



## **Explanatory Report to the Civil Law Convention on Corruption \***

Strasbourg, 4.XI.1999

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### **I. Introduction**

#### **a) General considerations**

1. The Council of Europe became strongly interested in the international fight against corruption because of the obvious threat corruption poses to the basic principles this Organisation stands for: the rule of law, the stability of democratic institutions, human rights and social and economic progress. Also because corruption is a subject well-suited for international co-operation: it is a problem shared by most, if not all, member States and it often contains transnational elements. However, the specificity of the Council of Europe lies in its multidisciplinary approach, meaning that it deals with corruption from a criminal, civil and administrative law point of view.

2. At the 1994 Malta Conference of the European Ministers of Justice, the Council of Europe launched its initiative against corruption. The Ministers considered that corruption was a serious threat to democracy, the rule of law and human rights and that the Council of Europe, being the pre-eminent European institution defending these fundamental values, should respond to that threat.

3. The Resolution adopted at this Conference endorsed the need for a multidisciplinary approach, and recommended the setting up of a Multidisciplinary Group on Corruption with the task to examine what measures could be included in a programme of action at international level, and the possibility of drafting model laws or codes of conduct, including international conventions, on this subject. The importance of elaborating a follow-up mechanism to implement the undertakings contained in such instruments was also underlined.

4. In the light of these recommendations, the Committee of Ministers agreed, in September 1994, to set up the Multidisciplinary Group on Corruption (GMC) under the joint responsibility of the European Committee on Crime Problems (CDPC) and the European Committee on Legal Co-operation (CDCJ) and invited it to examine what measures would be suitable for a programme of action at international level against corruption, to make proposals on priorities and working structures, taking due account of the work of other international organisations and to examine the possibility of drafting model laws or codes of conduct in selected areas, including the elaboration of an international convention on this subject and a follow-up mechanism to implement undertakings contained in such instruments. The GMC started operating in March 1995.

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(\*) The Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community entered into force on 1 December 2009. As a consequence, as from that date, any reference to the European Community shall be read as the European Union.

5. The Programme of Action against Corruption (PAC), prepared by the GMC in the course of 1995 and adopted by the Committee of Ministers at the end of 1996, is an ambitious document, which attempts to cover all aspects of the international fight against this phenomenon. It defines the areas in which action is necessary and provides for a number of measures, to be followed in order to realise a global, multidisciplinary and comprehensive approach to tackling corruption. The Committee of Ministers instructed the GMC to implement this programme before the end of the year 2000.

6. At their 21st Conference (Prague 1997), the European Ministers of Justice adopted Resolution No 1 on the links between corruption and organised crime. The Ministers emphasised that corruption represents a major threat to the rule of law, democracy and human rights, fairness and social justice, hinders economic development and endangers the stability of democratic institutions and the moral foundations of society. They further underlined that a successful strategy to combat corruption and organised crime requires a firm commitment by States to join their efforts, share their experience and take common actions. The European Ministers of Justice specifically recommended speeding up the implementation of the Programme of Action against corruption and to pursue the work concerning the preparation of an international civil law instrument, dealing, *inter alia*, with compensation for damage resulting from corruption.

7. On 10 and 11 October 1997, the 2nd Summit of the Heads of State and Government of the member States of the Council of Europe took place in Strasbourg. The Heads of State and Government, in order to seek common responses to the challenges posed by corruption throughout Europe and to promote co-operation among Council of Europe member States in the fight against corruption, instructed, *inter alia*, the Committee of Ministers to secure the rapid completion of international legal instruments pursuant to the Council of Europe's Programme of Action against Corruption.

8. The Committee of Ministers, at its 101<sup>st</sup> Session on 6 November 1997, adopted Resolution (97) 24 on the 20 Guiding Principles for the fight against Corruption. Principle 17 specifically indicates that States should "ensure that civil law takes into account the need to fight corruption and in particular provides for effective remedies for those whose rights and interests are affected by corruption"

9. At their 22<sup>nd</sup> Conference (Chisinau, June 1999), the European Ministers of Justice adopted Resolution No 3 on the fight against corruption, urging the Committee of Ministers to adopt the draft Convention on civil aspects of corruption and open it for signature before the end of 1999.

10. Consequently, following the adoption of the Criminal Law Convention on Corruption (European Treaty Series No 173), and of Resolutions (98) 7 and (99) 5, authorising and establishing, respectively, the "Group of States against Corruption (GRECO)", the Council of Europe finalised an international legal instrument aiming at fighting corruption through civil law remedies. Indeed, the possibility to tackle corruption phenomena through civil law measures is an outstanding feature of the Council of Europe approach to the fight against corruption.

11. Therefore, one of the characteristics of the Council of Europe approach in the fight against corruption is the possibility to tackle corruption phenomena from a civil law point of view.

12. The Programme of Action against corruption indicates that when fighting against corruption, "civil law is directly linked to criminal law and administrative law. If an offence such as corruption is prohibited under criminal law, a claim for damages can be made which is based on the commission of the criminal act. Victims might find it easier to safeguard their interests under civil law than to use criminal law. Similarly, if an administration does not exercise sufficiently its supervisory responsibilities, a claim for damages may be made."

**b) Terms of reference and feasibility study**

13. On 15 February 1996, the Committee of Ministers at the 558th meeting of the Ministers' Deputies decided to ask to the GMC, *inter alia*, "to start a feasibility study on the drawing up of a convention on civil remedies for compensation for damage resulting from acts of corruption."

14. A questionnaire on corruption was circulated to the States to provide a basis for this feasibility study. After having received replies from most Council of Europe member States, the GMC finalised the feasibility study which was submitted to the Committee of Ministers in March 1997.

15. The study gives as complete a picture as possible of the civil law aspects related to cases of corruption, underlining in particular the reasons for or against drafting one or several international instruments on this issue.

16. The study shows that it is possible to conceive a number of scenarios where the use of civil law remedies might be useful against any form of corruption. The text deals with, *inter alia*, the following questions:

- the accessibility and effectiveness of civil law remedies in general,
- the determination of the main potential victims of corrupt behaviours,
- the problems of evidence and of proof of the causal link between acts and damage,
- the fiscal aspects of illicit payments and their relation to the distortion of competition,
- validity of contracts,
- the role of auditors,
- protection of employees,
- procedures (including litigation costs) and international co-operation.

17. The feasibility study indicates that from the analysis of the replies to the questionnaire, it is clear that States have different laws against corrupt practices. However, common ground can be found and it would seem useful to continue to analyse and clarify the similarities and the differences. After all, all the laws are based on one common denominator, namely that corrupt practices should not be encouraged or tolerated.

18. Therefore, the study underlines that, notwithstanding different national legislation, an international approximation of civil law remedies in the fight against corruption is both possible and necessary.

19. The feasibility study concludes with a number of recommended items to be considered when drafting a future international instrument on the matter, such as compensation for damage, liability (including State responsibility), contributory negligence, limitation periods, the validity of contracts, the protection of employees, accounts and audits, the acquisition of evidence, interim measures and international co-operation.

**c) The Civil Law Convention on Corruption**

20. The GMC's Working Group on Civil Law met twice in 1997 and twice in 1998 to discuss and finalise the draft Civil Law Convention on Corruption, which was then forwarded to the GMC Plenary. The GMC examined this text at its 15th (December 1998) and 16th (February 1999) Plenary meetings. The draft Convention was then transmitted to the European Committee on Legal Co-operation (CDCJ) for its opinion, and to the Committee of Ministers with a view to enabling it to consult the Parliamentary Assembly. At their 662nd meeting (March 1999), the Ministers' Deputies invited the Parliamentary Assembly to give an opinion on this text. The GMC also consulted Transparency International (TI), the International Chamber of Commerce (ICC), the International Commission of Jurists (ICJ) and the International Bar Association (IBA) on this draft Convention. After having examined at its

17th meeting (June 1999) the opinions of the CDCJ (CDCJ (99) 48 Appendix III) and of the Parliamentary Assembly (Opinion 213(1999)), as well as those of Transparency International (TI) and the International Chamber of Commerce (ICC), the GMC approved, on 24 June 1999, the draft Civil Law Convention on Corruption and decided to transmit it to the Committee of Ministers for adoption.

21. At its 678th meeting, the Committee of Ministers adopted the Civil Law Convention on Corruption, decided to open it to signature on 4 November 1999, and authorised the publication of this Explanatory Report.

22. The Civil Law Convention aims at requiring each Party to provide in its internal law for effective remedies for persons who have suffered damage as a result of corruption, in order to enable them to defend their rights and interests, including the possibility of obtaining compensation for damage.

23. The Convention, which is divided in three Chapters (measures to be taken at a national level, international co-operation and monitoring, and final clauses), is a non-self-executing Convention. This means that States Parties will have to transpose the principles and rules contained in the Convention in their internal law, by taking into account their own particular circumstances.

24. Therefore, States Parties which already comply with the provisions of the Convention or have more favourable provisions, are not required to take further actions. It will be for the Group of States against Corruption (GRECO), in its monitoring activity in accordance with Article 14 of the Convention, to ensure that States Parties comply with their undertakings under the Civil Law Convention.

25. This Convention, which is the first attempt to define common principles and rules at an international level in the field of civil law and corruption, deals with the definition of corruption, compensation for damage, liability, contributory negligence, limitation periods, the validity of contracts, the protection of employees, accounts and audits, the acquisition of evidence, interim measures, international co-operation and monitoring.

## **II. Commentary on the articles of the Convention**

### **Article 1 – Purpose**

26. Article 1 deals with the purpose of the Convention, which contains principles and rules which Parties are required to implement in their internal law in order to enable persons who have suffered damage as a result of corruption to defend their rights and interests, including the possibility of obtaining damages.

27. The word "persons" contained in the Convention and in this Explanatory Report, refers to both natural and legal persons, and to other bodies existing in certain legal systems, which are able to engage in litigation.

### **Article 2 - Definition**

28. At the beginning of its work, the GMC adopted the following provisional definition of corruption:

*"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 the 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".*

29. The purpose of this definition was to ensure that no matter would be excluded from its work. Obviously, such a definition would not necessarily match the legal definition of corruption in most member States, in particular not the definition given by the criminal law, but its advantage was not to restrict prejudiciously the discussion within excessively narrow confines.

30. The Criminal Law Convention on Corruption contains several common operational definitions of corruption which could be transposed into national laws, even if some amendments may prove necessary in certain national definitions to match them.

31. The Civil Law Convention follows a traditional approach to questions relating to definitions and contains a definition of corruption for the purpose of this Convention. This does not mean that Parties necessarily have to adopt this definition of corruption in their internal law, although they could do so, if they so wished. Indeed, the main aims of this definition are to clarify the meaning of the term "corruption" in the context of this Convention and to provide a proper legal framework within which the other obligations arising out from this Convention operate.

32. Therefore, the word "corruption" in this Convention means "requesting, offering, giving or accepting directly or indirectly a bribe or any other undue advantage or the prospect thereof, which distorts the proper performance of any duty or behaviour required of the recipient of the bribe, the undue advantage or the prospect thereof".

33. It is worth underlining, with respect to this definition, that the present Convention has, as one of its main characteristics, a relatively wide scope, which reflects the Council of Europe comprehensive approach to the fight against corruption as a threat not only to international business or to the financial interests but to the democratic values, the rule of law, human rights and social and economic progress.

34. The term «recipient» refers to the person whose behaviour is distorted by the act of corruption, regardless of whether or not the bribe or the undue advantage was for himself or herself or for anyone else.

### **Article 3 – Compensation for damage**

35. Article 3, paragraph 1, embodies the main purpose of the Convention which is to provide the right to compensation for damage resulting from an act of corruption. This paragraph requires each Party to provide in its internal law for the right to bring a civil action in corruption cases. The judge, in the individual case, will decide whether or not the conditions for compensation are fulfilled.

36. It should be noted that, under the Convention, damages must not be limited to any standard payment but must be determined according to the loss sustained in the particular case. Also, full compensation according to this Convention excludes punitive damages. However, Parties whose domestic law provides for punitive damages are not required to exclude their application in addition to full compensation.

37. It is clear that the compensation for damage suffered may vary according to the nature of the damage. Material damage is normally compensated financially, whereas non-pecuniary loss may also be compensated by other means, such as the publication of a judgement.

38. Paragraph 2 specifies the extent of the compensation to be granted by the Court. The "material damage" (*damnum emergens*) represents the actual reduction in the economic situation of the person who has suffered damage. The "loss of profits" (*lucrum cessans*), represents the profit which could reasonably have been expected but that was not gained as a result of corruption. Finally, "non-pecuniary loss" refers to those losses which cannot immediately be calculated, as they do not amount to a tangible or material economic loss. The most frequent example of non-pecuniary loss is the loss of reputation of the competitor

which may be compensated financially or by the publication of a judgement at the costs of the defendant.

39. Finally, it will be up to the Parties to decide, in their domestic law, the nature of non-pecuniary losses which will be covered, as well as the nature of the compensation which will be given. If, for instance, the law of a Party provides, in the framework of compensation for non-pecuniary loss, for compensation of loss of reputation only, this Party shall be deemed to have fulfilled its obligations under this provision.

#### **Article 4 - Liability**

##### *Paragraph 1*

40. Paragraph 1 of Article 4 contains the prerequisites of a claim for damages. In order to obtain compensation, the plaintiff has to prove the occurrence of the damage, whether the defendant acted with intent or negligently, and the causal link between the corrupt behaviour and the damage. This provision does not give a right to compensation to any person who merely claims that any act of corruption has affected, in one way or another, his rights or interests or might do so in the future.

41. As far as the individual elements of claims for damages are concerned, the following should be indicated:

##### (a) Unlawful and culpable behaviour on the part of the defendant

42. Those who directly and knowingly participate in the corruption are primarily liable for the damage and, above all, the giver and the recipient of the bribe, as well as those who incited or aided the corruption. Moreover, those who failed to take the appropriate steps, in the light of the responsibilities which lie on them, to prevent corruption would also be liable for damage. This means that employers are responsible for the corrupt behaviour of their employees if, for example, they neglect to organise their company adequately or fail to exert appropriate control over their employees.

##### (b) Damages

43. The damage referred to in paragraph 1 (ii) of Article 4 must fulfil certain conditions in order to give the right to compensation. Damage, which is capable of justifying a claim for compensation, must be sufficiently characterised, particularly as regards the connection with the victim himself or herself.

44. Since the Convention lays down minimum standards, paragraph 1.ii of Article 4 does not prevent Parties from allowing a person other than the one who suffered damage to bring a claim for its compensation.

##### (c) Causal link

45. An adequate causal link must exist between the act and the damage, in order for the latter to be compensated. The damage should be an ordinary and not an extraordinary consequence of corruption. Thus, for instance, "loss of profits" by an unsuccessful competitor, who would have obtained the contract if an act of corruption had not been committed, is an ordinary consequence of corruption and should normally be compensated. On the other hand, there would be no adequate connection if, for example, an unsuccessful competitor, in his or her anger and disappointment over the loss of business, fell down the stairs and broke his leg. Moreover, it should be noted that Parties are free to apply in their domestic law and practice a wider concept of causal link.

*Paragraph 2*

46. Paragraph 2 of Article 4 provides for joint and several liabilities of several joint offenders, regardless of whether they knowingly co-operated or whether one of them is simply liable as a result of his or her negligent behaviour.

47. In the context of this Convention, "jointly and severally liable" means that persons who have suffered damage as a result of an act of corruption, for which several offenders are liable, may seek full compensation from any one or more of them.

**Article 5 – State responsibility**

48. Article 5 requires each Party to provide in its internal law for appropriate procedures for persons who have suffered damage as a result of an act of corruption by its public officials in the exercise of their function, to claim for compensation from the State or, in case of a non-State Party, from that Party's appropriate authorities. Indeed such a procedure exists already in a number of European States.

49. Article 5 does not indicate the conditions for the liability of the Party. The Convention leaves each Party free to determine in its internal law the conditions in which the Party would be liable. Therefore, the conditions and procedures for filing claims against the State for damage caused by acts of corruption committed by public officials in the exercise of their functions, will be governed by the domestic law of the Party concerned. However, Article 5 requires Parties to provide "appropriate procedures" to enable victims of acts of corruption by public officials to have effective procedures and reasonable time to seek compensation from the State (or, in the case of a non-State party, from that party's appropriate authorities).

50. The provision contained in Article 5 does not prevent Parties from providing in their internal law for the possibility for persons who have suffered damage as a result of an act of corruption to sue public officials, as well as the possibility for such Parties to sue their public officials for the reimbursement of any loss (including, for instance, the costs of defending the claim), for which they are adjudged to be responsible. In any event, most European legal systems already provide for this possibility.

**Article 6 – Contributory negligence**

51. Article 6 of the Convention indicates that the behaviour of the plaintiff may have a bearing on his or her right to compensation. It is clear that, when the plaintiff is not the victim of the damage, it is the latter's behaviour which has to be taken into account.

52. Therefore, this article provides for an exception to the principle of the right to full compensation of the damage suffered contained in Article 3, if the negligent behaviour of the victim may lead to a reduction or a disallowance of compensation, in accordance with domestic law.

53. It should be noted however that this must be a culpable behaviour and that the non-culpable behaviour of the victim will not affect his or her right to compensation.

54. Judges should therefore evaluate the behaviour of the victim in order to ascertain whether or not it constituted a culpable behaviour.

55. Moreover, the degree of culpable behaviour of the victim should be taken into account, as regards his or her contribution to the damage and to its aggravation.

56. It will be up to the judge to establish, in the light of the circumstances which surrounded the act of corruption, the amount of the reduction of the compensation. The judge may even decide that, in the light of the culpable behaviour of the victim, no compensation is to be awarded.

57. For example, employers who leave complete responsibility for dealing with large sums of money to employees, who are also in charge of negotiating certain contracts, without exercising, or having somebody else exercise, proper control over the conditions for the awarding of contracts or whether the contract is awarded to a suitable company may be accused of culpable behaviour which has contributed to the damage.

58. If, after having discovered that an employee had already paid a bribe, the employer did not take the necessary measures to avoid a repetition of the events, his or her claim for compensation might be reduced or even rejected owing to the employer's contribution to the aggravation of the financial damage suffered by the company.

### **Article 7 – Limitation periods**

59. It is widely accepted in most jurisdictions that the ability to take civil proceedings for compensation should be subject to some time limitation, so as to provide a degree of certainty for plaintiffs and defendants about the risks of litigation. The details vary from country to country, but in general limitation rules require plaintiffs to commence proceedings within a fixed period of becoming aware of the act which gives rise to the claim or of the damage. Most countries also prescribe a longer time period beyond which proceedings may not be commenced, regardless of the plaintiff's date of knowledge.

60. Article 7 of the Convention applies these general principles to corruption claims. Recognising that different countries fix different limitation periods, sometimes varying between different types of cases, the Article does not prescribe a fixed period that must apply to corruption cases. Once the plaintiff has become aware or should have become aware that damage occurred or that an act of corruption has taken place, and of the identity of the responsible person, it is necessary to give the plaintiff at least 3 years to bring an action, owing to the nature of corruption, the difficulty of detection and investigations in order to obtain the information to support the claim. This provision allows Parties either to provide in their internal law that the limitation period starts from the moment when the plaintiff becomes aware of the act of corruption or of the damage. Parties may also provide that the limitation period starts from the moment in which the plaintiff has become aware of both the damage and the act of corruption. In any event, the knowledge of the identity of the responsible person is a requirement which derives from general principles of civil law. Questions of balance and fairness (e.g. the defendant may not have access to the evidence after a great number of years) lead to the conclusion that the absolute bar on commencing proceedings should not come into effect before the expiry of 10 years of the corrupt act. Paragraph 1 of Article 7 makes these provisions.

61. Arrangements for suspending or interrupting limitation periods are also different from country to country, and are closely bound up with other aspects of domestic procedures for the administration of civil justice. It is not necessary or desirable to require a common approach for corruption cases, and paragraph 2 of Article 7 so provides. The expression "if appropriate" is necessary to recognise that different States have different rules about which periods may be suspended or interrupted.

62. Furthermore, it should be noted that, in cases of several acts of corruption, Parties are free to determine the date in which the act of corruption occurred which is relevant for counting the limitation period.



### **Article 8 – Validity of contracts**

63. Paragraph 1 of this article provides that any contract or clause of a contract providing for corruption shall be null and void. Indeed, in most European countries, the contract the cause of which is illegal is null and void.

64. Paragraph 2 of this article strengthens the civil law application to the fight against corruption by providing for an additional remedy to be available to those who have suffered damage as a result of an act of corruption. Notwithstanding the right to sue for compensation for damage, any party whose consent to enter into a contract has been undermined by an act of corruption, shall have the right to apply to Court for the contract to be declared void. It remains open to the parties concerned to continue with the contract if they so decide. The drafting clearly provides that the applicant for such a declaration must be one of the parties to the contract. It remains for the court to decide on the status of the contract, having regard to all the circumstances of the case

65. It should be noted that, as it is clear from the text of this provision, Parties are not obliged to provide in their internal law for the possibility for third parties to ask for the contract to be declared null and void. It is clear that nothing prevent Parties from going further than the content of this provision, if they so wish, by recognising the right of interested persons to request the contract to be declared null and void. In any event, persons who have a legitimate interest may, under other provisions of this Convention (e.g. Articles 3 and 4) bring an action for compensation for damage resulting from an act of corruption.

### **Article 9 – Protection of employees**

66. This article deals with the need for each Party to take the necessary measures to protect employees, who report in good faith and on the basis of reasonable grounds their suspicions on corrupt practices or behaviours, from being victimised in any way.

67. As regards the necessary measures to protect employees provided for by Article 9 of the Convention, the legislation of Parties could, for instance, provide that employers be required to pay compensation to employees who are victims of unjustified sanctions.

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

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

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

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

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

#### **Article 10 – Accounts and audits**

73. Article 10 recognises that national laws on accounts and audits are important tools for identifying and combating corruption. Stringent regulations on accounts and audits may help prevent and discover accounting irregularities such as inadequately identified transactions and liabilities, recording of non-existent expenditure, false documents and off-the-book accounts.

74. Article 10 is inspired by the Fourth Council Directive on the annual accounts of certain types of companies (78/660/EEC, Article 2, paragraph 3), the Seventh Council Directive on consolidated accounts (83/349/EEC, Article 16, paragraph 3) and the Eighth Council Directive on the approval of persons responsible for carrying out the statutory audits of accounting documents (84/253/EEC, Article 1, paragraph 1, letter a). This article aims to ensure effective procedures without specifying any legal requirements.

75. Paragraph 1 relates to the annual accounts of companies which comprise the balance sheet and other financial statements, the profit and loss account and its appendices. In order to make the fight against corruption more effective, annual accounts should give a true and fair view of all aspects of companies' financial situation.

76. Paragraph 2 underlines the central role of auditors in the fight against corruption. As part of the annual account, the balance sheet is a survey of assets and liabilities at a particular point of time. The provision refers to independent external audits, as well as internal company controls.

#### **Article 11 – Acquisition of evidence**

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

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

79. It should also be noted that the aim of the procedure referred to in Article 11 of the Convention should mainly be the acquisition of documentary evidence during civil proceedings relating to corruption. In particular, by the use of the documents referred to in Article 10, victims of corruption may be in a better position to prove that an act of corruption has taken place.

#### **Article 12 – Interim measures**

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

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

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

83. The measures referred to in this article aim mainly at:

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

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

### **Article 13 - International co-operation**

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

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

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

88. However, the Convention deliberately does not address these questions. Indeed, Article 13 of the Convention requires Parties to co-operate, whenever possible, in accordance with existing and relevant international legal instruments in these fields, such as the Brussels and Lugano Conventions on Jurisdiction and Enforcement of Judgements in Civil and Commercial Matters of 1968 and 1988 respectively, the 1965 Hague Convention on the Service Abroad of Judicial and Extra-Judicial Documents in Civil or Commercial Matters, the 1970 Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, the Hague Conventions on Civil Procedures of 1954 and 1980.

89. These Conventions, as well as those which are being negotiated in various international *fora* (such as the Hague Conference on Private International Law), constitute a sufficiently relevant *corpus iuris* which could and should be applicable also in corruption cases involving an international element. Those Parties to this Convention which are not yet Parties to these international instruments are invited to consider doing so whenever possible, in order to be able to comply with the provisions of Article 13 of this Convention.

90. However, although the drafters did not find it necessary to include any provision concerning specific questions of international co-operation relating to corruption cases, the co-operation required by Article 13 of the Convention has to be an effective one. It will be up to the GRECO to monitor the proper and effective implementation by Parties of this provision.

91. Moreover, the drafters of the Convention believed that Parties to this Convention, which have neither signed nor ratified the Conventions dealing with the subjects referred to in this provision, should endeavour to grant each other an equivalent level of mutual legal assistance in judicial matters in the fields covered by this Convention, even if it does not contain a specific legal obligation to that effect.

#### **Article 14 – Monitoring**

92. The implementation of the Convention will be monitored by the "Group of States against Corruption – GRECO". From the outset, the establishment of an efficient and appropriate mechanism to monitor the implementation of international legal instruments against corruption was considered as an essential element for the effectiveness and credibility of the Council of Europe initiative in this field (see, *inter alia*, the Resolutions adopted at the 19th and 21st Conferences of the European Ministers of Justice, the terms of reference of the Multidisciplinary Group on Corruption, the Programme of Action against Corruption, the Final Declaration and Action Plan of the Second Summit of Heads of State and Government). In Resolution (98) 7 adopted at its 102nd Session (5 May 1998), the Committee of Ministers authorised the establishment of a monitoring body, the GRECO, in the form of a partial and enlarged Agreement under Statutory Resolution (93) 28 (as completed by Resolution (96) 36). Member States and non-member States having participated in the elaboration of the Agreement were invited to notify their intention to participate in GRECO, which would start functioning on the first day of the month following the date on which the 14th notification by a member State would reach the Secretary General of the Council of Europe. Consequently, on 1 May 1999, Belgium, Bulgaria, Cyprus, Estonia, Finland, France, Germany, Greece, Iceland, Ireland, Lithuania, Luxembourg, Romania, Slovakia, Slovenia, Spain and Sweden, joined by Poland on 19 May 1999, adopted Resolution (99) 5 establishing the GRECO and containing its Statute.

93. The GRECO will monitor the implementation of this Convention in accordance with its Statute, appended to Resolution (99) 5. The aim of GRECO is to improve the capacity of its members to fight corruption by following up, through a dynamic process of mutual evaluation and peer pressure, compliance with their undertakings in this field (Article 1 of the Statute). The functions, composition, operation and procedures of GRECO are described in its Statute.

94. If a Signatory is already a member of GRECO at the time of ratifying the present Convention, the consequence will be that the scope of the monitoring carried out by GRECO will be extended to cover the implementation of the present Convention. If a Signatory or acceding State is not a member of GRECO at the time of ratification, acceptance or approval, this provision combined with Articles 15, paragraphs 3 and 4 or with Article 16, paragraph 2 imposes a compulsory and automatic membership of GRECO. It consequently implies an obligation to accept to be monitored in accordance with the procedures detailed in its Statute, as from the date in which the Convention enters into force in respect of that State or the European Community.

### III. Final clauses

95. With some exceptions, the provisions contained in this Section are, for the most part, based on the "Model final clauses for conventions and agreements concluded within the Council of Europe" which were approved by the Committee of Ministers of the Council of Europe at the 315th meeting of their Deputies in February 1980. Most of these articles do not therefore call for specific comments, but the following points require some explanation.

96. Article 15, paragraph 1 has been drafted on several precedents established in other Conventions elaborated within the framework of the Council of Europe, which allow for signature, before the Convention's entry into force, not only by member States of the Council of Europe, but also by non-member States which have participated in the elaboration of the Convention. These States are Belarus, Bosnia and Herzegovina, Canada, Georgia, the Holy See, Japan, Mexico and the United States of America. Once the Convention enters into force, in accordance with paragraph 3 of this article, other non-member States not covered by this provision may be invited to accede to the Convention in conformity with Article 16, paragraph 1.

97. Article 15, paragraph 3, requires 14 ratifications for the entry into force of the Convention. This is an unusually high number of ratifications for a civil law Convention drafted within the Council of Europe. The reason is that measures against corruption, particularly of international corruption, can only be effective if a high number of States undertake to take the necessary measures at the same time. It is widely recognised that corrupt practices bear an impact on international trade because they hinder the application of competition rules and undermine the proper functioning of the market economy. Some countries considered that they would penalise their national companies if they entered into international commitments against corruption without other countries having assumed similar obligations. In order to avoid becoming a handicap for the national companies of a few States Parties, the present Convention requires that a large number of States undertake to implement it at the same time. In addition, the number of ratifications required for the entry into force of this Convention is consistent with that provided in other Council of Europe instruments against corruption, such as the Partial and Enlarged Agreement establishing the "Group of States against Corruption – GRECO" and the Criminal law Convention on corruption (ETS No 173).

98. The second sentence of paragraphs 3 and 4 of Article 15 as well as of Article 16, paragraph 2, combined with Article 14, entail an automatic and compulsory membership of GRECO for States and the European Community, which are not already members of this monitoring body at the time of ratification, acceptance or approval. Therefore, it will not be possible to be a Party to this Convention without being a member of GRECO and without being submitted to its monitoring procedures. However, owing to the special nature of the European Community, the modalities of its participation in GRECO will be determined by a common agreement.

99. Article 16 has also been drafted on several precedents established in other conventions elaborated within the framework of the Council of Europe. The Committee of Ministers may, on its own initiative or upon request, and after consulting the Parties, which are not represented in the Committee of Ministers, invite any non-member State to accede to the Convention. This provision refers only to non-member States not having participated in the elaboration of the Convention.

100. In conformity with the 1969 Vienna Convention on the law of treaties, Article 19 is intended to regulate the relationship of the Convention with other treaties – multilateral or bilateral – or instruments dealing with matters which are also dealt with in the present Convention. Paragraph 2 of Article 19 expresses in a positive way that Parties may, for certain purposes, conclude bilateral or multilateral agreements, or any other international instrument, relating to matters dealt with in the Convention. The drafting makes clear, however, that Parties may not conclude agreements which derogate from the Convention. It is possible that the Parties submit themselves, without prejudice to the objectives and principles of this Convention, to rules on this matter within the framework of a special system which is

binding at the moment of the adoption of this Convention. This special regime applies to the European Community and to its member States, as well as to future member States from the date of their accession to the European Union. Paragraph 3 of Article 19 safeguards the continued application of agreements, treaties or relations relating to subjects which are dealt with in the present Convention, for instance in the European Community or in the Nordic co-operation.

101. The amendment procedure provided for by Article 20 does not prevent the Parties from introducing major changes into the Convention by means of protocols. Moreover, in accordance with paragraph 5 of Article 20, any amendment adopted after the adoption of this Convention, would come into force only when all Parties had informed the Secretary General of their acceptance. The procedure for amending the present Convention involves the consultation of non-member States Parties to it, which are not represented in the Committee of Ministers or the CDCJ.

102. Article 21, paragraph 1, provides that the CDCJ should be kept informed about the interpretation and application of the provisions of the Convention. Paragraph 2 of this article imposes an obligation on the Parties to seek a peaceful settlement of any dispute concerning the interpretation or the application of the Convention. Any procedure for solving disputes should be agreed upon by the Parties concerned.