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The Development of a European Union Policy Against Corruption

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INTRODUCTION

It is actually strange that the European Union itself has taken so long to start discussion of the devastating effects of corruption inside and outside the Union and to its 15 Member States^[2].

The Union's first and foremost task, ever since its inception in the 1950's, has been to safeguard competition and ensure open and free markets for goods, services, people and capital. It is clear in any objective assessment of the phenomenon of corruption that it goes to the very roots of these principles and are in contradiction to them.

Moreover, since the new and considerably widening of the Union's powers, in particular through the Single Act in the 1980's and the entry into force of the Maastricht Treaty^[3], the Union has definitely taken on tasks which have made it unavoidable to go to the roots of corruption and seek to fight it by every means. Corruption is contrary to the proper functioning of the internal market, it damages the financial interests of the European Communities, it damages international trade and runs contrary to the Union's spending of vast sums of money for purposes of external assistance and development. In addition, it is contrary to good governance and the Rule of Law, inscribed as foundations of the Union in the Treaty of Maastricht.

There are probably several reasons why the Union has taken so long to react to the threats of corruption, in spite of the fact that several of its important members have been victims of the scourge over the past years. Corruption has not everywhere been seen as a major problem, it has been difficult to tackle, the political corruption has made it difficult to combat in certain countries and so on. From an international perspective, however, the Union's member States have actually participated over a number of years in the international efforts to combat corruption, albeit in fora other than those of the European union.

All 15 Member States have participated actively in the discussion in the OECD since the late 1980's. These discussions are currently being crowned with the probable adoption before the end of 1997 of a convention which outlaws corruption in international business transactions and it is to be hoped that the convention will enter into force as quickly as possible for as many States as possible, in accordance with the wishes of the OECD Council of Ministers.

Simultaneously, the 15 Member States of the European Union have been active participants in the efforts of the 40 nation Council of Europe, which, following a Ministerial Conference on corruption in 1994, has adopted a comprehensive Programme of Action against corruption and is currently drafting a detailed criminal law convention in its governmental committee "GMC". Expectations are also high on the second summit of Heads of State and Governments of the Council of Europe, when they meet in October 1997, to adopt effective measures to combat corruption.

THE DEVELOPMENT OF A EUROPEAN UNION POLICY

Although it has taken time for the institutions of the European Union to react, they have nonetheless been active in certain fields, in particular where it comes to the protection of the financial interests of the European Communities. A number of resolutions^[4] of the European Parliament have been adopted, the Commission has been active to seek an extended protection for the financial interests of the European Communities in a number of different ways (legislative proposals, seminars, training etc) and judgements have been given by the European Court of Justice in Luxembourg which have gradually confirmed the obligation for Member States to deal with fraud against the financial interests of the EC in the same manner as fraud inside one

of the member States. Article 209 A of the Rome Treaty, as adopted in Maastricht, has confirmed this trend and the new draft Treaty of Amsterdam will further reinforce the Community competence in this area.

The efforts to protect the EC's financial interests were crowned on 26 July 1995, with the drawing up of the Convention on the protection of the European Communities' financial interests^[5]. The Convention, which is drawn up on the basis of Article K. 3 of the Treaty on European Union, is yet to be ratified by the Member States, but there is no doubt that they will do so as it is an instrument drawn up by the Council of the European Union and, therefore, has a different status than ordinary conventions drawn up under international law.

The Convention defines in respect of expenditure and revenue fraud affecting the EC's financial interests and obliges the Member States to criminalize such offences (with an exception made for certain cases of minor fraud). The intentional preparation or supply of false, incorrect or incomplete statements or documents having a certain effect shall also constitute a criminal offence under the Convention.

The Member States shall also ensure that the offences are punishable by "effective, proportionate and dissuasive criminal penalties, including, at least in cases of serious fraud, penalties involving deprivation of liberty which can give rise to extradition". The Convention contains also rules relating to criminal liability of heads of businesses, extradition and prosecution, ne bis in idem and the role of the Court of Justice.

It was clear already when the Convention was adopted that it was only a first step in erecting a legal framework for the protection of the EC's financial interests and that more instruments were needed as several questions had remained outstanding. One of those questions was corruption that involve national and community officials and damage or are likely to damage the EC's financial interests.

On the initiative of Spain, a Protocol to the Convention was drawn up on 27 September 1966^[6] dealing explicitly with this topic. To everybody that followed the negotiations of this instrument, it was clear that it was only a first step explicitly to deal with corruption in a more general way within the European Union. It would be difficult to conceive of a legislator who would enact specific rules on corruption for the protection of the financial interests of the EC and not for any other purpose. Therefore, the Protocol served as a predator for the general corruption conventions^[7] which was to be adopted in May the following year and which was to become literally the same text but with the link to the protection of the financial interests severed.

The Corruption Convention has already become a text of reference, both for Member States of the European Union and beyond. It forms part of the so-called "acquis" of the Union, and it will be imperative for any of the 11 candidate countries that have applied to join the Union to be able to ratify the text.

The Convention, herewith appended, defines the criminal behaviours of active and passive corruption, sets penalties like the previously mention fraud Convention and defines criminal liability of heads of businesses. It is of utmost importance that the corruption of foreign officials and of international civil servants is covered by the Convention as an "official" shall mean any Community or national official, including any national official of another Member State. It may be noted that, as regards Ministers, MP's and members of certain other public bodies (see Article 4 of the Convention) an assimilation principle has been laid down. It can be noted that the Convention has been adopted under rules of unanimity and, during the negotiations, it was not possible to find a consensus on the definition on these sensitive categories of persons liable to corruption. The international discussions will continue in other fora.

The European Union has thus taken the step to protect officials of other Member States and, from there, the step will not be long to protect officials of other States as well when corrupted by own nationals or by own enterprises. The negotiations within the OECD and the Council of Europe will probably be able to take the matters even further.

The Convention further contains provisions similar to the previously mentioned Fraud Convention.

Also other European Union bodies than the Council have been active in the area recently. Following a Resolution by the European Parliament on corruption of 15 December 1995, the Commission^[8] adopted in May 1997 a very comprehensive communication to the Council and the European Parliament on "A Union Policy Against Corruption". In that paper, the Commission argues for the adoption of a coherent strategy on corruption both within and outside its borders. Such a strategy should encompass international trade and competition, Community expenditure abroad, Community own resources, development co-operation policies and the pre-accession strategy (relating to the II countries candidates for membership of the EU).

In the 15 page document, the Commission lists specific policy areas where the Union should get more involved to fight corruption. Such areas include criminal law, tax deductibility, the single market and other internal policies, external assistance and cooperation and cooperation in international fora. It seems clear from the document that the Commission and the other institutions have now been engaged in a clear way to fight corruption on all fronts and that the full power of the European Union will be thrown in to diminish and, hopefully, to eradicate at least the more serious forms of corruption.

One of the results of this new approach of the Union to corruption is that it WHI seek to coordinate its views better in the future. Some attempts have been made to coordinate joint positions in the ongoing negotiations in the OECD and will probably, also be made in relation to the discussions within the Council of Europe.

The question of corruption will also become an important parameter within the context of fighting organised crime. The Dublin European Council set up in December 1996 a High Level Group on organised crime and requested it to draw up a Plan of Action rapidly. The Amsterdam European Council, which met in June 1997, approved the Action Plan^[9], containing 30 actions to be implemented within a given time frame. One of the 30 Actions is related to the fight against corruption and fits in very well with the proposals made by the Commission in its Communication.

CONCLUSION

After having let discussions continue in a number of various international fora, the European Union will in the future ensure a more coherent and coordinated approach between the 15 Member States to the issues of corruption. It will seek to adopt so-called "Joint Positions" under Article K of the Maastricht Treaty and throw its political weight into the discussions which, in my opinion, only have started at the international level.

Notes and References

[1] Head of the Division of Judicial Cooperation, General Secretariat of the Council of the European Union, Brussels. The opinions expressed in this paper are the personal views of the author.

[2] Austria, Belgium, Denmark, France, Finland, Germany, Greece, Ireland, Italy, Luxembourg, Netherlands, Portugal, Spain, Sweden, United Kingdom.

[3] On 1 November, 1993

[4] See, for instance; O.J. No C 305/106 of 25.11.91

[5] O.J. No C 316/48 of 27.11.95

[6] O.J. No C 313/1 of 23.10.96

[7] O.J. No C 195/1 of 25.6.97

[8] COM (97) 192 final, 21 May, 1997

[9] The Action Plan will be published in the Official Journal.

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