

# EUROPEAN PARLIAMENT



*s e s s i o n d o c u m e n t s*

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A4-0285/98

## REPORT

on the Communication from the Commission to the Council and the European Parliament on a Union policy against corruption (COM(97)0192 - C4-0273/97)S

Committee on Civil Liberties and Internal Affairs

Rapporteur: Mr Rinaldo Bontempi

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PE 226.841/fin.

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| • Consultation procedure<br>simple majority   | ***I Codecision procedure (first reading)<br>simple majority  |
| **I Cooperation procedure (first reading)<br>simple majority  | ***II Codecision procedure (second reading)<br>simple majority to approve the common position;<br>majority of Parliament's component Members to adopt a declaration of intended<br>rejection of the common position, and amend the common position or confirm its rejection |
| **II Cooperation procedure (second reading)<br>simple majority to approve the common position;<br>majority of Parliament's component Members to reject or amend the common position | ***III Codecision procedure (third reading)<br>simple majority to approve the joint text;<br>majority of Parliament's component Members to reject the Council text  |
| *** Assent procedure<br>majority of Parliament's component Members to give assent<br>but simple majority under Articles 8a, 105, 106, 130d and 228 EC                               |   |

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By letter of 23 May 1997 the Commission forwarded a Communication to the Council and the European Parliament on a Union policy against corruption (COM(97)0192 - C4-0273/97).

At the sitting of 13 June 1997 the President of Parliament announced that he had referred the Communication to the Committee on Civil Liberties and Internal Affairs as the committee responsible and to the Committee on Legal Affairs and Citizens' Rights and the Committee on Budgetary Control for their opinions. At the sitting of 5 November 1997 the Communication was also referred to the Committee on Development and Coopération for its opinion

At its meeting of 19 June 1997 the Committee on Civil Liberties and Internal Affairs appointed Mr Bontempi rapporteur.

The Committee on Civil Liberties and Internal Affairs considered the draft report at its meetings of 29 June and 22 July 1998.

At the latter meeting it adopted the motion for a resolution unanimously.

The following were present for the vote: d'Ancona, chairman; Reding, vice-chairman; Bontempi, rapporteur; Andersson (for Elliott), Berger (for Lindeperg), Caccavale (for Schaffner), Cederschiöld, Colombo Svevo, De Esteban Martin, Donnelly (for Deprez), Ford, Goerens, Gomolka (for Posselt), Mendes Bota, Nassauer, Oostlander (for Stewart-Clark), Pirker, Pradier, Roth, Wemheuer (for Terrón I Cusi) and Wiebenga.

The opinions of the Committee on Legal Affairs and Citizens' Rights, the Committee on Budgetary Control and the Committee on Development and Cooperation are attached.

The report was tabled on 24 July 1998.

The deadline for tabling amendments will be indicated in the draft agenda for the relevant part-session.

A  
MOTION FOR A RESOLUTION

**Resolution on the Communication from the Commission to the Council and the European Parliament on a Union policy against corruption (COM(97)0192 - C4-0273/97)**

The European Parliament,

- having regard to the Communication from the Commission of the European Communities to the Council and the European Parliament on a Union policy against corruption of 21 May 1997 (hereinafter referred to as the Communication), COM(97)0192 - C4-0273/97,
- having regard to the Treaty on European Union, in particular its Articles B, F, K.1(5) and (7) to (9), K.3(2) and K.6,
- having regard to the Treaty of Amsterdam signed on 2 October 1997, and in particular Articles 2, 6 and 29 of the thereby amended Treaty on European Union,
- having regard to the report of the High-Level Group on Organised Crime<sup>(1)</sup>, which was approved by the European Council meeting in Amsterdam on 16 and 17 June 1997, in particular Recommendation 6 of the Action Plan, which provides for the development of a comprehensive policy against corruption,
- having regard to the Convention on the protection of the European Communities' financial interests<sup>(2)</sup>, to its Protocols, adopted by the Council on 27 September 1996<sup>(3)</sup>, on 29 November 1996<sup>(4)</sup> and on 19 June 1997<sup>(5)</sup> and to the Convention on the fight against corruption involving officials of the European Communities or officials of the Member States of the European Union, adopted by the Council on 26 May 1997<sup>(6)</sup>,
- having regard to the common position of 6 October 1997 defined by the Council on the basis of Article K.3 of the Treaty on European Union on negotiations in the Council of Europe and the OECD relating to corruption<sup>(7)</sup>, the Second Joint Action of 13 November 1997 defined by the Council on the basis of Article K.3 of the Treaty on European Union on negotiations held in the Council of Europe and the OECD on the fight against corruption<sup>(8)</sup>, and the common position of 25 May 1998, defined by the Council on the basis of Article J.2 of the

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<sup>(1)</sup> OJ C 251, 15.8.1997, p. 1.

<sup>(2)</sup> OJ C 316, 27.11.1995, p. 48.

<sup>(3)</sup> OJ C 313, 23.10.1996, p.2.

<sup>(4)</sup> OJ C 151, 20.5.1997, p. 1.

<sup>(5)</sup> OJ C 221, 19.7.1997, p. 11.

<sup>(6)</sup> OJ C 195, 25.6.1997, p.1.

<sup>(7)</sup> OJ L 279, 13.10.1997, p.1.

<sup>(8)</sup> OJ L 320, 21.11.1997, p.1.

Treaty on European Union, concerning human rights, democratic principles, the rule of law and good governance in Africa<sup>(1)</sup>,

- having regard to its numerous resolutions on aspects of the fight against corruption, in particular its resolutions of 15 December 1995 on combating corruption in Europe<sup>(2)</sup>, 15 November 1996 on the draft Council Act drawing up the Convention on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union<sup>(3)</sup>, 20 November 1997 on the Action Plan to combat organised crime<sup>(4)</sup>, 20 November 1997 embodying Parliament's opinion on the draft joint action adopted by the Council on the basis of Article K.3 of the Treaty on European Union, on making corruption in the private sector a criminal offence<sup>(5)</sup>, of 17 February 1998 on the Commission's conduct in respect of alleged fraud and irregularities in the tourism sector<sup>(6)</sup> and on the Court of Auditors' Special Report No 3/96 on tourist policy and the promotion of tourism, together with the Commission's replies<sup>(7)</sup>,
- having regard to the final declaration of the second summit of heads of state and government of the Council of Europe of October 1997, the 'Twenty guiding principles for the fight against corruption' adopted by the Committee of Ministers of the Council of Europe with Resolution (97) 24, and Resolution (98) 7 authorising the partial and enlarged agreement establishing the 'Group of states against corruption – GRECO',
- having regard to the OECD Convention of 17 December 1997 on combating bribery of foreign public officials in international business transactions,
- having regard to the Communication from the Commission of the European Communities on 'Public Procurement in the European Union' of 11 March 1998 (COM(98)0143),
- having regard to the Chair Conclusions from the Conference 'Achieving a Corruption-Free Commercial Environment - the EU's Contribution', which was co-hosted by the UK Presidency of the EU, the European Parliament and the Commission on 14-15 April 1998,
- having regard to Council Decision 98/344/EC of 27 April 1998 concerning the conclusion of the agreement amending the Fourth ACP-EC Convention of Lomé, signed in Mauritius on 4 November 1995,
- having regard to the conclusions of the Presidency at the European Council meeting of 15 and 16 June 1998 in Cardiff, which include a call for the Council to adopt the common position concerning corruption in the private sector by December 1998,

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<sup>(1)</sup> OJ L 158, 2.6.1998, p. 1.

<sup>(2)</sup> OJ C 17, 22.1.96, p. 443.

<sup>(3)</sup> OJ C 362, 2.12.1996, p. 321.

<sup>(4)</sup> OJ C ... (A4-0333/97).

<sup>(5)</sup> OJ C ... (A4-0348/97).

<sup>(6)</sup> A4-0049/98.

<sup>(7)</sup> A4-0040/98.

- having regard to the report of the Committee on Civil Liberties and Internal Affairs and the opinions of the Committee on Legal Affairs and Citizens' Rights, the Committee on Budgetary Control and the Committee on Development and Cooperation (A4-0285/98),
- A. whereas corruption in the public sector endangers the functioning of the democratic system and thus undermines citizens' confidence in the democratic rule of law,
- B. whereas, further, even in the private sector corruption can have a corrosive impact on the fairness of free competition and on the credibility and financial conduct of businesses,
- C. whereas there are numerous connections between corruption and organised crime, which can entail special dangers for the democratic rule of law and the market economy, particularly if organised crime succeeds with the help of corruption in penetrating public administration or the legal system, because in so doing they gain access to important information and thus can increase their opportunity for exploiting legal structures for illegal purposes,
- D. whereas the widespread diffusion of corruption in a specific area of the law governing social, political or economic affairs is often a sign of the need for law reform, so that those aspects which indirectly allow or encourage abuse of the law can be corrected,
- E. whereas corruption is a worldwide problem requiring comprehensive and wide-ranging measures to prevent and counteract it, which must be taken at world, European, national, regional and local level in a comprehensive, integrated and flexible strategy,
- F. whereas corruption has in recent years become a central issue in the debate on legal policy at international level, and in that time there have been repeated calls for efficient, internationally applicable action against corruption from various bodies - albeit with varying emphasis - such as the OECD, the Council of Europe, the World Bank and the UN Conference on Trade and Development (UNCTAD), but also from private interest groups such as the International Chamber of Commerce and NGOs such as Transparency International,
- G. whereas it is in the EU's vital interest - as the Commission has pointed out - to develop a consistent anti-corruption strategy inside and beyond its frontiers that will also cover the fields of international trade and competition, and that of financial and technical assistance,
- H. whereas this consistent European anti-corruption strategy is also needed because, although each of the EU Member States has anti-corruption measures of its own, they diverge markedly in their legal impact, range and practical application, resulting in a disparate and patchy anti-corruption system for the EU as a whole,
- I. whereas - partly because of the increasing privatisation of public-sector activities and the growing pace of economic integration - anti-corruption measures must not be confined any longer to the national public sector, but every EU Member State must necessarily carry out a programme of legislative simplification and debureaucratisation, as well as adapting its sanctions system to the changing circumstances; this will include the threat of criminal action against any improper influence on a decision-making process in connection with public or private activity at home or abroad, whether exercised by granting a pecuniary advantage (active bribery) or by accepting one (passive corruption, corruptibility).

- J. whereas, for more efficient action to combat corruption, criminal penalties must be accompanied by penalties of an administrative, civil and disciplinary kind,
- K. whereas the introduction of transparency, by simplifying the law and reducing red tape, and effective control mechanisms for all significant decision-making processes can as a general principle of democracy make a substantial contribution to preventing corruption, because it prevents creating the ideal conditions for corruption to spread and increases the probability of its discovery - and punishment,
- L. whereas corrupt practices significantly reduce the impact of aid by diverting funds and by leading towards the selection of projects which are less relevant to local realities and the selection of contractors who are less able to attain cooperation objectives efficiently; considers, therefore, that a consistent European anti-corruption strategy should also cover relations with third countries; this will include demanding, in all agreements with third countries for assistance, cooperation and development, compliance not only with the general principles of transparency and independent justice, but also with a good governance clause which, together with respect for human rights, democratic principles and the rule of law, must become an essential component of any future agreement; in addition, the application of these principles should be extended to all trade relations with third countries, partly to ensure that private companies do not counteract and thus diminish the EU's anti-corruption efforts,
- M. emphasises that the Commission delegations in third countries, acting in conjunction with specialised units to be set up within the Commission directorates-general responsible for development aid and with the Commission's anti-fraud coordination unit (UCLAF), have a major role to play in the efficient implementation of an anti-corruption policy,
- N. whereas most regrettably - and in spite of harsh international criticism - many EU Member States are still encouraging corruption in private business activity, as they not only do not prohibit bribery in this area, but actually promote it indirectly by making it tax-deductible; considers that the legal and tax provisions of certain Member States which allow tax deductibility for bribes paid in third countries are totally contrary to the Treaty, particularly as regards the provisions concerning aid granted by States, since they distort or threaten competition by favouring particular undertakings or products; points out that the possibility of tax deductibility for bribes may be incompatible with the professed aims of the code of conduct for business taxation recently adopted by the Council on 1 December 1997 and calls for the Council to pay special attention to this problem when developing the code in future,
- O. whereas many internationally active companies and those representing their interests, most especially the International Chamber of Commerce, are calling for a Europe-wide, comprehensive and consistent anti-corruption strategy in the private sector, partly in order to supplement the various company self-regulating systems, the 'corporate codes of conduct', and safeguard their operation,
- P. whereas there is a particularly urgent need to tackle corruption in the political sphere, by guaranteeing the transparency of political parties' general funding methods, thus impeding the corruption of politicians and political parties,

- Q. whereas the European institutions' internal rules for safeguarding the transparency of the decision-making process, concerning in particular finance and financial transactions, are still inadequate,
- R. whereas the Commission in particular, in view of its many areas of activity at risk from corruption, needs to have a coordinated, systematic anti-corruption plan,
- S. whereas, more particularly, the measures that need to be taken to prevent and effectively tackle corruption - apart from the principle of free competition - also serve the interests of the citizen, who frequently has to bear the cost of over-priced, low-quality or even unnecessary goods, suffer from the impaired efficiency of authorities or administrative processes and, as a result of the destabilising of democratic structures, face personal risks that not infrequently lead to a restriction of civil liberties,
- T. whereas in accordance with Article 29 of the EU Treaty, in the wording amended by the Treaty of Amsterdam, preventing and combating bribery and corruption is an essential condition for gradually establishing an area of freedom, security and justice,
1. Strongly supports the Commission's call, in its Communication of 21 May 1997, for developing practical and coordinated anti-corruption measures and asks it to put forward the specific proposals within its terms of reference as soon as possible;
  2. Welcomes the Commission's proposals in its Communication of 11 March 1998 on the improvements to be made to public contracts in the European Union, since correct, transparent and non-discriminatory tender procedures impede corruption and other kinds of misuse of public resources; urges the Commission to put forward legislative proposals to clarify the conditions of access of tenderers to public procurement procedures, with the aim of eliminating any person convicted of corruption;
  3. Calls on the Commission also to develop practical anti-corruption measures for other areas susceptible to corruption (such as the directive on accounting methods), to counteract the emergence of corruption-oriented 'cultures' by adequate training programmes for persons at risk or by wide-ranging campaigns to increase public awareness, and - once the Treaty of Amsterdam enters into force - to make immediate use of its right of initiative in the field of police and judicial cooperation in criminal matters to improve the fight against corruption in Europe;
  4. Calls on the Commission to report to Parliament regularly on implementation of the calls contained in the Commission Communication on an EU anti-corruption policy;
  5. Calls on the Commission to devise a comprehensive anti-corruption plan, based on a review of national and international experience, that will
    - prevent, detect and punish corruption,
    - cover all areas at risk from corruption, from the provision of funds of any kind up to the decision on financially significant approvals,
    - and provide for the establishment of a central anti-corruption agency,

and to submit this plan to Parliament and report at regular intervals on its further progress; calls on the Commission to draw up a timetable indicating for each measure proposed the date by which it should be introduced; also calls on the Commission to submit this timetable to Parliament as soon as possible, and by 1 January 1999 at the latest;

6. Calls on the Commission, within the context of its policy against corruption, to come forward with specific proposals aimed at combating more effectively corruption within the EU institutions - with due regard for the principles of transparency in decision-making, simpler law, less red tape, effective internal control, and clear responsibilities that are accessible to review by criminal, civil and administrative justice - addressing in particular:
  - (a) the status of internal bodies within the EU institutions responsible for investigating allegations of internal corruption,
  - (b) provisions covering the attribution of criminal jurisdiction over EU officials suspected of corruption,
  - (c) cooperation between EU institutions and national investigative and judicial authorities in cases of alleged internal corruption,
  - (d) the principle of official immunity and the mechanisms for its waiver,
  - (e) the supervisory role of the Court of Auditors and the European Parliament,
  - (f) the importance of presenting a strategy on how increased transparency can be used as a method for preventing and suppressing corruption;
7. Calls on the Commission to give effect to the 'essential principle' of good governance in its policy for cooperation with third countries by universally including special anti-corruption clauses in agreements, providing dissuasive sanctions that are distinct from penal sanctions (the suspension or cancellation of agreements and funding, or the keeping of centralised registers) and strengthening the monitoring and assessment machinery within the Commission itself;
8. Demands that the Commission name explicitly those Member States which permit tax deductions for the bribery of foreign officials; calls upon the Commission to take appropriate action, possibly in form of legislative proposals, with the aim of abolishing tax deductibility of bribes paid to foreign officials;
9. Calls on the Member States resolutely to advance the campaign against corruption at international level and take a credible and leading role in drafting and enforcing international commitments; this would mean their:
  - abolishing from their legal systems and fiscal practices without exception, at an early date and by 1 January 1999 at the latest, any opportunities to make the funding of bribery tax-deductible, without requiring the abolition of such practices to be combined, as happens in some Member States, with conviction of the bribing and bribed parties in a court of law;
  - pushing forward the Council of Europe negotiations on the anti-corruption convention currently under discussion, so that it can be signed by the end of 1998;
  - ratifying the following conventions by the end of 1998:
    - <sup>a</sup> Convention of 26 July 1995 on the protection of the European Communities' financial interests, with its Protocols of 27 September 1996, 29 November 1996 and 19 June 1997;

- Convention of 26 May 1997 on the fight against corruption involving officials of the European Communities or the Member States;
  - OECD Convention of 17 December 1997 on combating bribery of foreign public officials in international business transactions;
10. Calls on the Member States and the European institutions to give detailed thought to the suitability of the laws and policies governing the social, political and economic fields in which corruption thrives, with the aim of assessing the possibility of fighting corruption by removing those aspects that encourage or allow it;
  11. Calls on the Council to comply without delay, and by the end of 1998 at the latest, with the guidelines on anti-corruption matters in the Action Plan for combating organised crime, approved by the European Council in Amsterdam on 17 June 1997; this will mean ensuring that the Council adopts the Joint Action on making corruption in the private sector a criminal offence, and in so doing gives due attention to Parliament's views<sup>(1)</sup>;
  12. Calls on the Council, the Commission and the Member States to give priority, as part of their responsibilities in the campaign against corruption, to the following areas:
    - preventing corruption, for instance by means of transparency, simplification and debureaucratisation in all important administrative decisions including financial control, codes of conduct in public administration and private industry, as far as possible abolishing bureaucratic procedures and guaranteeing transparency concerning the financial circumstances of ministers, MPs and people in administrative office who are exposed to risk;
    - punishing corruption in all its guises (active and passive corruption, in the public and private sector, at home and abroad, committed by natural and legal persons; the laundering of money from bribes); here care should be taken to ensure that the opportunities for administrative, civil and disciplinary sanctions are brought into play, alongside penalties under criminal law, in particular by providing for compensation of the damage done to the public budget;
    - including the principles of responsible government, transparency and judicial independence as a condition for concluding trade agreements and agreements on assistance, cooperation and development between the EU and third countries;
  13. Calls on all political parties, at local, regional, national and European level, to make their financial conduct - especially in the case of political parties' donations - transparent so as to preclude any suspicion of corruption; calls further on all political institutions to ensure that politicians and other decision-makers cannot misuse their professional immunity as a shield from criminal prosecution when there are grounds for the suspicion of corruption;
  14. Instructs its President to forward this resolution to the Council, the Commission, and the governments and parliaments of the Member States and the applicant countries.

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<sup>(1)</sup> OJ C 371, 8.12.1997, pp. 165 & 195 (A-1-0348/97).

## B EXPLANATORY STATEMENT

### 1. The phenomenon of corruption

The word 'corruption' originally meant physical or moral disintegration. Its modern primary usage covers bribery (in the active sense) and corruptibility (the passive sense). Society first attempted to ensure that public offices followed objective criteria in their activity by outlawing corruption; government decisions should not depend on personal financial gain, but should follow factual considerations on the principle of equal treatment.

Corruption is not a 'modern' phenomenon: it was well known in antiquity. Recent excavations by a Dutch team of archaeologists about 500 km north-east of Damascus have unearthed an ancient Assyrian government centre that contains an archive dating back to 1300 BC. This more than 3300-year-old archive - a kind of criminal record office - also contains details of civil servants who had taken bribes. The archaeologists found that they included senior officials, even identifying the name of an Assyrian princess. These and other archaeological finds may serve to show that society has long recognised the problem of corruption, in an extremely wide range of cultures, and that even those who occupy the highest office have been susceptible to bribes.

Reassuring as this may seem today, we would be wrong to take a fatalistic view of corruption by saying it has always happened, and always will. For we cannot deny that the conditions and organisations in which corruption can arise and grow have changed radically since the days of the Assyrians. Moreover, the dangers that are associated with corruption today reach a great deal further than they did 3000 years ago. The phenomenon of 'casual corruption', its traditional form, continues to occur spontaneously, and without the underlying structure to take it beyond the individual case. But a form of 'industrial or structural corruption' has also emerged in which corrupt practices regularly occur in quite specific industries, such as the building industry or the arms trade. And finally we also refer to 'systemic corruption' when contagion spreads to the political system. Recent inquiries, for instance, have frequently detected links between corruption and organised crime. If the latter succeeds - with the help of corruption - in penetrating government or the legal system, this particularly endangers the democratic rule of law and the market economy. Corruption then enables organised crime to obtain important information and quite often increases its chances of exploiting the legal system for illegal purposes. But we can also see these links between corruption and organised crime as a special criminal technique for penetrating political and administrative circuits in order to gain power.

Our understanding of the nature and scale of corruption, however, rests on relatively little hard evidence. The prosecution services generally uncover only a small proportion of corruption; but there is plenty of evidence of a large grey area beyond this small area of clarity. The main reason lies in the fact that corruption is organised in a different way from 'normal' offences: unlike the protagonists of conventional crime, the givers and takers of bribes are not so much offenders and victims as a joint enterprise, in which both sides stand to benefit: the giver gets the contract, and the taker gets the money. Both are offenders; neither is the victim. This means that both have a vested interest in ensuring that no one else finds out about the bribe; there is no documentation on the offence, or generally it is carefully encoded, those involved keep quiet and do their best to hush the matter up. This ultimately means that uncovering corruption usually calls for special efforts.

### 2. Legal situation in the EU Member States

A survey carried out in the course of drafting this report of anti-corruption measures in the Member States<sup>(1)</sup> broadly showed a wide variety of specific criminal offences. While the corruption of domestic civil servants carries the threat of imprisonment (albeit of widely varying duration) in all the Member States, the definitions of the offence diverge. Some Member States provide for prosecution even where their civil servants merely receive a financial advantage, while others also require that advantage to be related to an administrative action in breach of duty. Relatively few countries have special criminal offences to deal with corruption in the private sector. The situation varies just as widely with the prosecution of legal persons. Further wide discrepancies arise in the enforcement of politicians' and government ministers' criminal liability (immunity provisions) and the possibility of prosecuting the corruption of foreign or international civil servants.

Finally, the Member States show a totally disparate approach in their fiscal treatment of unlawful payments. In some Member States such payments cannot be offset against tax, while others treat them as quite normal business expenses; in some cases they require the name of the person bribed in order to declare the bribe tax-deductible. In any of these cases, companies based in such Member States which allow tax-deductibility for bribes have a substantial competitive advantage. This goes against the requirements of free and fair competition.

The survey on 'The financing of political parties in the Member States of the EU'<sup>(2)</sup> indicates similar disparities in this area. We notice major differences in approach (public support, private assistance, or hybrid systems) and in the transparency of political parties' financial conduct.

### 3. Why action is needed at international level

As international economic integration has gathered pace, corruption has become a cross-border problem. The risks to which corruption gives rise, ranging from international distortion of competition through the purchase of over-priced goods and services to the undermining of democratic structures and their practical functioning, are growing more and more apparent. Against this background the view has begun to prevail at international level in recent years that individual countries which attempt to tackle corruption with methods designed only for the national context all too soon come up against insuperable barriers. It has also become plain that individual countries or companies cannot afford to pursue a consistent anti-corruption policy on their own. This widespread recognition has led to a number of international initiatives, overlapping in some areas, that endeavour to set up practical measures to prevent and counteract cross-border corruption:

- In 1977 the International Chamber of Commerce drew up its *Rules on extortion and bribery in international business transactions*, revising them in 1996 in the light of experience;
- The UN General Assembly adopted an Action Plan against transnational corruption in 1996;
- The World Bank and the International Monetary Fund tightened up their rules on the prevention of corruption in the allocation of credit in 1997;
- The OECD, which includes all the EU Member States amongst its members, adopted recommendations in 1994 and 1997 to combat the bribing of foreign civil servants in business

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<sup>(1)</sup> EP - DG for Research, working paper, Legal Affairs Series. JURI-101XX, 03-1998.

<sup>(2)</sup> EP - DG for Research, working paper, Political Series, W - 34.

transactions. On 17 December 1997 the *Convention on combating bribery of foreign public officials in international business transactions* was signed under the auspices of the OECD. Only recently, on 23 April 1998, further recommendations on *Improving ethical conduct in the public service* were adopted by the same body;

- The Council of Europe's Committee of Ministers adopted a detailed anti-corruption action plan in 1996. This forms the basis for current deliberations on a comprehensive anti-corruption convention intended for adoption in 1998;
- In the EU itself an additional protocol to the agreement on the protection of the European Communities' financial interests was adopted on 27 September 1996, covering bribery involving national or Community civil servants in which the Community's financial interests are impaired<sup>(1)</sup>. A Convention on the fight against corruption involving officials of the European Communities or officials of the Member States of the European Union was signed on 26 May 1997<sup>(2)</sup>. The Action Plan to combat organised crime approved by the European Council on 17 June 1997<sup>(3)</sup> stresses the need to develop a comprehensive anti-corruption policy in the EU. Finally, on 6 October 1997<sup>(4)</sup> and 13 November 1997<sup>(5)</sup> the Council adopted common positions setting out its views on the negotiations in the Council of Europe and the OECD on the fight against corruption. And a Joint Action on making corruption in the private sector a criminal offence is still at present pending with the Council.

#### **4. The Commission Communication: 'A consistent strategy is needed'**

The Commission points out that each of the many anti-corruption activities devised by international institutions to fight corruption only covers certain aspects of the campaign, which means that we now need more closely coordinated measures as part of an integrated approach. It is in the EU's interest to draw up a consistent strategy to fight corruption inside its frontiers and beyond, covering the fields of international trade and competition, financial aid to third countries, the EU's own resources, development policy and preparations for accession.

For the EU's internal area the Commission does not advocate full harmonisation of national anti-corruption law and action - in spite of the many differences in national legal systems - but names certain key areas in which it would like to see a joint approach at Union level. In the case of third countries the Commission would like to strengthen prevention. This will include promoting appropriate conditions to establish transparency and safeguard responsible government and judicial independence. It also wants to expand technical assistance for the introduction of suitable legal instruments and defective procurement and control machinery.

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<sup>(1)</sup> OJ C 313, 23.10.1996, p. 1.

<sup>(2)</sup> OJ C 195, 25.6.1997, p. 1.

<sup>(3)</sup> OJ C 251, 15.8.1997, p. 1.

<sup>(4)</sup> OJ L 279, 13.10.1997, p. 1.

<sup>(5)</sup> OJ L 320, 21.11.1997, p. 1.

## **5. Parliament's view of the Communication**

Current definitions of corruption vary widely in the EU Member States, and anti-corruption policies diverge. But apart from the legal differences, we must also consider differences in the practice of prosecution. As the evidence shows, here the actual situation in the EU diverges even further. For these reasons Parliament unreservedly supports the Commission's policy approach, of developing practical and coordinated measures in the EU as part of an overall policy.

But this raises a major problem in the Communication: it contains only vague proposals for effectively preventing and fighting corruption. What we need is a policy for comprehensive corruption prevention, with a detailed list of practical options for action, to proceed from words to deeds.

## **6. Further EU priorities in the anti-corruption campaign**

The Commission, British Council Presidency and Parliament jointly held a two-day conference on *'Achieving a corruption-free commercial environment - the EU's contribution'* on 14-15 April 1998. The conference benefited from the attendance of a number of experts in the fields of research, industrial lobbies, business and the NGOs (particularly Transparency International), because they were able to provide an on-going interpretation of the impact of each of the proposals in specific cases. The conference chair's conclusions are attached. In the light of the conference the EU should now be concentrating specifically on a few particularly important measures in the anti-corruption campaign, as set out below.

### **6.1. The Commission's tasks**

As its main task the Commission should be developing practical proposals to prevent corruption by building on the survey set out in its communication. The communication on improving public procurement in the European Union of 11 March 1998 takes a first step in this direction, which many others should be following up. Measures in the field of education, training and in-service training come to the fore: people at risk, for instance, should receive special instruction. It would also make sense to carry out EU-wide public information campaigns. Finally, the Commission should make use of the right of initiative it will acquire when the Amsterdam Treaty enters into force in the field of police and judicial cooperation in criminal matters to improve the fight against corruption in Europe; this might include proposals to improve crime detection in the Member States, reduce legal differences at European level in the field of criminal law or encourage consistent use of the range of measures available to criminal justice in the Member States.

But problems will always arise when we demand certain standards from other institutions with which we do not fulfil, or sufficiently fulfil, ourselves. For this reason the Commission should also ensure that its own internal decision-making processes include a system for preventing and combating corruption, and one that works. It could significantly improve the transparency of its internal decision-making processes; and there are many opportunities for improving its internal control methods. Finally, the Commission must move towards an organisational structure with clear personal responsibilities which are also accessible to review by external bodies. When this discloses conduct in breach of criminal law the Commission must take steps to ensure that a criminal prosecution, with due penalties, can take place. Protecting its administrators through immunity from prosecution may be justifiable in many areas of the Commission's activities; but it undoubtedly fails in its purpose if it is used to prevent the criminal liability of persons whose conduct has broken the law.

## **6.2. Tasks of the Member States**

The EU Member States should be taking a leading role in the fight against corruption at international level. But that will only happen if they are credible themselves and set a good example. Here there are still failings in some areas. First of all, any opportunities to make bribes tax-deductible need abolishing; indeed, this would fulfil the OECD recommendations laid down in 1994 and 1997. Secondly, the Member States should push forward deliberations in the Council of Europe on the anti-corruption convention so that it can be signed before the end of 1998. The Member States also need to comply with their international commitments and make the necessary changes to national law and national implementing practice so that before the end of 1998 they can ratify the convention on the protection of the European Communities' financial interests, together with its three protocols, the convention on the fight against corruption involving officials of the European Communities or officials of the Member States of the European Union and the OECD Convention on combating bribery of foreign public officials in international business transactions. (Recommendation 14 of the Action Plan to combat organised crime actually calls for ratification of the Convention on the protection of the European Communities' financial interests, with its protocol, by mid-1998 at the latest.)

## **6.3. Tasks of the Council**

The Council must comply without delay with the guidelines on anti-corruption matters in the Action Plan for combating organised crime, and in particular with Recommendation 6. Part of the Council's tasks consists in completing discussion on the Joint Action on making corruption in the private sector a criminal offence, giving due attention to Parliament's views<sup>(1)</sup> as adopted on 20 November 1997.

Many other tasks set by the European Council still await practical implementation by the Council, the watchword here being transparency in Council decision-making. Recommendation 6 of the Action Plan expressly calls for this: *'a comprehensive policy against corruption should be developed, ... to enhance the transparency in public administration, at the level of both the Member States and the Communities'*.

## **6.4. Tasks in the political area**

A number of anti-corruption measures also need taking in the political area. These range from measures to prevent the corruption of politicians, at local, regional, national or European level by regularly publishing details of their personal financial situation, to the Union-wide criminal prohibition of passive corruption of politicians (by precisely defining offences and removing differences in prosecution practice and legal impediments to prosecution - such as professional immunity - in this area).

We also need to look more closely at how far the present system of funding political parties in the Member States is susceptible to corruptive activities, and how we could reduce that susceptibility. Here it would seem to make sense to prevent the corruptibility of political parties by increasing the transparency of their financial conduct, particularly in the area of party donations.

## **6.5. Joint tasks**

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<sup>(1)</sup> OJ C 371, 8.12.1997, pp. 165 & 195 (A4-0348/97).

Tasks which call for practical activities by the Council, Commission and the Member States as well as the private sector include the following:

#### 6.5.1. Creating a comprehensive policy for preventing corruption

We must first bear in mind that an efficient prevention policy should stand on a legal system that will guarantee the transparency and enforceability of decisions on the basis of the personal responsibility of those who take them, and not just on an increase in formal controls. Transparent procedures have a particularly inhibiting or deterrent effect on those who are offered bribes, and strengthen the resolve of those who intend to resist. But where decision-making processes do not benefit from transparency, as in the case of procurement in the arms trade, we need as a point of principle to insist on special vigilance against corruption.

We also need to deal more honestly with the often controversial and conflict-ridden relationship between political power and justice. The way to tackle this, perhaps, would mean ensuring that politics and its institutions properly fulfil their task of solving problems, instead of merely passing them on to the judicial authority. So the task of devising measures to prevent corruption is a matter for politicians, to ensure that the reappraisal of corruption by the criminal courts at a subsequent stage remains the *ultima ratio* of the State's response.

Adopting practical 'recommendations on preventing corruption' might also have the effect of inducing the institutions of the Union to discharge their duties in their own fields of activity, and the Member States to take account of such rules in their legislative and administrative work. By way of illustration, a few areas and measures for these recommendations might include:

- simplifying administrative control procedures;
- improving public activity on the basis of transparency, efficiency and verifiability;
- transparency in privatisation and the private-sector activity of public administration;
- introducing codes of conduct in public administration and private industry;
- reforming political appointments or the selection of civil servants in accordance with objective criteria;
- transparency in the financial position of government ministers, MPs and civil servants exposed to risk, by disclosure at regular intervals;
- introducing regulation of professional activities for employment in the public sector;
- regulating the professions dealing with public administration;
- strengthening internal controls in limited companies.

#### 6.5.2. Creating a comprehensive penalty system

As a first step, criminal law in all the Member States needs to adapt to the changing circumstances and cover all acts of bribery in public and private activity, at home and abroad (including the criminal liability of legal persons, taking account of corruption as an incentive for money laundering, and the opportunity to confiscate the assets involved). But we should also ensure that we make use of the opportunities for administrative (blacklisting), civil law (compensation payments) or disciplinary sanctions (pay cuts, transfers or dismissal).

#### 6.5.3. Including general principles in contractual relations with third countries

Taking the general premise that we should build in transparency in all important decision-making processes and their effective control, as a general democratic principle, the same principle should also apply to the EU's external relations, especially as its consistent application substantially helps to prevent corruption. This means that in all agreements with third countries on aid, cooperation and development we should require compliance with the general principles of responsible government, transparency and judicial independence; but in addition, we should extend the application of these general conditions to all trade relations with third countries, partly to ensure that the private sector does not counteract and so undermine the EU's anti-corruption efforts.

## **Annex**

### **CHAIR CONCLUSIONS FROM THE CONFERENCE, 'ACHIEVING A CORRUPTION-FREE COMMERCIAL ENVIRONMENT - THE EU'S CONTRIBUTION', 14-15 APRIL 1998**

The Chair of the Conference on 'Achieving a corruption-free commercial environment - the EU's contribution', which was co-hosted by the UK Presidency of the EU, the European Parliament and the Commission, drew the following conclusions:

#### **General**

- corruption represents not only bad ethics but also bad business. It has unacceptable costs to business, hinders free and fair trade, distorts competition, limits opportunities for expansion and undermines the fabric of society and the democratic process;
- to avoid the corruption trap, the individual business entity needs the support of a broad coalition against corruption, provided by a committed anti-corruption approach by governments, international organisations, the business community, and political parties;
- this approach must be multi-faceted and balanced, with strong emphasis on preventative in addition to coercive measures.

#### **Action by Governments and International Community**

- the Commission's Communication of 21 May 1997 on a Union-policy against corruption is broadly welcomed but the Commission is urged to translate this framework into specific proposals, in particular the Commission's role in promoting preventative measures was emphasised;
- the recommendations concerning the fight against corruption contained in the Action Plan on combating organised crime adopted by the European Council in Amsterdam, June 1997, were fully endorsed along with the planned progress report;
- the EU Convention on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union, and other relevant instruments agreed upon by the EU Council of Ministers, are considered as a major break through but their speedy ratification is considered to be vitally important;
- the importance of the OECD Convention combating bribery of foreign public officials in international business transactions is acknowledged as is the importance of the Council of Europe's twenty guiding principles for the fight against corruption, speedy ratification and implementation of these instruments was encouraged;
- the on-going work of the OECD, the Council of Europe and other international fora in combating corruption is strongly supported, the OECD work related to the use of off-shore accounts, and problems linked with the funding of political parties was particularly noted. The

EU and its Member States should constructively participate so as to ensure complementarity between the work of the various institutions;

- because payment of bribes can be linked to the problem of solicitation and extortion, the international community should consider more ways to tackle this problem;
- these developments already mentioned must be accompanied by measures aimed at improving judicial co-operation among Member States and with third countries including measures aimed at improved mutual assistance and action to deal with money laundering;
- there is a recognition that modern economies are characterised by growing privatisation, and therefore in principle the criminalisation of private sector corruption is supported, the international community should examine available information from the business community on this subject in the context of the examination of the proposals to criminalise private sector corruption taking place in the EU and the Council of Europe;
- there is a strong feeling that the credibility of industrialised countries in developing and transition countries is at stake as long as tax deductibility of bribes remain. The Commission was asked to seek a coordinated approach to effective abolition of such practices in order to ensure that taxation regimes in no way impede the fight against corruption;
- greater efforts to achieve transparency in public procurement rules as well as improved auditing and accounting standards with a view to preventing corruption are required;
- a coherent strategy must be applied by the European Union in relation to external assistance and co-operation. In particular there should be provisions to promote good governance and deter corruption in all international agreements of assistance, co-operation and development. Procurement rules should be sharpened in order to prevent corruption and to allow for sanctions in case of corrupt behaviour;
- in addition, a need exists to promote good governance in developing and transition countries. The important role of bilateral and multi-lateral programmes to support and encourage efforts to fight against corruption and its sources was highlighted as was the need to enforce the relevant laws;
- EU institutions in particular are asked to apply transparent procedures in relation to EU expenditures and subventions.

#### **Action by the Business Community**

- the business community has played an active role in encouraging and supporting national and international anti-corruption efforts;
- nevertheless a need remains to establish within the business community wide support networks of companies and other business interests openly committed to operating without recourse to bribery;
- the efforts of the business community to develop best corporate practice by utilising anti-corruption codes of conduct is welcomed and the business community is urged to further develop and promote such measures.

## **Joint Government, International Community and Business Actions**

- the time is now right for all sectors of society to come together to develop a culture where no room remains for habits and mindsets conducive to corruption;
- the need for transparency in the funding of political parties was recognised;
- the need for practical measures which take account of the realities of the market place and the need of the honest businessman for unequivocal guidance are recognised, some interventions also insisted in addressing known areas of concern, for example, the arms trade;
- anti-corruption corporate codes of conduct must be fostered alongside government and international anti-corruption laws and preventative strategies. Such codes, laws and strategies must be mutually supportive and synergistic;
- the need to continue the dialogue with the business community and other interested parties on how best to fight corruption was stressed and the Commission together with the Parliament, the Member States and the Council are asked to facilitate effective and on-going dialogue.

# EUROPEAN PARLIAMENT

14 October 1997

## **OPINION**

(Rule 147)

for the Committee on Civil Liberties and Internal Affairs

on the Communication from the Commission to the Council and the European Parliament on a Union policy against corruption (COM(97)0192 - C4-0273/97) ( Report of Mr Rinaldo Bontempi)

Committee on Legal Affairs and Citizens' Rights

Draftsman: Miss Anne Caroline B. McIntosh

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## **PROCEDURE**

At its meeting of 30 June - 2 July 1997 the Committee on Legal Affairs and Citizens' Rights appointed Miss Anne Caroline B. McIntosh draftsman.

It considered the draft opinion at its meetings of 22 - 24 September and 13 - 14 October 1997.

At the latter meeting it adopted the following conclusions unanimously.

The following were present for the vote: De Clercq, chairman; McIntosh, draftsman; Barzanti, Berger, Buffetaut, Fontaine, Habsburg-Lothringen, Malangré, Medina Ortega and Wijsenbeek.

## **Introduction**

As a procedural remark, the draftsman would like to point out that talking about corruption should not be mistaken for fighting corruption. In its communication the Commission tries to set out the main elements of a comprehensive Union Policy against Corruption. They comprise *inter alia* reflections about the criminal law aspects of corruption, about tax deductibility and measures to be envisaged within existing Single Market and other internal policies. From a legal point of view, the following observations seem to be necessary:

### **1. Corruption and criminal law (§§ 9-19)**

The following three conventions, drawn up on the basis of Article K.3 TEU, have been published in the Official Journal:

- The Convention on the protection of the European Communities' financial interests<sup>(1)</sup>
- The (First) Protocol on the protection of the European Communities' financial interests<sup>(2)</sup>
- The Convention on the fight against corruption involving officials of the European Communities' or officials of the Member States of the European Union<sup>(3)</sup>
- The Second Protocol drawn up on the basis of Article K.3 of the Treaty on European Union, to the Convention on the Protection of the European Communities' financial interests (which has been signed on 19 June 1997)<sup>(4)</sup>.

None of these third-pillar conventions has yet entered into force.

When elaborating these instruments the Council did not generally take into consideration Parliament's views. It would nevertheless be helpful to put into force the above-mentioned conventions.

It is common ground that the Communities do not possess a criminal-law competence. Paragraph 4 of Article 209a TEC as to be amended by the Treaty of Amsterdam provides that pursuant to the procedure of Article 189b the 'necessary measures in the fields of the prevention of and the fight against fraud affecting the financial interests of the Community with a view to affording effective and equivalent protection in the Member States' shall be adopted. There is therefore no or only an extremely limited and exceptional Community competence at hand in order to make active corruption of an official of a non-Member State a criminal offence.

In general terms, it would be useful to make any form of active corruption a criminal offence.

An indirect way of combating corruption would consist of adapting the rules on money laundering to the needs of fighting corruption. The main disposition of the money laundering directive 91/308/EEC<sup>(5)</sup>, Article 2, reads as follows: 'Member States shall ensure that money laundering as defined in this Directive is prohibited'. In addition to that, the money laundering directive sets obligations for credit institutions and authorities with regard to suspect transactions.

However, the underlying criminal activity to which the term of money laundering relates is limited to illicit traffic in narcotic drugs and psychotropic substances and to *any other criminal activity*

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<sup>(1)</sup> OJ C 316, 27.11.1995, p. 49; supplemented by the Protocol on the interpretation, by way of preliminary rulings, by the Court of Justice of the European Communities of the Convention on the protection of the European Communities' financial interests (OJ C 151, 20.5.1997, p. 2); see also the Explanatory Report on the Convention on the protection of the European Communities' financial interests (OJ C 191, 23.6.1997, p. 1)

<sup>(2)</sup> OJ C 313, 23.10.1996, p. 2

<sup>(3)</sup> OJ C 195, 25.6.1997, p. 2. European Parliament Resolution of 15.11.1996 (Committee Report A4-0365/96) on Corruption involving officials

<sup>(4)</sup> OJ C 221, 19.7.1997, p. 11-22. The draftsman also makes reference to the following documents: Commission proposal COM(96)693 (95/360(CNS)); European Parliament Resolution of 24.10.1996 (Committee Report A4-0313/96); Council draft 7752/96 Justpen 76 of 29 May 1997 (C4-0137/96)

<sup>(5)</sup> Directive 91/308/EEC, OJ L 166, 28.5.1991, p. 77

*designated as such for the purposes of this directive by each Member State* (Article 1, last-but-one indent). The crime of corruption - as to be **defined by the Member States** by virtue of the criminal-law competence - could be introduced explicitly into that part of the directive, provided that the conditions for the application of the appropriate legal bases, Articles 57 and 100a of the EC Treaty, are fulfilled.

The Commission should be called upon to put forward legislative proposals in that sense.

It has to be borne in mind that the above-mentioned Second Protocol has a rather limited role in the field of money laundering: In its Article 2 it provides that 'each Member State shall take the necessary measures to establish money laundering as a criminal offence'.

## **2. Tax Deductibility (§§ 20-29)**

The Commission addresses the issue of tax deductibility of bribes in certain countries. Unfortunately, these Member States have not been named explicitly. The measure suggested by the Commission, namely to raise the issue 'in the appropriate fora' (§29) seems to be poor and insufficient. Articles 95 to 99 of the EC Treaty, of course, only refer to indirect taxation. But the Commission has not sufficiently explored the possibility of using other Treaty articles for putting forward appropriate legislative proposals.

## **3. Public Procurement (§§ 31-34)**

The Commission claims that the existing directives on public contracts cover corruption, under their heading 'Criteria for qualitative selection'. The passage reads as follows:

'Any service provider<sup>(1)</sup>/supplier<sup>(2)</sup>/contractor<sup>(3)</sup> may be excluded from participation in a contract who:

[...] c) has been convicted of an offence concerning his professional conduct by a judgment which has the force of res judicata;

d) has been guilty of grave professional misconduct proven by any means which the contracting authorities can justify; [...]'.

Even in its current form, letter c) may lead to discrimination against natural persons as in some Member States offences cannot be committed by legal persons. The same may occur, even though to a lesser extent, in cases covered by letter d).

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(<sup>1</sup>) Directive 92/50/EEC, OJ L 209 of 24.7.1992, p. 1 in Article 29

(<sup>2</sup>) Directive 93/36/EEC, OJ L 199 of 9.8.1993, p. 1 in Article 20

(<sup>3</sup>) Directive 93/37/EEC, OJ L 199 of 9.8.1993, p. 54 in Article 24

Should one intend to apply the existing scheme to corruption, the following questions arise due to the unclear wording of the directive: Does corruption, active or passive, necessarily concern the *professional* conduct of the service provider/supplier/contractor? Could it not be the case that national measures transposing the directives have, in combination with existing national laws, regulations or administrative action, different concepts of what is strictly *professional* conduct?

As to the means of proof, all three directives provide in the same above-mentioned Articles the following:

'Where the contracting authority requires of the contractor proof that none of the cases quoted in (a), (b), (c), (e) or (f) applies to him, it shall accept as sufficient evidence:

- for points (a), (b) or (c), the production of an extract from the "judicial record" or, failing this, of an equivalent document issued by a competent judicial or administrative authority in the country of origin or in the country whence that person comes showing that these requirements have been met; [...]'.

The words 'Where the contracting authority requires...' mean that there is no obligation to systematically require evidence. This may lead to serious distortions. In addition, the means of proof risk reinforcing discrimination against natural persons: In countries where legal persons cannot be condemned, they can consequently not have a 'judicial record' [or an equivalent document]. Non-production of a 'judicial record' would accordingly have to be accepted as a proof for the fulfilment of the conditions of letter c) even if employees or representatives of the legal person have committed offences in the meaning of the directive in the past.

The directives' possibility to prove conformity with letter c) by means of an oath or a declaration does not constitute a remedy because where a legal person cannot be condemned it can without any breach of law claim that it has never been convicted of an offence.

#### **4. Blacklisting (§§ 42-46)**

For reasons of efficiency, blacklisting is of particular importance for the application of any system which seeks to exclude rogue economic operators from participation in procedures awarding contracts or providing benefits.

As a pre-condition, a satisfactory solution to the particular status of legal persons should be found. It could consist of requiring responsible representatives of the legal person to be free of any misconduct or of imputing, for the restricted purpose of blacklisting only, the natural persons' offences to a legal person as long as that natural person still has an influence over the management of the legal person for which he/she was working for at the time of the infringement or over the management of any other legal person.

For reasons of legal certainty, the rules determining which behaviour may have as a consequence the entry onto such a database should be sufficiently clear and appropriate procedures of appeal against an entry have to be provided.

## 5. Commitments against corruption (§ 47)

The Commission suggests that 'all competitors for a specific project might be required to give a written undertaking that they will not use bribery to obtain the contract'. It states that such a commitment discourages bribery and can leave the enterprise open to a civil action for damages or a contractual fine.

This idea merits some legal reflection. In any case, the nature of the contract and who the parties should be would need to be analysed in the light of the specific characteristics of the civil-law-system of each Member State. It might appear necessary that each tenderer has to enter into contractual obligations *vis-à-vis* the contracting or awarding authority and all the other tenderers. A contractual obligation cannot, of course, resolve the problem of the insolvency of a tenderer who has previously obtained a benefit through bribery.

Corruption is, of course, a completely unacceptable behaviour and its condemnation is not intended to be infirmed by proposing commitments against corruption. The intention is reinforce the fight against corruption by civil means as well as criminal and administrative.

### Conclusions

In the light of the foregoing the Committee on Legal Affairs and Citizens' Rights would call upon the Committee on Civil Liberties and Internal Affairs to include the following conclusions in its report:

The European Parliament

1. Calls upon the Commission to put forward legislative proposals designed to extend the scope of application of the money laundering directive to criminal activities such as active corruption (bribery) and passive corruption; notes at the same time that the definition of these underlying criminal activities has to be given by the Member States by virtue of the criminal-law-competence;
2. Demands the Commission to name explicitly those Member States which permit tax deductions for the bribery of foreign officials; calls upon the Commission to take appropriate action, possibly in form of legislative proposals, with the aim of abolishing tax deductibility of bribes paid to foreign officials;
3. Urges the Commission to put forward legislative proposals to clarify the conditions of access of tenderers to public procurement procedures, with the aim of eliminating any person convicted of corruption, these proposals should limit the risks of fraud and corruption and should not lead to discrimination between natural persons and legal persons;
4. Asks the Commission to take appropriate steps to establish a comprehensive system to blacklist rogue undertakings and to exclude them from competing for or being awarded further contracts and subsidies and to alert third parties to possible risks in conducting business with such undertakings; nevertheless advises the Commission that for reasons of legal certainty clear criteria for the entry onto such a blacklist and appropriate procedures of appeal should be established;

5. Calls upon the Commission to submit legislative proposals in order to introduce civil actions for damages or contractual fines based on commitments of tenderers against corruption relating to a specific project in the light of the specific characteristic of the civil law system of each Member State; further calls upon the Commission to study the incorporation into the public procurement directives of a requirements of each tenderer to enter into a contractual obligation vis-à-vis the contracting authority and all the other tenderers against corruption.

# EUROPEAN PARLIAMENT

21 October 1997

## **OPINION**

(Rule 147)

for the Committee on Civil Liberties and Internal Affairs

on the Commission's communication on a Union policy against corruption (COM(97)0192 - C4-0273/97) (report by Mr Bontempi)

Committee on Budgetary Control

Draftsman: Mr Herbert Bösch

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At its meeting of 22 July 1997 the Committee on Budgetary Control appointed Mr Herbert Bösch draftsman.

At its meetings of 24 September and 21 October 1997, it considered the draft opinion.

At the latter meeting it unanimously adopted the conclusions as a whole.

The following were present for the vote: Theato, chairman; Blak, Tomlinson, Grosch, vice-chairmen; Bourlanges (for Bardong), Colom I Naval, Dührkop Dührkop (for Bösch), Fabra Vallés (for Kellett-Bowman), Garriga Polledo, Marset Campos, Müller (for Holm), Redondo Jiménez, Virrankoski (for Mulder), Waidelich and Wynn.

### **1. Introduction**

Corruption, as a range of recent cases has revealed, represents a serious threat to the interests of the Community budget and hence the European taxpayer at large. The Commission's communication, which draws attention to the subject of corruption in general, is therefore to be welcomed. Given the scale of public expenditure now crossing national borders, and, above all, the existence of the European Single Market, a European response to corruption is vital and probably long overdue.

The interest of the Committee on Budgetary Control in corruption focuses on the impact it has on the EC budget, and the measures which can be taken to prevent, detect and punish it. This interest is to some extent a sub-category of the Commission's subject matter, notwithstanding the fact that the general principles are the same. From this committee's point of view therefore, this is not the occasion for a full and detailed response to the Commission. The following remarks thus represent an initial reaction, pending an opportunity for the committee to deal at length with specific proposals falling within its own area of competence.

## 2. General Assessment of the Communication

As a consciousness-raising exercise, the Commission's document is useful. It presents an overview of the existing legal ambiguities in relation to corruption in the Member States and indicates possible options open to the legislator and the authorities in general to tackle the problem more effectively. There are few surprises in this document for the expert, but the lay reader will inevitably be shocked by the extent to which bribery and corruption are quasi-officially perceived as facts of life. Indeed, the rapporteur is struck by the extent to which national legal and tax systems not only tolerate corruption, but *actively encourage it*, particularly where non-nationals are concerned. If the effect of this document is to mobilise any significant amount of public opinion towards a hardening of official attitudes to corruption, the Commission will have done a considerable service with its publication.

The document is also a good one as a declaration of intent. It is difficult to disagree with any of the ideas mooted aimed at dealing more effectively with corruption. Herein, however, lies the document's main difficulty. Under the Maastricht architecture, the Commission is entirely dependent on the goodwill of Member States to make progress with proposals in the fields of justice and home affairs, under which most anti-corruption measures fall. The practical effects of this dependency is all-too-visible in the linked cases of the Convention on the protection of the financial interests of the Community and its first protocol on corruption, neither of which show the slightest sign of obtaining parliamentary ratification in Member States in the foreseeable future.

As a result of this, it is possible to be encouraged by the ideas contained in the document while remaining sceptical about the Commission's practical ability to translate them into concrete action. Such scepticism is reinforced by the fact that several of the ideas are familiar ones (common definitions of corruption, criminalisation of bribery of foreign/international officials, blacklisting of companies involved in bribery, protection of 'whistle blowers') which, notwithstanding their having achieved a certain vintage, make little practical headway. The Commission's language too is revealing. It rarely speaks in terms of making firm proposals, but of 'supporting', 'working on' or 'pressing for' anti-corruption measures.

The draftsman has no wish to be negative; there is nothing wrong, at an initial stage, with a speculative approach aimed at launching (or re-launching) useful ideas. However, it is difficult for the European Parliament to react clearly to a text the potential practical consequences of which are so uncertain.

## 3. Commission corruption

From the committee's perspective of the protection of the financial interests of the Community, there is a glaring (perhaps worrying) omission in the communication: namely its failure to discuss the problem of corruption within the Commission itself and/or EU institutions in general. This is all the more regrettable as this is the one area where the comments above do not apply, in that there is considerable scope for the Commission to take concrete action on its own initiative. One is tempted to suggest that the Commission would be well advised to be seen to be putting its own house in order before giving lessons to others.

The subject is not a marginal one. Over the last decade, allegations of possible corruption in the Commission have persistently arisen and, whatever the truth behind them, its response has been

unconvincing. In an institution with the ambitions of the Commission, it is vital not only that corruption be eliminated, but that the strongest and most effective possible line to be taken against it.

An opinion such as this is not however the place to deal with this difficult subject, particularly as at least two substantial reports touching in different ways on the issue are currently in course in the Committee on Budgetary Control<sup>(1)</sup>. The draftsman is happy to leave substantial discussion to these. For present purposes, it is sufficient to outline the main areas of concern as pointers to the issues which the committee would wish to see the Commission address.

- Status (powers, independence) of internal bodies within the EU institutions responsible for investigating allegations of internal corruption,
- The attribution of criminal jurisdiction over EU officials suspected of corruption,
- Cooperation between EU institutions and national investigative and judicial authorities in cases of alleged corruption,
- The principle of official immunity and the mechanisms for its waiver,
- The supervisory role of the Court of Auditors and the European Parliament.

#### **4. Conclusion**

While the Commission's communication is to be welcomed as a valuable contribution to placing the question of corruption on the public agenda, it remains unclear whether the proposals it contains will ultimately lead to firm proposals and action, and, if so, in what form. In the draftsman's view, detailed discussion of the measures floated in the document must await more concrete developments.

The communication disappoints in not addressing internal corruption in the EU institutions as a separate issue (separate in the sense that counter-action is more immediately possible) and it is in this area, pending more detailed conclusions emerging in the course of the Committee on Budgetary Control's current work, that a single amendment is proposed.



The Committee on Budgetary Control asks the Committee on Civil Liberties and Internal Affairs to incorporate the following paragraph in its motion for a resolution:

- Calls on the Commission, within the context of its policy against corruption, to come forward with specific proposals aimed at combatting more effectively corruption within the EU institutions, addressing in particular:

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<sup>(1)</sup> Report on the Commission's 1996 Annual Report on the Fight against Fraud (Bösch) - PE 222.169  
Report on Fraud and Irregularities in the Tourism Sector (Wemheuer)

- a) the status of internal bodies within the EU institutions responsible for investigating allegations of internal corruption,
- b) provisions covering the attribution of criminal jurisdiction over EU officials suspected of corruption,
- c) cooperation between EU institutions and national investigative and judicial authorities in cases of alleged internal corruption,
- d) the principle of official immunity and the mechanisms for its waiver,
- e) the supervisory role of the Court of Auditors and the European Parliament.
- f) the importance of presenting a strategy on how increased transparency can be used as a method for preventing and suppressing corruption.

# EUROPEAN PARLIAMENT

18 March 1998

## **OPINION**

(Rule 147)

for the Committee on Civil Liberties and Internal Affairs

on the Commission communication to the Council and the European Parliament on a Union policy against corruption (COM(97)0192 - C4-0273/97) (report by Mr Bontempi)

Committee on Development and Cooperation

Draftsman: Mr Pomés Ruiz

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## **PROCEDURE**

At its meeting of 26 November 1997 the Committee on Development and Cooperation appointed Mr Pomés Ruiz draftsman.

It considered the draft opinion at its meeting of 25 February 1998 and at its meeting of 18 March 1998 adopted the following conclusions.

The following took part in the vote: Rocard, chairman; Fassa and Stasi, vice-chairmen; Pomés Ruiz, draftsman; Fernández Martín, Girão Pereira (for Andrews), Günther, Martens, Paasio, Pettinari, Pors Grau, Robles Piquer, Sandbæk, Sauquillo Pérez del Arco and Vecchi.

## **SUBMISSION OF THE PROPOSAL**

As a matter of principle, the Committee on Development and Cooperation must welcome the Commission's submission of a communication on combating corruption. In spirit, this communication responds to the requests set out explicitly by the European Parliament in its resolution of 15 December 1995 on combating corruption in Europe<sup>(1)</sup> which emphasises that the European Union must devise its own anti-corruption policy which enables it to take both the preventive and repressive measures required.

The Committee on Development and Cooperation wishes to emphasise that corruption represents a genuine threat to the fundamental principles of the EU, which is based on the rule of law and the

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<sup>(1)</sup> OJ C 17, 22.1.1996, p. 443.

principle of sound public administration, that it constitutes a brake on economic progress based on free competition and that it contradicts the moral foundations of our European society.

The Commission communication is divided into two major sections, each of which is clearly as important as the other. The first section deals with aspects internal to the EU, the second concerns external assistance and development cooperation.

The Committee on Development and Cooperation welcomes the Commission's emphasis on the need to take simultaneous action internally and externally. The objective clearly spelt out by the Commission - to define a consistent anti-corruption strategy in the field of cooperation with third countries - merits particular approval.

It is essential to increase the effectiveness of EU aid to third countries, especially in the current period of budgetary constraint - which is affecting the budgets of both the EU and of the Member States - when the amount of funds devoted to public development aid is tending to remain constant, if not actually diminishing. An effective anti-corruption campaign would significantly improve the impact of the aid granted. Corruption results in funds being diverted away from their legitimate targets. In the field of development cooperation, corruption usually results in the selection of projects which or contractors who are less relevant to local realities and to the specific objectives of cooperation.

This requirement to combat corruption becomes all the more obvious at international level. In late 1996, the World Bank adopted an anti-corruption programme which resulted in the drawing up of new guidelines for Bank staff responsible for implementing its policies<sup>(1)</sup>. At their recent hearing before the Committee on Development and Cooperation, the President of the World Bank, Mr Wolfensohn, and the Director-General of the International Monetary Fund, Mr Camdessus, emphasised the need to combat corruption<sup>(2)</sup>.

The requirement of an effective and coordinated anti-corruption campaign corresponds totally with the high priority ascribed by the EU to good governance in its relations with the developing countries, a priority which the Committee on Development and Cooperation totally shares. Accordingly, an explicit reference to the consolidation of the rule of law and good governance was inserted in the Convention of Lomé when it underwent its mid-term review in 1995<sup>(3)</sup>. The Commission's Green Paper on relations between the EU and the ACP countries on the eve of the 21st century also makes explicit reference thereto. The resolution on this issue adopted by the European Parliament on the basis of the Martens report<sup>(4)</sup> endorses the pursuit of that priority. It should also be emphasised that this requirement to strengthen the rule of law and good governance is largely shared by the EU's ACP partners, as is shown by a number of resolutions adopted by the ACP-EU Joint Assembly, such as the resolution on Article 5 of the Convention of Lomé adopted at its most recent meeting in Lomé<sup>(5)</sup>.

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<sup>(1)</sup> World Bank News, No 31, 23.10.1997.

<sup>(2)</sup> Hearing of 21 January 1998.

<sup>(3)</sup> See Article 5.

<sup>(4)</sup> Resolution on the Green Paper on relations between the EU and the ACP countries, OJ C 325, 27.10.1997, p. 28.

<sup>(5)</sup> AP/2282, page 45. ACP-EU 2272/97/fin.

In 1994, the Joint Assembly adopted a resolution in which it proposed to all the governments and other social organisations involved that a commitment be made to high moral standards in the political and administrative spheres in order to combat all forms of corruption<sup>(1)</sup>.

The Committee on Development and Cooperation would strongly emphasise the fact that the EU cannot require from its partners in the developing countries good governance and sound management of their financial resources unless it commits itself internally to a global and practical policy of reforms to combat corruption. In particular, the EU must not allow measures to remain any longer on the statute book in some of its Member States which tend to encourage and enshrine corrupt practices. This refers in particular to the issue of tax deductibility for bribes.

The Union's anti-corruption policy must, therefore, include a significant internal section which covers that issue in particular and, more generally, the practices employed by private firms.

In this respect, the Committee on Development and Cooperation emphasises that progress, albeit insufficient, has been made - in a sphere covered by cooperation in the field of justice and home affairs - in particular by the adoption of the Convention on the Protection of the European Communities' Financial Interests and its two subsequent protocols, the adoption of the Council act establishing the Convention on the fight against corruption involving officials of the European Communities and officials of the Member States of the European Union, and by the submission of a draft joint action of the Council designed to make corruption in the private sector a criminal offence.

Furthermore, the recent adoption by the OECD of a convention on combating the corruption of public servants in international commercial transactions also represents an additional step forward.

At an early date, the EU and its Member States must properly transpose these texts into their national law and adopt the requisite additional anti-corruption provisions, especially as regards tax.

As regards the definition and implementation of a global anti-corruption policy in its relations with the developing countries, the EU must address the issue on several levels simultaneously.

First of all, on the most general level of its relations with each of the developing countries concerned, it must pursue its efforts to promote and consolidate the democratisation process in each country, the introduction of pluralist political systems and support for the establishment of transparent and accountable management and monitoring institutions and mechanisms. Everything which contributes towards democratic, efficient and transparent public administration also contributes towards curbing corruption. Support for the emergence and organisation of civil society is a decisive factor in this respect. The EU introduced a policy of this nature some years ago, both within the ACP-EU framework and vis-à-vis the countries of Latin America and Asia. This policy must be stepped up.

More specifically, the EU should seek to incorporate in every cooperation agreement concluded with third countries a precise reference concerning the objectives of and procedures for a joint anti-corruption campaign. In this connection, the renewal of the Convention of Lomé must provide an opportunity for the insertion of an explicit reference to an anti-corruption campaign deemed to be a direct corollary of the henceforth enshrined objective of good governance.

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<sup>(1)</sup> Resolution on the broadening and deepening of democracy, OJ C 167, 20.6.1994, p. 73.

As regards the practical implementation of the development policy, mechanisms to prevent and detect corruption must be involved in each phase of a project, from the project selection and award phase right through all the subsequent implementation phases. Project follow-up, monitoring and assessment mechanisms must be improved. The selection phase seems to be particularly critical. We must ensure that transparent procedures are used, principally by putting projects out to tender on a wider basis and by improving the transparency of the tender procedures.

The Committee on Development and Cooperation is aware that an effective anti-corruption campaign must be adapted to suit the new cooperation guidelines and practices. The growing tendency to opt for a decentralised approach, involving not merely the individual countries but also the various private and public organisations associated with development, increases the number of people involved in cooperation. A large increase in the number of partners and contracts increases to the same degree the potential for irregularities and the need for monitoring.

As part of its cooperation with the ACP States, the EU has implemented, with some partner countries and on an experimental basis, anti-corruption policies which are based on the principle of compliance with ethical standards, the rejection of corruption and malpractice, and a precise definition of what constitutes corruption and malpractice. Those policies provide for penalties in the event of any breach thereof. Such clauses have been implemented, for example, in the case of cooperation with the Côte d'Ivoire and, in particular, with respect to decentralised cooperation operations. The Commission will have to draw up a detailed overview of the effectiveness of clauses of this nature in order to include them as a general rule and at an early date in all cooperation contracts.

An efficient anti-corruption policy presupposes the definition and effective imposition of a series of penalties which must act as a deterrent. Apart from any penal sanctions, which would require a greater effort to harmonise the national laws of the Member States, other types of penalty must be clearly laid down and strictly applied. Provision must be made for the suspension or cancellation of contracts, projects and/or programmes and of the relevant funding involved. These penalties must be applied in accordance with the provisions laid down in the Council act establishing the Convention on the fight against corruption involving officials of the European Communities or officials of the Member States of the European Union and in the Council act establishing the second protocol to the Convention on the Protection of the European Communities' Financial Interests.

The keeping of a register of the names of legal or natural persons convicted of corruption should serve to exclude those undertakings or individuals from further participation in development projects and, by the same token, provide support for undertakings which have themselves introduced internal codes of conduct to combat corruption.

The practical, day-by-day implementation of an anti-corruption policy presupposes action by and close cooperation between various Commission departments. The success or otherwise of this policy will depend to a large extent on the effectiveness of their supervision.

The rôle of the Commission delegations in third countries seems to be decisive. Those delegations have first-hand knowledge of the economic, political and social realities in the countries concerned and of the various local decision-makers and operators. They can - and must - play a major rôle in both preventing and detecting and exposing fraud at local level.

Nevertheless, we should emphasise the fact that an increase in the number of tasks in this sphere must be accompanied by a corresponding increase in staff. Specialist units should also be set up within each Commission directorate-general responsible for development aid in order to ensure that the anti-corruption policy is efficiently developed and followed up.

Finally, UCLAF - the anti-fraud coordination unit - should have its powers and scope for action extended to this new sphere relating to development cooperation.

## CONCLUSIONS

The Committee on Development and Cooperation:

1. Welcomes the Commission's submission of a communication on a Union policy against corruption which includes both an internal section and a section relating to external assistance and cooperation; regrets, however, that this communication does not constitute the definition of a genuine anti-corruption policy and, in most cases, lays down no more than general objectives without any specific timetable or commitments;
2. Approves wholeheartedly the particular objective set by the Commission of defining a consistent anti-corruption strategy in the field of cooperation with third countries; calls on the Commission to submit at an early date specific proposals for the attainment of that objective;
3. Emphasises that corrupt practices significantly reduce the impact of aid by diverting funds and by leading towards the selection of projects which are less relevant to local realities and the selection of contractors who are less able to attain cooperation objectives efficiently;
4. Emphasises that the anti-corruption campaign is one of the constituent components of the principle of good governance to which the EU ascribes high priority and which corresponds to the objectives pursued in common with a large number of developing countries which are partners of the EU, particularly under ACP-EU cooperation;
5. Emphasises that the EU cannot require its partners in the developing countries to comply with and promote the principles of good governance and transparent administration unless it, too, carries out internally, together with its Member States, reforms which are indispensable in the anti-corruption campaign, with particular regard to tax deductibility for bribes and, more generally, to making corrupt practices which threaten undertakings into criminal offences; calls therefore on the Commission to study in detail and publish the laws of the Member States which directly or indirectly allow the situations described above to exist;
6. Considers that the legal and tax provisions of certain Member States which allow tax deductibility for bribes paid in third countries are totally contrary to the Treaty, particularly as regards the provisions concerning aid granted by States, since they distort or threaten competition by favouring particular undertakings or products;
7. Points out that the possibility of tax deductibility for bribes may be incompatible with the professed aims of the code of conduct for business taxation recently adopted by the Council on 1 December 1997 and calls for the Council to pay special attention to this problem when developing the code in future;

8. Takes the view that an enhanced anti-corruption campaign requires an increase in EU aid for policies designed to strengthen democratisation, good governance and the emergence of a civil society - especially NGOs - in the developing countries;
9. Calls on the EU to negotiate with its partners the inclusion in every cooperation agreement of an anti-corruption clause laying down the objectives of and procedures for this policy; considers, in particular, that the negotiations for the renewal of the Convention of Lomé must result in the incorporation of a clause of this nature in the new Convention;
10. Emphasises that the anti-corruption mechanisms to be implemented must cover each of the project selection and implementation phases and that this presupposes a substantial strengthening of the follow-up and assessment mechanisms within the Commission;
11. Calls for the general incorporation of specific clauses in cooperation contracts which set out the principle of compliance with ethical standards and a rejection of corruption, a precise definition of what is understood by the term 'corruption', and any penalties to be imposed;
12. Considers that deterrent penalties must be laid down - other than those which should be provided for under criminal law - in particular the suspension or cancellation of contracts and funding, as well as the keeping of a central register of the names of those convicted of corruption;
13. Emphasises that the Commission delegations in third countries, acting in conjunction with specialised units to be set up within the Commission directorates-general responsible for development aid and with the Commission's anti-fraud coordination unit (UCLAF), have a major role to play in the efficient implementation of an anti-corruption policy.