ensure that they have a possibility to have access to certain commercial records, while protecting legitimate interests of business. It could also be considered if the civil law, by shifting for instance the burden of proof in some cases, could make it easier for unsuccessful competitors to receive damages.

The idea of introducing, as is already the case with some fraud and money laundering offences, an obligation to report suspicious transactions should be considered in respect of corruption offences as well. Should, for instance, a duty to report prevail over a duty of confidentiality? Should so-called "whistle-blowers" be protected? To whom should a report be made? The questions by whom (internal/independent auditors, supervisory authorities, general public, financial institutions, etc) and on the basis of which criteria such an obligation should exist also have to be examined in this connection.

Related matters

This topic relates to the role of auditors in business (B.I.6), the protection of whoever helps justice (C.V), the abuse of shell corporations (C.VIII), international co-operation (C.XI).

Priority

This topic is of **high priority** to the GMC.

Future action

The GMC should undertake a comparative study on the different means and procedures of obtaining evidence and its use in relation to corruption offences. In particular a study on the reporting of corruption offences and the procedures connected therewith should be conducted. This study should examine the merits and limits of a possible extension of ways of gathering evidence and should result in suggestions which could be inserted in a recommendation or, if appropriate, a future convention. The possibility of harmonising at international level the means and procedures of gathering evidence, with a view to making them more compatible in member states could also be explored. In carrying out its study, or in the context of the drafting of a future convention, the GMC should pay special attention to the international aspects of the problem, including investigations concerning foreign bank or commercial records and the question of bank secrecy as an obstacle in international co-operation.

V. PROTECTION OF WHOEVER HELPS JUSTICE

Description of the topic and evolution of the law

Given the consensual nature of most corruption offences, the collaboration of witnesses and collaborators (information-sources) with the law enforcement authorities is of vital importance to uncover and prosecute these offences. Nevertheless, in a large majority of cases persons who have information on corruption offences do not report it to the police, mainly because they would thus incriminate themselves or because of fear of the possible consequences. This is true both in the administration and in private business.

There is a need to distinguish between the protection of witnesses on the one hand, and of other persons, on the other. Protection of witnesses has in particular been dealt with in the framework of combating organized crime where special witness protection programmes have been set up. Other persons may be potential witnesses, other kinds of collaborators with justice or they may be the person who disclosed the offence - the so-called "whistle-blower".

Furthermore, it is necessary to distinguish between rules applicable to those who disclose criminal offences and those who may disclose behaviour which may be against, for instance, codes of conduct but which may not constitute a criminal offence.

There is a need to study further whether a compulsory reporting obligation for corruption offences needs to be introduced for certain categories of persons, such as auditors, public officials or supervisory authorities. If such a duty to report were to be introduced, the rules need to provide for protection from adverse consequences for the persons who fulfill such an obligation.

Such rules need to consider at least the following matters: 1) the reporting obligation vis-à-vis breaches of any confidentiality requirement. One of the issues which needs consideration is whether the reporting obligation lifts any duty of confidentiality and how to protect the person who reported from liability of any kind for having fulfilled the duty to report. 2) It could also be considered whether one could set up some kind of system of voluntary reporting instead of a mandatory system and the legal consequences thereof. 3) Moreover, the procedural questions relating to reporting systems need to be resolved, including confidentiality rules and so-called "hot-lines" for persons disclosing offences. 4) An important question to resolve is to which authorities the persons who disclose should report. Several alternatives could be considered in this context, depending on the legal traditions of each State, for instance the ordinary police and prosecuting authorities, specialized such services, independent administrative bodies or bodies with both investigating and prosecuting functions. Inside the administration, there should be some alternative reporting channel to the line management as the whistle-blowers might be likely to

report their bosses. Could, for instance, some kind of internal ombudsman help maintain standards and ethics in large organisations?

Moreover, further work needs to be done to ensure that such measures be taken so that the person who reports a corruption offence does not suffer disadvantages because of his action. On the contrary, one could consider whether any incentives may be found. However, it should be noted that in a number of States it may be a civic obligation to disclose offences. In such States it might be argued that incentives, at least not in the form of money or other rewards, should be given.

In order to promote better reporting attitudes, mainly in the framework of combatting organised crime, some countries adopted new policies to protect witnesses, repentant offenders and collaborators of justice against intimidation and interference by suspects. Such policies, mostly conducted without legislative reforms, may require appropriate funding and an established structure. Experiences gained from some countries show that they may be successful, e.g. in the field of corruption offences. There is a need to consider this question further.

As far as repentant offenders are concerned, some legal systems recognise the possibility of "bargaining" either the prosecution/indictment or the sentence against information or testimony. In some countries they may also be compensated for services rendered. Such arrangements may provide the authorities, in particular under those procedural laws which are based, at the stage of the prosecution, on the principle of "opportunity", with information which enables them to catch the serious offenders. If the repentant offenders also testify at the trial, their subsequent protection has to be organised. Witnesses and collaborators of justice may also need similar protection.

The systematic protection of life, security and identity of these individuals in some countries has recently been given much attention in relation to corruption offences. Other countries have adopted or are currently preparing to adopt general witness protection programs, including the criminalisation of the disclosure of the identity or location of a protected witness.

Related matters

This topic relates to the role and responsibility of legal professions (B.I.5) and of other professions (B.I.6-8), and means of obtaining evidence (C.IV).

Priority

Part of this topic is of **high priority** (reporting obligation) and part of it is of **medium priority to** the GMC.

Future action

The GMC should make further study of this topic, carry out research and promote action at national level. In particular, it should be considered whether a reporting obligation should be recommended and, if so, its legal consequences. A provision in a future convention, a protocol or a recommendation should be considered.

Any further work on this topic should take duly into account the work already carried out by another Council of Europe expert committee (PC-WI), which is currently preparing a draft recommendation on the subject of the intimidation of witnesses. When the recommendation has been adopted, the GMC should consider if further work need to be carried out in view of the particular considerations that need to be taken in connection with corruption offences.

VI. SPECIAL PROCEDURES FOR SOME CATEGORIES OF PERSONS

Description of the topic and evolution of the law

Many states apply different procedural rules when it comes to the investigation and prosecution of offences, including corruption offences. The adoption of such rules may be dictated by the necessity to protect members of Parliament or the government from harassment or the need in a democratic state, at least according to classical theory, to separate the powers of the judiciary, the executive and the legislature. Some States have extended the legal protection to senior civil servants. The special rules have been adopted to protect the function and not the person. These special procedures have in some States however come to be perceived as privileges of certain persons rather than as rules necessary to enhance democracy. The question could therefore be asked if such privileges are necessary in todays' democratic society. The question becomes particularly serious in the context of prosecution of members of Parliament and governments for offences of corruption as such offences usually are intimately linked with the function.

Several examples of such special rules, applicable to the investigation and prosecution of MP's and members of government suspected having committed an offence, may be found in the member States. These rules would normally be applicable to investigation and prosecution of any kind of offence, and not just corruption offences. As such offences are linked with the function, one could legitimately consider whether there is a need to make some exceptions to investigation and prosecution of corruption offences.

In Portugal, the Parliament must, with regard to one of its members or a member of the government, authorise arrest and provisional detention in certain cases (imprisonment less than three years provided) and will decide on the suspension of the MP. If the MP, as in the case of a corruption offence, is prosecuted for a case involving a higher penalty, the suspension is automatic. Corruption cases are tried by normal courts but special rules apply to the President and the Prime Minister. Some special rules apply furthermore in respect of the procedure (there is always a right to be tried separately, the principle of legality is applied strictly and the trial by jury is not allowed). Special rules apply to the investigation procedure. The investigation is conducted by Parliamentary Commissions, vested with the powers of judicial authorities. - In Switzerland, a decision by the Federal Chambers is necessary to open up criminal investigations against parliamentarians. For urgent provisional measures, a four-member Parliamentary Commission will give the authorisation. - In Germany, as in Luxembourg and Iceland in respect of MP's, the investigations and proceedings of elected persons are admissible only with the consent of the body which elected them (the lifting of parliamentary immunity). - In Finland and Norway, crimes committed by, inter alia, members of Government (and MP:s in the case of Norway), are tried in the High Court of Impeachment which is a special court set up solely for the purpose of trying such persons. In Finland, the President or Parliament makes the decision to charge the person. Parliament selects

six judges and the other judges are drawn from the senior judiciary. Offences committed by members of Parliament are tried in an ordinary way, sometimes with the Court of Appeal as the first instance. -In Cyprus, a MP may only be arrested, prosecuted or imprisoned as long as he continues to be an MP, if there is consent of the Supreme Court (except where the offender is caught in "flagrant délit" and the offence is very serious). - In Hungary, an MP may only be arrested in cases of "flagrant délit" and criminal proceedings, including taking of coercive measures, may only be initiated or continued with the consent of Parliament. Similar rules apply in the Czech Republic and in Slovenia. Also in non member States special rules exist such as in the Russian Federation where MP's may be prosecuted if there is consent of the State Duma.

These examples show that the legislative situation in the member States has developed differently, probably depending on different legal traditions. Experiences have shown that these privileges might lead to very slow procedures, lower penalties or that the person investigated may escape justice. The question could be asked whether it is appropriate or necessary for the protection of the public official to maintain special rules in cases of suspect corruption offences and whether there should not be instituted a duty to lift immunity in suspected cases of corruption or some special procedures if the offence under investigation is connected with some defined corruption offences.

Related matters

This topic relates to the role and responsibility of civil servants, elected representatives and members of government and officials of political parties (B.I.1-3) and to the financing of political parties (D.I).

Priority

This topic is, although of great importance, of **medium priority** to the GMC.

Future action

The GMC should study further the legal situation of the member states while taking into account their different legal traditions. Such a study should be made in close co-operation with the Commission for Democracy through Law (the so-called Venice Commission) and could, if appropriate, lead to a report or some recommendations or guidelines, indicating a common minimum standard in the matter.

Future action

The GMC should study carefully the question of provisional and confiscation measures to be taken to render more efficient the fight against corruption. The GMC should consider this question taking into account the provisions of the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, with a view to the elaboration of one or several provisions to be inserted in a future convention or a protocol of a framework convention. In this context, one could consider to limit the possibility of entering reservations to the Laundering Convention so as to exclude the possibility of reservation as regards confiscation of proceds from corruption offences.

VII. SEIZURE AND CONFISCATION OF THE PROCEEDS FROM CORRUPTION

Description of the topic and evolution of the law

It is necessary that law enforcement agencies possess adequate legal instruments so that they are able to seize proceeds from corruption as well as evidence thereof. An efficient international co-operation needs equally well functioning instruments which one should be able to use rapidly. For instance, a possibility of direct contact between judicial authorities in view of seizure is essential to render efficient international co-operation. Furthermore, at the international level, it is necessary that countries with a system of value-confiscation should be able to co-operate with countries that have the system of property confiscation. Particular attention needs to be given to the issue of territoriality and jurisdiction. Countries need to consider carefully whether it is always necessary to require double criminality or reciprocity in order to be able to co-operate at international level in the fight against corruption. Also in countries which do not accept to protect the integrity of other countries' public officials, it could be considered to co-operate in respect of provisional measures to fight corruption.

Also here, the question of intermingled property and of bona fide third parties needs to be addressed. In the context of fight against corruption, it has been discussed to enact laws against illicit enrichment. Such laws could contain rules to the effect that public officials who possess wealth beyond what can be explained as the result of lawful activities might risk that their property be confiscated. Such laws could be extended to the finances of their family. These laws should not be confounded with the reversal of the burden of proof in criminal cases and the presumption of innocence. What has been discussed in the context of fight against corruption is the reversal of the burden of proof of the licit origin of property. Notwithstanding that such laws have been accepted by the European Court of Human Rights under certain circumstances (see, for instance, the *Salabiaku Case*), they may still lead to constitutional problems in certain countries.

Related matters

This matter is related to laundering (A.II.5), abuse of shell corporations (C.VIII) and to international co-operation (C.XI).

Priority

This topic is of **high priority** to the GMC.

VIII. ABUSE OF SHELL CORPORATIONS

Description of the topic and evolution of the law

This issue relates to the difficulties in investigating corruption offences, in particular when the proceeds of corruption have been transferred abroad. Practice shows that money which has been paid as bribes or as illicit financing of political parties have been channelled through the shell companies abroad. At the national level, the question could be asked if there should be a legal duty on the part of for instance banks to know the beneficial ownership of their clients, whether they would need to verify the regularity of incorporation documents and the nature of the client's business. The issue of sanctions for banks or financial institutions, or their employess, who fail to exercise such imposed duties could be considered.

A difference should be made between shell companies (companies which do not conduct any legitimate business), shelf companies (dormant companies which are bought off-the-shelf), ghost companies (which exist in name only but have never been incorporated) and front companies (companies which also do legitimate business serving as a guise for illegitimate purposes).

The problem is important but has also a significant degree of complexity. It has been dealt with by the Financial Action Task Force in the context of money laundering.

Related matters

This matter is related to laundering (A.II.5), seizure and confiscation (C.VII) and to international co-operation (C.XI).

Priority

This topic is, although of importance, **medium priority** to the GMC.

Future action

The GMC should, when considering this question take into account the provisions of the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, with a view to the elaboration of one or several provisions to be inserted in a future convention or a draft protocol to a framework convention. In view of the complexity of the matter, it should, as a first step, not devote any significant resources to the issue. It should await any results of the work of the Financial Action Task Force and consider any future action in connection with such results.

IX. LIABILITY OF LEGAL PERSONS FOR CRIMINAL OFFENCES

Description of the topic and evolution of the law

It is often the case in corruption that the bribe-giver may be a large enterprise which acts or decides collectively to bribe public officials. Such a decision could be taken at the highest level of the enterprise, for instance by the Board of Directors, the Managing Director or by a responsible for one of the branches/divisions of the enterprise. At any rate, experience has shown that senior level management at least is aware of the corrupt practices without taking any action to stop them. Thus, a proposal to make companies as such - because of senior level management involvement - criminally responsible for acts of corruption may therefore seem reasonable, at least in countries which are familiar with the notion of corporate criminal liability. The actual stigmatisation of the company as such - and not only its officers - could therfore have a deterring effect and enhance the efficiency of the fight against grand corruption.

While businessmen who bribe or corrupt public officials may be successfully prosecuted and punished, those legal persons on the account of which they performed their duties may continue their corrupt practices. However, relatively few legislations foresee a general possibility of establishing corporate liability for criminal offences, including corruption offences. Some countries where corporate criminal liability exists restrict its application to a limited number of specific offences whereas others have a general application. Moreover, one should not forget in this context the administrative sanctions which may be taken against companies which have been involved in corruption offences and the relationship between such sanctions and criminal sanctions.

Some recent international instruments suggest that the use of corporate liability should be extended: the Council of Europe Recommendation N° (88) 18 on liability of enterprises for offences advised that "enterprises should be able to be made liable for offences committed in the exercise of their activities, even where the offence is alien to the purposes of the enterprise"; following this concept, a draft Council of Europe Convention on the protection of the environment through criminal law, which should be adopted in 1996, implements the above principle in the particular field of environmental offences, while a draft EC Convention on the protection of the financial interests of the Communities, which is under discussion since 1994, also provides for corporate criminal liability, in the field of fraud. Moreover, criminal liability of legal persons might make it easier for victims (unsuccessful competitors, governments, etc) who have suffered from the act of corruption to recover damages, for instance by joining the criminal proceedings against the company. Furthermore, it is the company itself which has profited the most from the offence and will be in a position to pay any damages. It should also be considered that some sanctions might be particularly suitable for corruption offences, such as the closing of companies, exclusion from public procurement in the future or public advertising of a criminal judgement.

It may be noted that the previously mentioned draft UN Convention contained the following provision:

> "Each Contracting State likewise undertakes to make the acts referred to in paragraph 1 (a) of this article punishable by appropriate criminal penalties under its national law when committed by a juridical person, or, in the case of a State which does not recognize criminal responsibility of juridical persons, to take appropriate mesures, according to its national law, with the objective of comparable deterrent effects."

Related matters

This topic relates to a number of other topics in the Programme of Action, but in particular to bribery of foreign public officials (A.II.2), responsibilities of the administration (C.II), civil remedies (C.III).

Priority

This is a **high priority** issue to the GMC.

Future action

The GMC should carry out a study on the question of liability of legal persons for criminal offences in the light of the recommendation No R (88) 18 on liability of enterprises for offences. In doing so, the GMC should study what kind of liability could be considered (administrative, civil, criminal) as well as if there is a need to distinguish between different offences of corruption and any appropriate sanctions. In the light of such a study, a recommendation could be elaborated on this matter. It should not be excluded that a provision on corporate criminal liability could be included in a future convention or framework convention.

X. OTHER CRIMINAL LAW SANCTIONS AND MEASURES

Description of the topic and evolution of the law

The liability of enterprises for criminal offences is not the only sanction under criminal law which might be available - and particularly appropriate - in corruption offences. Apart from the traditional sanctions of imprisonment and fines, a number of special sanctions may be envisaged in in the legislation of the member States. Separation from the post after the commission of a corruption offence is common for public official. Ineligibility to hold office for a specific time, for instance five years, in cases of corruption could be one type of sanction. Interdiction to continue as a public official or "black-listing" could in some States be envisaged as a criminal law sanction and not as only an administrative one. Publishing of judgments in newspapers or some form of "community service" for companies could also be envisaged.

Related matters

Criminalisation of corruption offences (A.II.1-6), liability of legal persons for criminal offences (C.IX).

Priority

This topic is of **high priority** to the GMC.

Future action

The GMC should carry out a study on the question of sanctions. In doing so, the GMC should study what kind of liability could be considered (administrative, civil, criminal) as well as if there is a need to distinguish between different offences of corruption. In the light of such a study, a recommendation could be elaborated on this matter. It should not be excluded that a provision on sanctions could be included in a future convention.

XI. INTERNATIONAL COOPERATION

1. Penal law

Description of the topic and evolution of the law

Corruption is nowadays becoming an increasingly international phenomenon which needs to be addressed by the entire international community. Countries may avail themselves of two different legal techniques to control it: either they criminalise certain corruption offences, e.g. the bribery of foreign public officials, by a binding international instrument, thus ensuring uniformity of interpretation and settle questions of jurisdiction and international co-operation in such an instrument or they conclude bilateral or multilateral treaties of international co-operation in criminal matters (transfer of proceedings, mutual legal assistance, extradition) which relate to offences criminalised by national criminal law. So far the first technique has for several reasons failed in respect of corruption, although recent developments in this area may be seen as encouraging, and in particular the adoption by the Council of the OECD of the Recommendation on Bribery in International Business Transactions on 27 May 1994. Moreover, several cases of international co-operation, for instance in connection with the so-called "mani pulite" investigations in Italy, seem to have received an adequate co-operation between law enforcement bodies.

Given the fact that national criminal laws are adapted to different social, cultural and legal contexts, some countries do not criminalise certain behaviour while others do. The second technique therefore raises, among others, the problem of double criminality. This issue requires that in both the requested and requesting States the behaviour is a criminal offence. Although it may be relaxed at regional level between countries with common legal traditions, as was done in the 1959 Convention on Mutual Assistance, some exception clauses may still prevent countries from providing legal assistance or extraditing an offender in respect of e.g. corruption offences. Unlike the fiscal offence exception which was successfully neutralised in the European context by a protocol to the 1959 Convention, the political offence exception remains totally unfettered. When corruption offences involve high ranking public officials, politicians, members of government etc, this exception clause, although it may at present seem obsolete in Europe, could in practice come into use.

Another technique, represented by the concept of "assimilation", which could bridge the gap between diverging national criminal laws was used by the 1972 Convention on the transfer of proceedings in criminal matters. It provides for the possibility of establishing jurisdiction over offences committed abroad, by or against, public officials in contracting parties to the Convention (Article 7, paragraph 2); this Convention has however received only a limited number of ratifications and is of little practical importance so far.

The above mentioned examples point to the difficulties of adapting international legal co-operation to the realities of international criminality. It is considered by the law enforcement community that the procedures are slow and costly, especially if diplomatic channels need to be used. Recent tendencies of co-operation at an international level, particularly in specific sectors of criminal law, as illustrated notably by the 1990 Council of Europe Convention on Laundering, seem to suggest a change in attitudes in that a more efficient regime has been created for international co-operation. To combat the international dimensions of corruption, this example should be followed and amplified.

Related matters

This topic relates to the criminalisation of corruption of foreign public officials (A.II.2), corruption of officials of international and supranational organisations (A.II.3) and to the means of obtaining evidence (C.IV).

Priority

This topic is of **high priority** for the GMC.

Future action

The GMC should examine whether the requirement of double criminality could be relaxed further in the context of corruption offences, in particular with regard to extradition; simplified extradition could also be considered in this context; the restriction of the scope of or the total ban on the "political offence exception" should also be given consideration. The GMC should assess the existing instruments on international criminal law co-operation and their efficiency in order to fight corruption. To ensure the effectiveness of international co-operation in combatting corruption, the GMC should consider drafting provisions to be inserted in a binding instrument, i.e. a future convention or framework convention or in the form of a protocol to it. Monitoring mechanisms and bodies to ensure quick and smooth international co-operation need to be considered in this context.

2. Civil law

Description of the topic and evolution of the law

Corruption in international business transactions, including public procurement, has become an increasingly common phenomenon. It is possible that a company in country A may find that it has lost a contract to a company in country B on the basis of a bribe which was paid to a company in country C, or to a public official in that country. In such a situation the company in country A may experience difficulties in trying to seek redress. Such difficulties may relate to, for instance, the choice of jurisdiction to seek redress, the obligation for the company to advance security for legal costs if the law-suit is filed with the courts of another country, the difficulties in having a judgment executed in a foreign country and the uncertainties of the applicable law in a situation where several different alternatives may be plausible. Moreover, if the company elects to take action against the government as responsible for the actions of the bribe-taker/public official, the government may be able to invoke State immunity in such a situation; an area of law which is particularly complex.

Conversely, the government in country C may wish to seek compensation from the company in country B which paid the bribe to the public official. The situation becomes even more complicated if other countries are involved. In such cases, the legal basis for compensation is not always clear and questions may exist concerning jurisdiction, applicable law, content of substantive law and the enforcement of judgments as well as differences in the law depending on whether the companies are State owned enterprises or private enterprises.

Further difficulties arise if the bribe-taker work for a government with which the Council of Europe members normally not have agreements on mutual legal assistance or agreements on execution of foreign judgments. In such cases, a truly international solution is called for.

Related matters

This matter is related to fiscal aspects (A.IV) and to public procurement (C.I).

Priority

This topic is of **high priority** to the GMC.

Future action

The GMC should continue to study the international aspects of the question of damages as a means to fight corruption. The GMC should consider this question with a view to the elaboration of one or several provisions to be inserted in a future convention, a separate convention on civil remedies to fight corruption or a draft

protocol in a framework convention. The GMC should consider whether it is more appropriate to elaborate a report or a recommendation, as appropriate depending on the results of the further study needed. The study should be undertaken on the basis of a questionnaire which should be sent out to all members of the GMC.

3. Administrative law

Description of the topic and evolution of the law

The international co-operation between administrative bodies in the fight against corruption could take many different forms. It could be a co-operation between bodies which have purely administrative functions or with bodies which have some investigative or quasi-judicial functions. Where the body seeking co-operation from another State has status as an administrative organ and the body in the other State is a judicial authority the international co-operation may become difficult, because of the different status of the bodies. It is necessary to be able to find ways and means of co-operation, in particular in the ways to exchange information, also spontaneously, to render the international co-operation in the fight against corruption compatible and efficient.

Related matters

This matter is related to responsibilities of the administration (C.II) and to means of obtaining evidence (C.IV).

Priority

This topic is of **high priority** to the GMC.

Future action

To ensure the effectiveness of international co-operation in combatting corruption, the GMC should consider drafting provisions to be inserted in a binding instrument, i.e. a future convention or framework convention or in the form of a protocol to it. Monitoring mechanisms and bodies to ensure quick and smooth international co-operation need to be considered in this context.

D. GENERAL ISSUES OF IMPORTANCE FOR THE FIGHT AGAINST CORRUPTION

I. FINANCING OF POLITICAL PARTIES

Description of the topic and evolution of the law

Non-public financing of political parties and activities (like election campaigns) obviously opens up huge opportunities for corruption. It is, in fact, doubtful that any businessman will "invest" money without some sort of return or another whether in the short, medium or long term range. Moreover, exclusive public financing (which might leave room for small contributions only by private persons) allows for the limitation of expenses for instance in election campaigns. - However, the mode of financing of political parties and activities is linked to political philosophy as well as to constitutional and legal traditions and good solutions from the point of view of combatting corruption may not be acceptable for those reasons, as the question needs to be considered in the wider context of democracy and the rule of law. Nevertheless, the illicit financing of political parties has become an issue in the fight against corruption and should be dealt with by the GMC.

Where private funding is permitted, transparency is an absolute requirement in fighting corruption. If one can trace back which party or individual politician received what from whom, the detection of corruption becomes easier. Transparency should be required on both sides, for the receivers as well as the donors, who must both keep accurate records on all their financial transactions.

Related matters

Definition of corruption (A.I), trading in influence (A.II.4), role and responsibility of elected representatives and officials of political parties (B.I.2-3).

Priority

This topic is of **medium priority** to the GMC.

Future action

The GMC should monitor work carried out in the Project Group on Human Rights and Genuine Democracy (CAHDD) and of the Parliamentary Assembly relating to financing of political parties and the role of lobby organisations. In the light of the results of on-going work, the GMC should consider the elaboration of one or several recommendations on the subject with the purpose of taking into account the needs to prevent corruption. Any draft texts submitted to the Committee of Ministers concerning financing of political parties should be submitted to the GMC for opinion.

II. ROLE OF LOBBY ORGANISATIONS

Description of the topic and evolution of the law

The role of lobby organisations is to publicly exert influence on politicians and other decision-makers. That role is tolerated and forms part of several democratic cultures, mainly Anglo-Saxon, although it has become increasingly widespread in continental Europe, in particular in connection with the institutions of the European Union.

The main argument in favour of lobbying is that it can help citizens approach their representatives for the solution of practical problems, although in practice much lobbying is being done on behalf of those already possessing some sort of power, and can afford the fees. As it is not possible, however, to totally do away with such organised use of influence, rules and limits for it must be drawn up in order to draw the difficult line between lobbying and corrupting. This does not mean however that lobbying in itself is something evil. It merely suggests that the role of the lobby organisations need to be carefully considered from both sides. Indeed, some lobby organisations have themselves sought to establish such rules, sometimes in co-operation with the involved institutions, in order to set certain limits to lobbying activities.

Related matters

Definition of corruption (A.I), trading in influence (A.II.4), role and responsibility of elected representatives (B.I.2-3).

Priority

This topic is of **medium priority** to the GMC.

Future action

The GMC should monitor work carried out in the Parliamentary Assembly relating to the role of lobby organisations. In the light of the results of on-going work, the GMC should consider the elaboration of one or several recommendations on the subject with the purpose of taking into account the needs to prevent corruption. Any draft texts submitted to the Committee of Ministers concerning the role of lobby organisations should be submitted to the GMC for opinion.

III. THE MEDIA AND THE FIGHT AGAINST CORRUPTION

Description of the topic and evolution of the law

The existence of a free and enquiring press is essential to the configuration of democratic societies. The quality of the democratic process is dependent on how the media performs its task of rationally conveying to the individual what is happening in the political, social and economic arenas. Press and broadcasting organisations perform a crucial "watchdog" role by subjecting the exercise of public and private power to close and continuing scrutiny.

The media are thus central to the fight against corruption, in particular by investigating and exposing malfeasance in political and corporate affairs. The public's right to be informed of the professional behaviour of individuals exercising positions of trust or responsibility entails a corresponding duty on the part of governments not to interfere with the media's right to make such information available.

The framework for guaranteeing media freedom including the rights and freedoms of all those engaged in the practice of journalism is secured by Article 10 of the European Convention on Human Rights, as well as by a range of media law and policy instruments which have been adopted within the Council of Europe. Particular reference should be made to the political Declaration and Resolutions adopted at the 4th European Ministerial Conference on Mass Media Policy (Prague, 7-8 December 1994).

However, it is believed appropriate to focus specifically on the media's role in the fight against corruption and, as appropriate, to work out relevant principles.

Working in close collaboration with the Steering Committee on the Mass Media (CDMM), consideration might be given, in a first stage, to the examination of:

- access to information held by public and private bodies

Investigative reporting on the cancer of corruption is dependent on the right of media professionals to have access to information. Guaranteed access rights obviate the needs for journalists and editors to have recourse to subterfuge and clandestine methods of obtaining information, which bring them into conflict with legal and ethical principles.

- protection of the confidentiality of the sources used by journalists

The scope of protection of sources varies in the legal systems of the member States. The disclosure of corruption cases by the media quite often depends on information communicated by third parties and the guarantee that their names will not be revealed by investigating journalists. Consideration might be given to the

potential for harmonising the level of protection of sources around a set of minimum guarantees. The issue of "whistle blowing" is also relevant in this respect.

- media coverage of legal proceedings

The right to a "fair trial", as guaranteed by Article 6 of the European Convention on Human Rights must be reconciled with the freedom of the media to impart information. Violation by the media of the presumption of innocence is not simply a gross infringement of Article 6 rights, it also undermines respect for human dignity. The identity of the accused needs to be protected in a way which counterbalances the public's interest in obtaining information through the media, so as to prevent individuals from being subjected to additional social punishment on a "media pillory".

- the ethical responsibility of journalists, editors, publishers, broadcasters

The fundamental function of journalism in a democracy implies that all those engaged in its practice act in an ethical and responsible manner, in particular by not abandoning their independence nor their critical approach. However, in an increasingly multimedia environment characterised by a trend towards ownership of media organisations by economic groups unrelated to the media, it might be useful to reflect on the increased difficulties which journalists, editors, broadcasters, etc experience in resisting economic and commercial pressures.

Related matters

This topic is related to a number of the topics on the Programme, but in particular to role and responsibilities of elected representatives and members of government, officials of political parties, lobbyists, journalists (B.I.2-4 and 8), public liability (C.II.4), protection of whoever helps justice (C.V), financing of political parties (D.I), role of lobby organisations (D.II).

Priority

This topic is of **medium** priority to the GMC.

Future action

The GMC should devote a symposium to the study of the above issues. The participants would need to be drawn from the representative associations of journalists, editors, publishers, broadcasters, etc. As noted above, the preparation of a symposium (or similar event) would need to be worked out in close co-operation with the Steering Committee on the Mass Media (CDMM). Depending on the outcome of the symposium, the GMC could consider drafting a recommendation or some guidelines on the role of the media in the fight against corruption.

IV. RESEARCH PROJECTS, TRAINING PROGRAMMES AND EXCHANGE OF PRACTICAL EXPERIENCES

Description of the topic and evolution of the law

There is an obvious gap between the need for action against corruption on the one hand and the fact-basis on which such action could be founded on the other. In comparison to other areas of concern, such as violent crime and juvenile crime the corruption phenomenon has rather been neglected by criminological research. Devising appropriate strategies for combatting corruption on all levels therefore tends to become a rather hazardous undertaking.

In order to give guidance to those responsible for decision-making in the fight against corruption, policy-relevant research should be promoted and, if appropriate, subsidised. Such research could comprise, among others:

* identification of the main areas in which corruption occurs, both at national and at international level

* case-studies of corruption, identifying relevant actors and networks

* comparative, and possibly quantitative, analysis of corruption cases brought before the courts with a view to identifying corruption patterns and strategies

* identification of opportunity-structures likely to lead to corruption practices

* analysis of economic circumstances provoking corrupt practices (eg. exacerbation of competition in certain market sectors)

* description of examples of 'good practice' in corruption control

* assessment of the real costs of corruption; how much really is the damage in economical terms to society, to the business, to the consumers?

* the effects of systematic corruption of legal systems, economic management, the delivery of public services and policy making.

Any decisions about granting possible subsidies to projects of research into corruption should be based on an assessment of the policy-relevance of these projects.

Moreover, training need to be undertaken to all relevant actors involved in the fight against corruption, such as police, prosecutors and senior members of the civil service. In particular, such training is of importance in countries of Central and Eastern Europe.

As a necessary corollary to training comes the exchange of practical experiences, both at national and at international level. It is only through the exchange of practical experiences that one can understand - and combat - the phenomenon of corruption.

Related matters

This matter is related to all topics on the Programme.

Priority

This topic is of **high priority** to the GMC.

Future action

In order to promote exchange of experiences and information at international level, the GMC should be able to organise meetings of national authorities responsible for the fight against corruption at regular intervals. The first such meeting should take place in 1996. The GMC should be prepared to assist in carrying out training programmes in particular in Central and Eastern Europe and could, budgetary resources permitting, organize its own programmes. It could consider to make specific proposals to the Committee of Ministers in this respect. It should assess the current research on corruption and its causes and could directly and indirectly promote such research. Having made such assessment, it could make specific proposals to the Committee of Ministers on how to take this matter further.

APPENDIX: TENTATIVE LIST OF CORRUPTION OFFENSES

TENTATIVE LIST OF CORRUPTION OFFENCES[10]

I. DOMESTIC BRIBERY

Bribery of public officials or persons assimilated under national law to public officials

1. Offer or gift of a bribe to a national public official.
2. Acceptance or demand of a bribe by a national public official.
3. Offer or gift of a bribe to elected representatives or members of government, at the local and national level.
4. Acceptance or demand of a bribe by an elected representative or member of government, at the local or national level.
5. Offer or gift of a bribe to persons whose duties are to perform public service functions.
6. Acceptance or demand of a bribe by a person whose duty it is to perform public service functions.

Bribery between private entities

7. Offer or gift of a bribe to officers or other persons belonging to a company which does not have any duty to perform public service functions.
8. Acceptance or demand of a bribe of officers or other persons of a company which does not have any duty to perform public service functions.

Offences considered as bribery in some national laws

9. Demand of a bribe by a public official, where the bribe-giver considers that he, in view of his situation vis-à-vis the bribe-taker is forced to give the bribe, thus excluding punishability of the bribe-giver.
10. Acceptance, without an express demand, of a bribe, where the bribe-giver considers that he, in view of his situation vis-à-vis the bribe-taker, is forced to give the bribe, thus excluding punishability of the bribe-giver.
11. Acceptance or demand of a bribe by a public official, where the bribe-giver mistakingly believes that he is under a legal obligation to give the bribe, thus excluding punishability of the bribe-giver.

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[10]. This list has been elaborated with a view to putting some topics on the agenda for future discussion in the GMC. The main purpose of this list is to limit the scope of discussion in the GMC to certain types of offences. The list can in no way be considered to have been adopted by the GMC other than as an agenda for future discussion.

II. BRIBERY INVOLVING FOREIGN ENTITIES

Bribery offences involving foreign public officials or persons assimilated under national law to public officials

12. Offer or gift of a bribe to a foreign public official.
13. Offer or gift of a bribe to foreign elected representatives or members of government, at local and national level.
14. Offer or gift of a bribe to foreign persons whose duties are to perform public service functions.

Bribery between private entities

15. Offer or gift of a bribe to foreign officers or other persons belonging to a foreign company which does not have any duty to perform public service functions.

III. TRADING IN INFLUENCE[11]

Offence involving domestic trading in influence

16. Trading in influence by a third person asserting that he can influence another person and accepting a reward in consideration thereof, whether such influence is exerted or not and whether or not the supposed influence leads to a result.

Offence of trading in influence involving foreign entities

17. Trading in influence by a third person in a foreign country asserting that he can influence another person in that country and accepting a reward in consideration thereof, whether such influence is exerted or not and whether or not the supposed influence leads to a result.

IV. OFFENCES INVOLVING INTERNATIONAL OR SUPRANATIONAL BODIES

18. Offer or gift of a bribe to civil servants working for international or supranational bodies.
19. Acceptance or demand of a bribe by elected representatives, officers or other persons working for an international or a supranational body.
20. Trading in influence by a third person working for an international or supranational body or being an elected representative thereof, asserting that he can influence another person and accepting a reward in consideration thereof, whether such influence is exerted or not and whether or not the supposed influence leads to a result.

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[11]. In some countries, this offence may be conceived as participation in a bribery offence in cases where influence is exerted.

21. Trading in influence by a third person, who is a civil servant of an international or supranational body in a foreign country asserting that he can influence another person in that country and accepting a reward in consideration thereof, whether such influence is exerted or not and whether or not the supposed influence leads to a result.

V. LAUNDERING OFFENCES

22. Laundering of the economic advantage of the offences listed above.

VI. OTHER OFFENCES RELATED TO CORRUPTION

23. Unwarranted personal interference or undue taking or receiving a personal interest ("*ingérence*" ou "*prise illégale d'intérêt*").
24. Insider trading.
25. Financing of political parties in violation of the law.
26. Buying of votes.
27. To receive or request what one knows should not be paid for rights, taxes, customs, interests or salaries - "concussion"