



**Economic Crime Division
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**TECHNICAL PAPER ON RECOMMENDATIONS, COMMENTS AND BEST PRACTICES IN APPLYING THE
COUNCIL OF EUROPE CIVIL LAW CONVENTION ON CORRUPTION**

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1 INTRODUCTION

This Technical Paper was produced as a follow up of the Conference "Implementation of the Council of Europe Civil Law Convention on Corruption" held in Podgorica, Montenegro on 21 – 22 April 2008.

Bellow is the summary of the power point presentation that was delivered in accordance with the Conference agenda. The following issues were elaborated:

1. The specificity of the Council of Europe lays its multidisciplinary approach, meaning that it deals with corruption from a criminal, civil and administrative law point of view.
2. Therefore, one of the characteristics of the Council of Europe approach in the fight against corruption is the possibility to tackle corruption phenomena from a civil law point of view.
3. The Committee of Ministers, at its 101st Session on 6 November 1997, adopted Resolution (97) 24 on the 20 Guiding Principles for the fight against Corruption. Principle 17 specifically indicates that States should "ensure that civil law takes into account the need to fight corruption and in particular provides for effective remedies for those whose rights and interests are affected by corruption"
4. At their 22nd Conference (Chisinau, June 1999), the European Ministers of Justice adopted Resolution No 3 on the fight against corruption, urging the Committee of Ministers to adopt the draft Convention on civil aspects of corruption and open it for signature before the end of 1999.
5. The Program of Action against corruption indicates that when fighting against corruption, "civil law is directly linked to criminal law and administrative law. If an offence such as corruption is prohibited under criminal law, a claim for damages can be made which is based on the commission of the criminal act. Victims might find it easier to safeguard their interests under civil law than to use criminal law. Similarly, if an administration does not exercise sufficiently its supervisory responsibilities, a claim for damages may be made."
6. The Civil Law Convention on Corruption aims at requiring each Party to provide in its internal law for effective remedies for persons who have suffered damage as a result of corruption, in order to enable them to defend their rights and interests, including the possibility of obtaining compensation for damage.
7. The Council of Europe Civil Law Convention on Corruption was adopted in Strasbourg on 4 November 1999. It is the first attempt to define common international rules in the field of civil law and corruption. In particular, it provides for compensation for damages as a result of acts of corruption.

2 CONVENTION'S CONTENT

The following issues concerning the content of the Convention were presented:

a) General structure

The Convention is divided into three chapters with altogether 23 articles:

Chapter 1 (Measures to be taken at national level)

Arts 1, 2: Purpose, Definition of Corruption

Arts 3, 4, 5, 6, 8, 11, 12: Compensation for Damage, Liability, State Responsibility, Contributory Negligence, Validity of Contracts, Acquisition of Evidence, Interim Measures

Art 7: Limitation Periods

Art 9: Protection of Employees

Art 10: Accounts and Audits

Chapter 2 (International co-operation and monitoring of implementation)

Art 13: International co-operation

Art 14: Monitoring

Chapter 3 (final clauses)

Arts 15, 16, 17, 18, 19, 20, 21, 22, 23: Signature and Entry into Force, Accession to the Convention, Reservations, Territorial Application, Relationship to other Instruments and Agreements, Amendments, Settlement of Disputes, Denunciation, Notification

b) Coverage

Sectors covered: Public sector and private sector (private-to-private) corruption

Corruption offences covered: A broad definition is given covering the "requesting, offering, giving or accepting of a bribe or any other undue advantage or the prospect thereof", which gives the Convention a relatively wide scope.

Measures: Civil law remedies for injured persons, compensation for damage from corruption; invalidity of corrupt contracts (null and void); whistleblower protection.

Level of obligation: Mandatory provisions. No reservation may be made in respect of any provision of the Convention.

c) Monitoring arrangements

A monitoring mechanism (GRECO) is provided for in Art.14. The GRECO began functioning in May 1999. It was established as a monitoring mechanism pursuant to the Partial and Enlarged Agreement Establishing the "Group of States Against Corruption-GRECO," adopted by the Council of Europe's Committee of Ministers on 5 May, 1998. Its aim is to monitor through a process of mutual evaluation and peer pressure the compliance of States with their undertakings in the field of corruption. Among these undertakings are the CoE Criminal and Civil Law Conventions. Membership in the GRECO overlaps, but is not identical to, membership in the CoE Convention. Although a State Party automatically joins the GRECO when it ratifies the CoE Convention, the reverse is not true; a State Party may choose to participate only in the GRECO, but not accede to the CoE Convention.

We then discussed following main benefits of this convention. The Convention:

Provides for civil remedies for persons who have suffered damage as a result of acts of corruption, including compensation for a broad range of damages (Art. 3)

Requires that the State or appropriate authority is liable to compensate for the corrupt act of a public official (Art. 5)

Establishes minimum limitations periods for bringing a case (Art. 7)

Requires contracts providing for corruption to be held void and enables parties to apply for contract to be voided where consent undermined by corruption (Art. 8)

Requires whistleblower protection of employees (Art. 9)

Requires measures ensuring accounts present true and fair view of the company's financial position and that auditors be required to confirm this (Art. 10)

Requires effective procedures for acquisition of evidence in civil cases (Art. 11)

Provides for international cooperation by contracting parties in civil cases of corruption, including in obtaining evidence abroad, jurisdiction, recognition and enforcement of foreign judgments. (Art. 13)

Provides for monitoring system (Art. 14)

No reservation may be made in respect of any provision in the Convention. (Art. 17).

3 CONCLUSIONS

Following the presentation of a local expert who was dealing with relevant national legislation and some discussion in the group (regrettably local participants were not very active and the amount and scope of discussion was therefore very limited) we were able to draw certain conclusions relevant for implementation of the Convention in Montenegro. Below is the non-exhaustive list of them:

According to relevant provisions of the Constitution of Montenegro the Convention has become after its ratification an integral part of domestic legal system – in this sense its provisions are already legally binding in Montenegro;

There is no need for the adoption of special law dealing exclusively with the implementation of the Convention in the legal system of Montenegro. Instead it was agreed that in several different laws majority of Convention provisions there are corresponding and appropriate solutions already in place. These laws are The Law on Obligations, The Law on Civil Procedure, The Law on Enforcement Procedure, Criminal Procedure Code; The Law on Misdemeanors and some other regulations.

This was however only a general assessment of a situation from an external point of view. In order to get a detailed and completely accurate interview into the level of compliance and implementation of the Convention a more active attitude of domestic experts is necessary. Only members of all stakeholders who have to deal with all perspectives of the implementation of the Convention requirements and who actually were present at the seminar could give all relevant information. The interactive discussion was very limited as already mentioned above.

I therefore strongly recommend to national experts to go through all relevant domestic legislation again, following the proceedings of this seminar, in which the Convention and methods of its implementation were presented and explained in detail and illustrated with examples of three different states – Slovenia, Albania and Bulgaria. It is necessary to identify how the laws that already include relevant provisions (e.g. dealing with civil remedies for the compensation of damage, responsibility of a state, void and null contracts as a consequence of corruption and all the rest that exist in Montenegrin legal system) are actually enforced, interpreted and applied in practice. Only after this revision has been accomplished, it will be possible to clearly see what legislative changes might still be necessary in Montenegrin legal system to fully comply with the Convention.

Without underestimating other provisions of the Convention (but for which it is more or less obvious that they can be enforced through existing domestic legislation) special attention need to be given to the implementation of Articles 2 and 9. The definition of corruption in its entirety does not exist in domestic legislation – it is partially covered with definitions of corruption-related criminal offences but this is far from satisfactory if we want to get efficient system of civil law remedies against corruption that will not depend on criminal law. Therefore the definition of corruption from Article 2 of the Convention has to be included in civil law system of Monte Negro in a way that will enable for actual and effective implementation of all other provisions, related to (and dependent on) this definition.

Similar (but not the same) is situation concerning protection of whistleblowers. There are some fragments of this Convention requirement already built in the domestic legal system – however it would be too optimistic to state that the overall system of protection is appropriate and that it will work against any unjustified sanction as required by the Convention. Implementation of this particular provision needs systematic approach that has to include the identification of all situations where unjustified sanctions can be imposed on people who report corruption in good faith; after that identification appropriate (effective) protection mechanism need to be provided for each situation. This is the second issue that in my opinion requires legislative changes in order to comply with Article 9 of the Convention.