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Summary Analysis of Selected Private Sector Bribery Cases

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Aim

The aim of this document is to analyse the extent to which the private sector bribery provisions included in Articles 7 and 8 of the Council of Europe’s Criminal Law Convention on Corruption (hereinafter referred to as “the Convention”) are adapted to dealing with actual private bribery cases encountered in GRECO member states and to identify any loopholes in the international and/or domestic legal framework and practice.

Methodology

The authors collected and analysed officially investigated private sector corruption cases in those GRECO member states who answered the Secretariat’s request for information of 6 January 2017. Out of the 11 countries which replied, seven – Croatia, Estonia, Greece, Lithuania, the Netherlands, Romania and Slovenia – sent a total of 28 examples of private-to-private bribery cases. Cyprus and Latvia noted they did not have such cases, while Finland sent statistics on cases. Sweden replied that they had no official statistics enabling the identification of such cases. Additional cases of interest in Italy and Switzerland were found through open sources and analysed. Finally, inputs from domestic investigators in the countries that replied to the questionnaire were also analysed and are reflected below.

Cases received

A majority of the private corruption cases received related to procurement and contracting. In the field of sports, most cases related to football match-fixing, in connection with betting.



Typology of selected private bribery cases

Type	Description
Contracting	<p>A company R. from a foreign country won the contract to supply welders for a major public project of a Thermal Power Plant. The defendant promised the head of company R. a financial reward if he chose to employ foreign welders supplied by the defendant. Nine natural and two legal persons were tried for the criminal acts of accepting illegal gifts. The bribes were meant to employ welders and arrange for their accommodation and transportation.</p> <p><u>Sentence:</u> the defendant who supplied the welders pleaded guilty and was sentenced to six months in prison and fined 5000 Euros.</p>
Contracting	<p>Five defendants (the president of the management board of an electricity company and four sub-contractors) were tried for setting up and implementing a system of commissions of 3% of the contracts' value on construction works, corresponding to over 120.000 Euros, which were used to finance a political party. This was done at the request of the party's treasurer, who was not tried. The 1st, 2nd and 3rd defendants, who were responsible persons in a legal entity performing economic business operations, requested and accepted a gift in return for concluding a deal. The 4th defendant, also a responsible person in a similar legal entity, promised and gave a gift as a counter favour for concluding a deal. The 5th defendant promised to a responsible person in a legal entity performing business operations, a gift as a counter favour for concluding a deal.</p> <p><u>Sentence:</u> the 1st, 2nd and 3rd defendants were each convicted to a prison sentence of 18 months, the 4th to a suspended prison sentence of 10 months and the 5th to a suspended prison sentence of 7 months. As a security measure, the 1st, 2nd and 3rd defendants were also forbidden to perform their duties of president/director/member of the company's management board.</p>
Contracting in retail	<p>Two top-level managers of the H Ltd – a wholesale company of food and beverages – made a proposal to the purchasing manager of a major retailer that the latter would receive a fixed amount of money each month, in case he did not insist on an extra price cut on the soft drinks sold by the retailer. The purchasing managers would have received 0.5 to 1 euro cent for each unit of goods sold according to the proposed transaction. The purchasing manager informed his employer, which was followed by investigation.</p> <p><u>Sentence:</u> the bribers received conditional prison sentences of three years and fines of respectively 4960 Euros and 4070 Euros, of which 1000 Euros was actually imposed. The legal person had to pay 20,000 Euros (only 0.14% of its sales revenue that year).</p>

<p>Match-fixing</p>	<p>B.G., financier and shareholder of a football club, offered 1,700,000 Euros (roughly 100,000 Euros each), to football players from a football team who were to play a match in the National Football Championship – First League, in order to obtain a favourable result in the match against the „R.B.“ team.</p> <p><u>Sentence:</u> prison sentences of two to three years, confiscation of 1,700,000 Euros.</p>
<p>Match-fixing</p>	<p>A defendant offered a goalkeeper a bribe in the amount between 60.000 to 80.000 Euros in order that the goalkeeper would ensure that his football club, when playing a match in the UEFA League against another country’s football club, lost by scoring at least two or three goals less. The bribe was offered because the defendant wanted to win bets he had placed at sports betting shops.</p> <p><u>Sentence:</u> the defendant pleaded guilty and received a conditional prison sentence.</p>
<p>Football broadcasting rights</p>	<p>Three executives of Company I. were convicted for embezzlement and deviously obtaining false documents to set up sham companies with the aim of diverting funds from the mother company. They had paid 87.5 million Euros in bribes to international sports federations officials to secure broadcasting rights of football events. The crux of the other charges was whether the payments were considered bribes or not. There were no doubts that payments were made but they were justified as necessary commissions. No convictions for sports federations’ executives for receiving bribes, although an internal investigation report later revealed that they had.</p> <p><u>Sentence:</u> unknown</p>
<p>Owner’s supervision</p>	<p>During the reconstruction works of the training centre, while carrying out their duty as owner’s supervision, representatives of the company “RE” asked the construction company for bribes of 50 000 Euros and 10 000 Euros for accepting the construction works “without complications”. They proposed intermediary for hiding the bribe, who accepted to sign a false contract with the construction company for providing consultation works. The construction company informed the police about the proposal.</p> <p><u>Sentence:</u> case still in pre-trial procedure</p>
<p>Getting a loan</p>	<p>DD, director of the bank and chairman of the credit committee of the same banking unit, requested and received a bribe of about 61 000 Euros from VO, an administrator of a company in the forms of a jeep and undue benefits in order for DD to assist VO in fraudulently obtaining multiple loans for the companies they represented and for himself a personal loan, totalling 410 000 Euros.</p> <p><u>Sentence:</u> sentences of 4 years and 18 months prison and confiscation of the amount of the bribe.</p>

<p>Media broadcasting</p>	<p>The program director of a commercial television channel was tried for promising that the shows of a media company would be purchased by his channel at the price asked by the company and broadcasted for a fee of 250 or 375 Euros for each broadcast, depending on the type of show. The director received a total amount of 67 500 Euros in bribes for these broadcasts between November 2004 and December 2007.</p> <p><u>Sentence:</u> prison sentence of 8 months, commuted in community service; confiscation of the bribe.</p>
<p>Expert opinion</p>	<p>The defendant, who was as an expert witness in the automotive field, solicited from the plaintiff a 3 000 Euros reward for himself in a corporate criminal case in exchange for producing a written expert opinion in his favour. In his report, he would corroborate an expert opinion from a German company which valued the damage on a vehicle at 10 000 Euros whereas he himself valued the damage at between 4 000 Euros and 5 000 Euros. The defendant was handed the reward required; however, he was apprehended by the police in the act of accepting the reward.</p> <p><u>Sentence:</u> suspended prison sentence of two years to be served by community service, and fine of 2,940 Euros.</p>
<p>Education</p>	<p>Parents of a pupil gave to a teacher in the exercise of his business activity (he had a full-time employment contract of indefinite duration with the Private School “[...]”, in which he was employed as Director-Coordinator of the International Baccalaureate Program), money ranging from 10 000 Euros per course up to 60 000 Euros, in order for the latter to provide some of the pupils, in advance of the Baccalaureate scheduled test date, with the answers of the exams in which they participated, in breach of his duties.</p> <p><u>Sentence:</u> unknown</p>



Article 7 – Active bribery in the private sector

Each Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law, when committed intentionally in the course of business activity, the promising, offering or giving, directly or indirectly, of any undue advantage to any persons who direct or work for, in any capacity, private sector entities, for themselves or for anyone else, for them to act, or refrain from acting, in breach of their duties.

Article 8 – Passive bribery in the private sector

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

When examining the cases received against the elements of the active and passive private bribery offences of articles 7 and 8 of the Convention, the following remarks may be made.

‘Persons who direct or work for, in any capacity, private sector entities’

In most of the cases analysed, the perpetrators appear to fall under the definition of persons who direct or work for private sector entities. The explanatory report to the Convention specifies that it covers the employer-employee relationship, but also other types of relationships, such as partners, lawyer and client and others in which there is no contract of employment. It can also include persons who do not work for a company, but can engage its responsibility, such as consultants, commercial agents, etc. The question may arise, however, in respect of the expert witness in a court case in one of the examples mentioned above. Given his/her status of independent witness, could it be considered that s/he has a relationship with the plaintiff – or with the court, which is not a private sector entity?

As for private sector entities, the explanatory report to the Convention mentions that it refers to any entity owned by private persons, even those with no legal personality. Thus it covers commercial companies, private schools and football clubs. In the expert opinion case again, it is not clear whether the bribe giver was an individual or whether he acted on behalf of a company, but both cases would fall under the scope of the Convention.

‘In the course of business activity’

According to the explanatory report of the Convention, the scope of Articles 7 and 8 was deliberately restricted to “the course of business activity”, in order to “focus on the most vulnerable sector, i.e. the business sector”. In a number of countries, sports activities are considered “non-profit oriented

activities” and, as such, are excluded from the provisions of private sector bribery under the Convention, although the explanatory report adds that state parties may wish to fill this gap by implementing the articles without the restriction to business activities – and several have done so. However, it is debatable whether professional sport remains a non-profit activity, bearing in mind the lucrative business (e.g., TV rights, sponsorships, publicity) surrounding it. The sports-related bribery cases received were legally qualified as bribery cases under their respective domestic legislations – except in one case, and legislation on private sector bribery has been amended since. In another case dealing with the designation of football referees, the perpetrators were convicted for fraud, as the court could not establish bribery. But the problem did not lie with the business activity restriction, as that country’s criminal legislation has specific match-fixing offences. It is interesting to note that one country reported on some sports bribery cases which were incriminated under the articles of the criminal code dealing with private sector bribery, which contain the restriction of ‘in the performance of an economic activity’.

‘Breach of duties’

The explanatory report of the Convention explains that this notion “does not aim only at ensuring respect for specific contractual obligations but rather to guarantee that there will be no breach of the general duty of loyalty in relation to the principal’s affairs or business”. It is also linked to the notion of secrecy, in that the undue advantage is obtained without the knowledge and approval of the employer or principal.

This restriction may cause difficulties in the field of sports, as it would require proving that a football player, for instance, has breached his/her duty of loyalty vis-à-vis his/her employer by underperforming in a match, without the latter’s knowledge and consent. Even more difficult would be the case of two football club managers fixing a game in their respective clubs’ interests. By extrapolating on the explanatory report, one could perhaps argue that such a manipulation breaches trust in the fairness of sport, but this interpretation would need to be confirmed by the courts.

Some domestic investigators (see below) have mentioned difficulties in establishing the element of breach of duties, because employees had vague or no job descriptions. Similarly, persons in positions of responsibility had a wide range of tasks and powers, making it more difficult to prove a breach of duties. Consultancy or expert jobs are also cited as a possible vehicle for undue payments, because of the difficulty to measure the service provided and thus the breach of duties. However, it should be noted that the explanatory report of the convention conceives the breach of duties in a very general manner as a breach of loyalty and trust. Therefore, requiring a precise list of tasks or responsibilities is overly formalistic view and unnecessary.

‘Other elements of the private bribery offences’

The other elements of the private bribery offences of articles 7 and 8 of the convention – namely ‘promising, offering or giving’ (active bribery), ‘request or receipt, acceptance of an offer or promise’ (passive bribery), ‘any undue advantage’, ‘directly or indirectly’, ‘for themselves or for anyone else’, ‘to act or refrain from acting’, ‘committed intentionally’ – also exist for public bribery offences and do not call for specific comments.

Investigations

Replies from investigators in the countries that provided cases indicate the following:

- ◆ While public corruption is considered unacceptable by society, attitudes towards private sector corruption are less stringent. Therefore police receives fewer reports, which makes evidence collection complicated.
- ◆ The difficulties in investigating private corruption are mostly of a practical nature. Reporting of corruption in the private sector is relatively rare and private entities generally treat this issue as "an internal affair". Participants in corruption schemes have often no interest to report them, because they benefit from them. Decision-makers in private companies fear that their business would be negatively affected if they reported. Employees avoid reporting as well for fear of losing their job or being stigmatised.
- ◆ An additional difficulty is that foreign or off shore companies are often used for corruption activities. This makes it easier to manipulate documentation and prolongs or blocks the investigation, as information has to be collected through mutual legal assistance from countries that are sometimes uncooperative.
- ◆ The "breach of duty" element is the most difficult to establish, given the large scope of powers held by authorised persons or the fact that employees have no precise job descriptions clearly indicating their attributions. The link between a bribe and an incriminating behaviour is also difficult to ascertain.
- ◆ With respect to international corruption in sport, co-operation with international organisations such as FIFA or UEFA has proved useful in investigating the frequent cases of illegal betting conducted electronically through third, non-European countries.

Conclusions

- ◆ This summary report gives only a partial view of the private sector bribery situation in GRECO members. A limited number of countries responded to the questionnaire, some answered that their statistics did not allow the identification of private sector bribery cases. By hypothesis, all cases received were the result of successful investigation and court proceedings. It would be interesting to examine the percentage of successful versus unsuccessful private sector bribery cases and whether it is significantly different from public sector bribery cases. It would also be interesting to examine the situation in countries other than those that replied to the questionnaire. Another emerging topic in this sector refers to the preventive tool of so-called compliance programmes for private entities; two parallel issues arise in this respect: 1. the effective role they are actually playing (impact assessment) as an anticorruption preventing instrument; 2. the safeguards in place, in the different legal systems, to ensure that they are not used as a defence to waive liability.

- ◆ All of the respondents mention receiving fewer reports on private sector bribery than on public sector bribery mostly due to (i) a different societal attitude towards private sector bribery which is perceived as “less serious” and (ii) reduced or no business interest in private sector entities to report private sector bribery cases.
- ◆ Difficulties stemming from the legal framework include the following:
 - no legal obligation to report private bribery occurrences (unlike for public sector bribery), gaps in the protection of whistle-blowers;
 - misuse of legal entities and use of jurisdictions where mutual legal assistance may prove difficult or impossible;
 - some elements of the private sector bribery offence contained in the Convention are difficult to ascertain. These include:
 - ◆ The notion of “breach of duties”. It is to be noted in this respect that some of the difficulties reported – vagueness or lack of job descriptions – seem to stem from a formalistic view of the notion of breach of duties. This view is not supported by the explanatory report to the Convention, which refers to a more general notion of breach of loyalty and trust. However, even this more general notion is sometimes difficult to establish, as it requires being able to measure in some way what the duty of loyalty and trust implies, in order to assess whether deliberate underperformance or action contrary to this duty of loyalty took place;
 - ◆ The element of “business activity” has been understood in some jurisdictions as not covering non-profit sectors such as sports. Some of the countries which reported bribery in the area of sports had a specific offence, such as match-fixing. However, some cases were also successful in a country where the relevant criminal code articles contain a limitation to “economic activities” which is similar to that of the convention.

