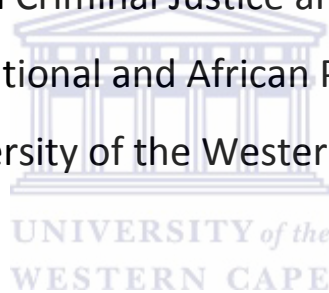


**The Criminalisation of Trading in Influence in International
Anti-Corruption Laws**

Submitted in partial fulfilment of the requirements for the LLM
degree Transnational Criminal Justice and Crime Prevention –

An International and African Perspective

University of the Western Cape



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Declaration

I, Julia Philipp, hereby declare that this dissertation is original. It has never been presented to any other University or institution. Where other people's ideas have been used, proper references have been provided. Where others people's words have been used, they have been quoted and duly acknowledged.

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Date: _____



Supervisor: Dr Raymond Koen

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Date: _____

List of Abbreviations

AU Convention	African Union Convention on Prevention and Combating Corruption
CoE Convention	Council of Europe Criminal Law Convention on Corruption
SADC Protocol	Southern African Development Community Protocol against Corruption
UNCAC	United Nations Convention against Corruption
UNODC	United Nations Office on Drugs and Crime



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Chapter I Introduction

1. Setting the Scene

Corruption causes substantial damage to societies. It not only impairs the efficient functioning of the organs of the state and diminishes public trust in their integrity, thus undermining the rule of law and democracy, but it also distorts economic competition and undermines the foundation of economic development.¹ Corruption grows in the shadows, mostly to the benefit of the powerful.² It also provides a lever by which organised crime can gain influence in public decision-making.

‘Corruption is bad not because money and benefits change hands, and not because of the motives of participants, but because it privatizes valuable aspects of public life, bypassing processes of representation, debate, and choice.’³

The end of the Cold War also brought an end to the often unconditional support by western countries for corrupt regimes in the developing world. Instead of ideological loyalty, western governments increasingly demanded good governance, knowing that corruption is not only a major cause for poverty, but also a danger to their own economies, which were more and more characterised by a globalisation of trade and of international mergers, and thus especially vulnerable to the corruption virus.⁴

Since the 1990s, the growing awareness among the states of the damage done by corruption has led many countries across the globe to initiating countermeasures, specifically in the area of criminal law.⁵ The increased interest in the phenomenon of

¹ See the Preambles of the United Nations Convention against Corruption and the Council of Europe Criminal Law Convention on Corruption.

² Kubiciel (2009: 139).

³ Thompson (1993: 369).

⁴ Sanyal (2005: 139).

⁵ Bannenberg & Schaubenstein (2004: 28).

corruption has produced a multitude of policy prescriptions and reform initiatives⁶ of which the United Nations Convention against Corruption (UNCAC) is the most recent example. In the course of this development, the gradual understanding of the nature and impact of the problem reflects in the progression of the counter-measures from targeted legal instruments directed at specific crimes such as bribery, to an increasingly general definition of corruption and broader measures against it.

Since it is clear that the fight against corruption is no longer just a moral issue, but has become a problem of economic and political significance in countries all over the world, effective action is demanded. There are numerous measures which can be employed to rein in corruption. First on the list should be preventive measures. Secondly, effective criminalisation through adequate legislation is necessary to manifest the determination of the state and to deter potential offenders.

UNCAC prescribes that States Parties shall criminalise, or – in some cases – at least consider criminalising, a wide range of acts of corruption. In doing so, UNCAC goes further than previous instruments of this kind, as it considers not only the most obvious forms of corruption, such as bribery and the embezzlement of public funds, but also, for example, trading in influence.⁷ This offence basically deals with a person who has good connections to public officials and wants to benefit from this fact by selling his ability to exert influence. More precisely, it presupposes that a private person gives an undue advantage to another person - the 'influence peddler', who himself may be a public official or a private individual - who claims, by virtue of his professional position or social status, to be able to exert an improper influence over the decision-making of a public authority.

⁶ UNODC (2004: 26).

⁷ UNODC (2004: 27).

2. Background to the Research

There is an immense academic discussion on the question of what corruption actually is.⁸ This is a time-consuming debate at the end of which the preference for one or another approach is spelled out. A general definition of the term is avoided by international agreements, as well as by many scholars, as it would restrict the scope of the contribution whilst not providing a significant benefit to the reader. Furthermore, corruption is characterised differently in different regions.⁹ Corruption is perceived archetypally by most observers. As United States Supreme Court Justice Potter Stewart argued in 1964: 'I can't define pornography, but I know it when I see it.'¹⁰

In brief, corruption is the misuse of public power for private gain.¹¹ Corruption usually entails an exchange of favours between two actors, the client and the agent.¹² The latter is entrusted with power by his superior, the principal. By establishing certain rules, the principal declares how the agent has to behave with respect to the client. In corruption cases, the agent is acting in contravention of these rules. Corruption offences are characterised generally by this triangular relationship.¹³

Bribery is probably the most common form of corruption and may be best demonstrated by the following example: A, director of a regional bank, is very interested in a valuable piece of real estate which is owned by the city. One of the biggest competitors of the bank is also interested in this property. A agrees with C, who is the responsible officer in the city's construction department, that C will be

⁸ See, for example: Carr (2007: 132); Tanzi (1998: 564).

⁹ UNODC (2004: 10).

¹⁰ U.S. Supreme Court, *Jacobellis v. Ohio*, 378 U.S. 184 (1964)

¹¹ This is the definition used by Transparency International, see on the internet:

http://www.transparency.org/news_room/faq/corruption_faq

¹² Argandona (2007: 481).

¹³ Lambsdorff (2007: 19).

given the opportunity to buy a luxurious mansion considerably below the market price if C provides A with the required construction permit for the plot. C (the agent) subsequently acts as desired by A (the client), thus disregarding the procedures and rules set up by the administration of the city (the principal) which would normally have applied in the case. By soliciting or accepting an undue advantage for himself (in form of the luxurious mansion below market price) in exchange for a favour given to A in the course of his official duties, C fulfils the elements of the offence of passive bribery under the definitions of most international anti-corruption instruments and the domestic laws of most countries. A, as the active briber, is also punishable.

The question of trading in influence arises if one changes some elements in the previous example: The case remains the same, except that A, this time, does not approach C directly with his concern. A seeks out his friend and tennis partner, B, a city officer for waste management. A tells B about his desire and asks him for 'help' in this regard. In exchange, A offers B the opportunity to buy a luxurious mansion considerably below the market price. B knows C well because they had met in several meetings at work which concerned both of their areas of responsibility. Furthermore, B and C are members of the same political party. B uses his personal relation with C in order to obtain a construction permit for A (without C knowing of the agreement between A and B). In the end, C provides A with the required permit.

The result is the same in both cases: A obtains a favourable decision from the responsible public officer, C. But while in the first case C receives a benefit for acting according to A's wishes, he does not receive anything in the second case, but merely acts in order to do his friend, B, a favour. The person obtaining a benefit in exchange for the desired decision of the public authority is B. This second example is a clear case of trading in influence, where B uses his influence (arising from his position) to

obtain an action or decision from a public authority. Accordingly, in contrast to bribery, the offence of trading in influence requires a relationship which is enlarged by a fourth person: the 'influence peddler', that is, the person who commercialises his real or supposed influence (in our case B). The agent (C) does not appear on the scene himself, but remains in the background. Trading in influence thus appears as an indirect form of corruption, also called second-hand corruption.¹⁴ Despite its indirect nature, trading in influence seems neither less dangerous for a society, nor ethically more justifiable than the traditional offence of bribery.

3. Objectives of the Research

Despite being mentioned in most international anti-corruption instruments, trading in influence appears only rarely in the spotlight of legal practice and literature. This paper aims to shed some light on the issue. The main objective is to highlight the different forms of trading in influence stipulated in various international agreements and national laws in order to draw a comprehensive picture of this offence. Furthermore, by identifying and critically appraising the core issues connected with trading in influence, this paper aims to provide recommendations which may be of use to states obliged to implement or to consider implementing this offence.

4. Significance and Scope of the Research

The subject was dealt with only very briefly in the course of the academic discussion of the international agreements on corruption. Also, there is a dearth of books and papers which deal exclusively with trading in influence and its criminalisation in the international context.

¹⁴ Vander Beken, De Ruyver & Siron (2001: 17).

This paper will analyse critically the main sources, namely UNCAC, the African Union Convention on Prevention and Combating Corruption (AU Convention), the Southern African Development Community Protocol against Corruption (SADC Protocol) and the Council of Europe Criminal Law Convention on Corruption (CoE Convention). Furthermore, the paper will examine the corresponding explanatory notes and try to provide a picture of the most important aspects of the issue. As many countries are obliged to consider the criminalisation of trading in influence, drawing an overview of it may make a substantial contribution to its comprehension.

Due to the limited space, the paper is unable to cover all provisions of trading in influence in countries where it exists. Accordingly, the discussion will be restricted to the situation in France, Spain and Belgium. By analysing the position in these countries, the different approaches to criminalisation can be highlighted.

5. Chapter Overview

This paper consists of four further chapters. In the second chapter, the individual articles in the international agreements will be examined and compared. The paper will focus on the only truly global instrument, UNCAC, and the three other international agreements mentioned above. Apart from article 18 of UNCAC, trading in influence is mentioned in article 12 of the CoE Convention. Neither UNCAC nor the CoE Convention oblige States Parties legally to establish trading in influence as an offence. But States Parties are required to consider the establishment of the offence under their domestic law. Thus, apart from an analysis of the model provisions, which are being proposed in the conventions, the paper will try to identify the factors that prevented the provision from being made obligatory for the member states.

Under article 4(1)(f) of the AU Convention and article 3(1)(f) of the SADC Protocol, trading in influence is an act of corruption which should be established as an offence under domestic law. The said provisions are nearly identical. It is noteworthy that the prohibition applies to persons performing functions in both the public and the private sectors.

Chapter three outlines the legislation of three European countries, namely, France, Belgium and Spain, which have criminalised trading in influence. This analysis will show that the structure and wording of the respective provisions, as well as the offending actions and potential perpetrators, differ substantially among these countries.

Chapter four is dedicated to the search for a brief answer to the question of how one should differentiate between proper influence, which may be traded freely, and illegitimate forms of lobbying. The influence must be objectionable in common terms ('improper influence'), as accepted forms of lobbying should not be criminalised.¹⁵

The notion of improper influence is central therefore to the determination of which behaviour is an offence and which is not.¹⁶

Chapter five consists of a review of the presentation, conclusions drawn from the study, and recommendations for an effective implementation of the offence.

¹⁵ Explanatory Report on the CoE Convention, paragraph 65.

¹⁶ Androulakis (2007: 328).

Chapter II Trading in Influence in International Agreements

This chapter aims to provide an overview of the four international instruments dealing with trading in influence, to pinpoint the elements of the offence in each criminalisation provision and to highlight the differences between the various provisions. The different instruments are examined in the order of their importance, which manifests in their number of member states. Accordingly, the analysis starts with UNCAC, followed by the CoE Convention, the AU Convention and the SADC Protocol.

1. United Nations Convention against Corruption

On 31 October 2003, the UN General Assembly passed resolution 58/4, adopting UNCAC. Requiring 30 ratifications to become binding in accordance with article 68 (1), UNCAC came into force on 14 December 2005.¹⁷ UNCAC is the first legally binding and the most comprehensive of the global instruments to prevent and combat corruption.¹⁸ By August 2009, UNCAC had 136 States Parties and 140 signatories.¹⁹

The purpose of the Convention is to prevent and criminalise corrupt practices and promote and facilitate international cooperation and technical assistance in this regard.²⁰ The Convention aims to take into account the various forms of corruption and to harmonise national laws by establishing a common language and common guidelines. Apart from the preventive measures, the criminalisation of corrupt practices set out in Chapter III constitutes a fundamental pillar of UNCAC.

¹⁷ Argandoña (2007: 485).

¹⁸ Webb (2005: 195).

¹⁹ Updated information of the signature and ratification status is available on the Internet <http://www.unodc.org/unodc/en/treaties/CAC/signatories.html>

²⁰ See article 1 of UNCAC.

(1) The elements of the offence under article 18 of UNCAC

Article 18 of UNCAC reads as follows:

Each State Party shall consider adopting such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:

- (a) The promise, offering or giving to a public official or any other person, directly or indirectly, of an undue advantage in order that the public official or the person abuse his or her real or supposed influence with a view to obtaining from an administration or public authority of the State Party an undue advantage for the original instigator of the act or for any other person;
- (b) The solicitation or acceptance by a public official or any other person, directly or indirectly, of an undue advantage for himself or herself or for another person in order that the public official or the person abuse his or her real or supposed influence with a view to obtaining from an administration or public authority of the State Party an undue advantage.

Active corruption (Art. 18(a) of UNCAC) falls within the scope of UNCAC as does passive corruption (Art. 18(b) of UNCAC) committed by someone who asserts or confirms that he is able to exert improper influence over the decision-making of a person who performs a function in the public sector. The aim of the provision is to prevent people, who are not necessarily public officials themselves, but – due to their work or social contacts – have good ties to public officials, from commercialising their influence.²¹ Article 18 of UNCAC mirrors the provisions concerning active and passive bribery of national officials stipulated by article 15, with the difference that, while the latter focuses on the act or omission of the public official, article 18 seeks to criminalise the use of a person's influence to obtain an undue advantage for a third person from a public official.

²¹ van Aaken (2005: 412).

As otherwise the elements of the offence under article 18 of UNCAC are the same as those under article 15 of UNCAC, the definitions of the elements describing the scope of article 15 of UNCAC can be transferred to article 18 of UNCAC.²² Indeed, in some UN documents, the similarity of trading in influence offences with bribery offences is emphasised by the naming of article 18 (as far as public officials are the influence peddlers) as ‘active or passive bribery of public officials in relation to abuse of influence’.²³

(a) Possible Offenders

Under article 18 of UNCAC, the perpetrator of the passive form of trading in influence may be a public official as well as a private person. According to article 2(a) of UNCAC a public official is any person holding a legislative, executive, administrative or judicial office, whether appointed or elected, or any other person who performs a public function or provides a public service. The UNCAC definition aims to include all possible categories of public officials. This definition is broader than the definition of other anti-corruption conventions and goes beyond the definition of many national criminal codes.²⁴ Apart from ‘officials by status’, any person who provides a public service is considered to be a public official, regardless of his or her status. This definition takes account of the fact that it is generally not the status but the function that renders its bearer vulnerable to corruption.

²² UNODC (2006: 101).

²³ UNODC (2004: 36).

²⁴ Kubiciel (2009: 143).

(b) 'Undue advantage'

With the term 'undue advantage', UNCAC covers a broad scope of incentives promised or offered to public officials or any other persons. An 'advantage' can be anything that places the public official or other person in a better position than he was before the commission of the offence. The range of 'advantages' is wide: mostly, it is something tangible and of value, such as money, precious objects and holidays. But also intangible advantages such as inside information, sexual or other favours, entertainment and employment are covered by this term.²⁵

The term 'undue' remains formless and indefinite. In regard to public officials, every advantage received is presumed to be undue unless the acceptance is expressly allowed by internal regulations. Advantages of very low value or traditionally accepted gifts are not regulated. While one could argue that every such advantage is unjustified, it is arguable also that goods of very low value ought to be beyond criminalisation. Where exactly the line needs to be drawn will have to be decided on a national basis.

How the undue advantage is handed over does not matter. It may be promised, offered or given, directly or indirectly. The persons involved in the offence cannot avoid the contravention by using an intermediary.²⁶

Furthermore, the words 'for any other persons' indicate that the advantage may be given to a family member or a friend of the passive influence peddler, indirectly or directly, with the knowledge of the influence peddler. In contrast to articles 15 to 17 of UNCAC (which deal with bribery and embezzlement), it seems that the advantage

²⁵ UNODC (2006: 101).

²⁶ UNODC (2006: 102).

can be received only by persons, not by entities.²⁷ The reason for this differentiation remains unclear. The authors of the UNCAC Legislative Guide are nevertheless of the view that the advantage can be given also to a political party or another entity.²⁸ Additionally, the undue advantage must be linked to the trading of influence.

(c) Offering, promising or giving

The elements of active trading in influence are those of promising, offering or giving something to the influence peddler. Unlike 'offering', which does not require an agreement, promising may well imply an agreement between the peddler and the instigator.²⁹ The term 'giving' is unproblematic.

(d) Solicitation or acceptance

Solicitation is a unilateral act by the influence peddler to let the prospective client know that an advantage is required by the influence peddler to 'help' him. For 'acceptance' to occur, a consensus between the parties is necessary. The elements of the offence are fulfilled even if the influence peddler withdraws his or her agreement later.

²⁷ During the drafting UNCAC, one delegation suggested the insertion of the words 'or entity' after the words 'any other person'. See Revised draft United Nations Convention against Corruption, Doc. A/AC.261/3/Rev.1, p. 29, footnote 163.

²⁸ UNODC (2006: 102).

²⁹ UNODC (2006: 101). In contrast, Kubiciel (2009:146) is of the view that an express agreement is not necessary: 'States and their law enforcement bodies may bear in mind that said corrupt manoeuvres can be either unilateral or bilateral, so that offering, promising or giving is to be penalized irrespective of the existence of an agreement between briber and bribe.'

(e) 'in order that the public official or the person abuse his or her real or supposed influence'

The ambition of the instigator is to induce the influence peddler to abuse his or her real or supposed influence. The wording of article 18 does not stipulate whether or not the influence must be exerted or whether or not the supposed influence must lead to the intended result.³⁰ But as even the pretence of influence is sufficient for the offence, it seems logical that the influence need not really be exerted and does not in fact have to lead to the intended result.

Furthermore, with respect to a public official trading with his or her influence, article 18 does not comment on how the influence should be connected to the public official's status or duties. It remains unclear whether the ability to exert influence has to be facilitated through his position or be somehow related to his work or if any capacity on his part to manipulate another authority may be sufficient.

The aim of the offence is to prevent not only public officials, but also private individuals who have good connections to (high-ranking) public authorities, from gaining any advantage by commercialising their ability to influence the public decision-making process. Thus, the influence trader has to 'abuse' his capacity to manipulate public decisions. From this it follows that, especially regarding influence trading between private individuals, there can be legitimate forms which might not be criminalised. The abuse of influence presupposes the intention to corrupt a public authority.

³⁰ In the Revised draft United Nations Convention against Corruption, there was a formulation stating 'whether or not the influence is exerted or whether or not the supposed influence leads to the intended result' in the then article 22; see: Ad Hoc Committee for the Negotiation of a Convention against Corruption, Doc. A/AC.261/3/Rev.4, 22. There are no further data as to why this phrase was deleted and not adopted in the final version of UNCAC.

(f) *Mens Rea*

With regard to the subjective element, article 18 prescribes intention. The knowledge, intent or purpose element required for the offences under the Convention can be established through inference from objective factual circumstances.³¹

The offender must have linked mentally the giving or receiving of an advantage with the incentive to exert influence illegitimately. Since the offence of trading in influence is committed regardless of whether or not the desired conduct of the influence peddler actually took place, the *mens rea* is fulfilled already if the bribe-giver wanted to induce the bribe-receiver to perform certain conduct.

(2) The non-mandatory character of article 18 of UNCAC

As mentioned above, the criminalisation of trading in influence is not imposed by the Convention. According to the wording of article 18 ('shall consider'), States Parties are required to consider the implementation of such an offence into their domestic legislation. The lack of an obligation to criminalise certain acts, such as trading in influence, illicit enrichment, abuse of public functions and a number of other form of conduct, was criticised by scholars.³² In their view, this lack would impede the goal of the Convention to establish common standards for national legal systems.

While drafting UNCAC, the Ad Hoc Committee for the Negotiation of a Convention against Corruption anticipated in the draft of the first session that the offence would be mandatory.

³¹ See article 28 of UNCAC.

³² Argandoña (2007: 490).

The proposals submitted by France,³³ Mexico,³⁴ Colombia,³⁵ Turkey³⁶ and the Philippines³⁷ supported the mandatory implementation the offence ('each State Party shall adopt...'). During the first reading, many delegations expressed preference for the French proposal as the basis for further work. Other delegations had serious doubts about the inclusion of this article.³⁸ Still other delegations were of the view that such a provision should not be included at all. Unfortunately, the reasons raised against the inclusion are not stipulated in the UN documents preparing UNCAC. An informal working group established after the second reading of the draft text presented an article on the basis of the French proposal in which the hesitation on this issue is visible.³⁹ Finally, at the sixth session, a non-binding version was adopted which was submitted by Canada, France and Italy, who also co-ordinated another informal working group established at the fifth session of the Ad Hoc Committee.⁴⁰ During this session, a number of delegations had suggested the deletion of this article; others were of the view that a mandatory formulation would be preferable. At the end, the majority of delegations prevailed, which considered that a non mandatory formulation would be necessary in order to achieve consensus. The decision not to introduce a mandatory provision was taken 'especially in view of the significantly broad scope of the article'.⁴¹ Probably, the fact that the criminal codes of many countries (for example the United States and Germany) do not have a provision of this kind, played an important role as well.

³³ A/AC.261/IPM/10.

³⁴ A/AC.261/IPM/13

³⁵ A/AC.261/IPM/14

³⁶ A/AC.261/IPM/22

³⁷ A/AC.261/IPM/24.

³⁸ Ad Hoc Committee for the Negotiation of a Convention against Corruption, Doc. A/AC.261/3/Rev.1, 29, footnote 162.

³⁹ See article 18 '*Each State Party shall [adopt] [consider adopting] such legislative...*' in: Ad Hoc Committee for the Negotiation of a Convention against Corruption, Doc. A/AC.261/3/Rev.3.

⁴⁰ Ad Hoc Committee for the Negotiation of a Convention against Corruption, Doc. A/AC.261/3/Rev.4, 22.

⁴¹ Ad Hoc Committee for the Negotiation of a Convention against Corruption, Doc. A/AC.261/3/Rev.4; 22. Fn. 103.

2. Council of Europe Criminal Law Convention on Corruption

The Council of Europe Criminal Law Convention on Corruption (CoE Convention) was adopted in November 1998 by the Council of Ministers and opened for signature in January 1999. The Convention entered into force in July 2002 when the prescribed number of 14 ratifications was achieved. The Convention is open for signature by the member States of the Council of Europe and six non-member states⁴² which have participated in its elaboration. Also, other states and the EU can be invited to join the Convention. By the end of August 2009, the CoE Convention had been signed by 49 states, 41 of which have ratified it thus far.

The Council of Europe chose a multidisciplinary approach to the fight against corruption. The main pillars are the standardisation of European norms concerning corruption offences, the monitoring of compliance with these norms and capacity building through technical co-operation programmes. The monitoring of compliance with the Convention is being carried out by the Group of States against Corruption (GRECO), which started work in May 1999.⁴³

The Convention does not provide a uniform definition of corruption, but presents a commonly agreed definition of bribery which serves as the basis for various forms of criminalisation. The Convention covers a broad range of offences, including private sector corruption and money laundering. In contrast to the anti-corruption instruments of the European Union,⁴⁴ article 12 of the Convention obliges states to penalise

⁴²They are Belarus, Canada, the Holy See, Japan, Mexico and USA.

⁴³ GRECO is seeking to encourage the States Parties to live up to their obligations under the Convention through a process of mutual evaluation and peer pressure. While a State Party automatically joins the GRECO when it ratifies the CoE Convention, a country may choose to participate in the GRECO without joining up to the Convention.

⁴⁴ Ligeti (2005: 324).

trading in influence,⁴⁵ which it views as a specific form of corruption, linked to bribery. The provisions stipulated in the Convention are mandatory, but article 37 provides for the possibility of reservations with regard to some of the offences. Thus, any state can decide not to establish trading in influence as a criminal offence under its domestic law. By the end of August 2009, 10 Parties (among them France and Belgium) had declared that they would not criminalise the entire offence prescribed by article 12. The authors of the Explanatory Report emphasise that the offence of trading in influence would be a novelty for various States Parties. As the Convention aims to advance the range of anti-corruption criminal law measures, the criminalisation of trading in influence appeared indispensable.⁴⁶

(1) The elements of the offence under article 12 of the Council of Europe Criminal Law Convention on Corruption

The criminalisation of trading in influence aims to prevent corrupt behaviour of persons who are ‘in the neighbourhood of power’⁴⁷ and generate an ambience of corruption by seeking to profit from their positions. This so-called ‘background corruption’ attacks the same protected legal interests, namely, transparency and impartiality of public authorities, as do bribery and other corruption-related offences.⁴⁸

Article 12 presupposes a corrupt trilateral relationship where a person having real or pretended influence on persons referred to in articles 2, 4 to 6 and 9 to 11, uses his

⁴⁵ Article 12 of the CoE Convention provides that:

Each Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law, when committed intentionally, the promising, giving or offering, directly or indirectly, of any undue advantage to anyone who asserts or confirms that he or she is able to exert an improper influence over the decision-making of any person referred to in articles 2, 4 to 6 and 9 to 11 in consideration thereof, whether the undue advantage is for himself or herself or for anyone else, as well as the request, receipt or the acceptance of the offer or the promise of such an advantage, in consideration of that influence, whether or not the influence is exerted or whether or not the supposed influence leads to the intended result.

⁴⁶ Explanatory Report on the CoE Convention, paragraph 63.

⁴⁷ Explanatory Report on the CoE Convention, paragraph 64.

⁴⁸ Explanatory Report on the CoE Convention, paragraph 64.

or her influence in exchange for an undue advantage from someone seeking this influence. It is noteworthy that the influence peddler cannot take decisions himself, but misuses his real or alleged influence on other persons. As the provision criminalises passive and active trading in influence, states may implement the offence in two separate parts.

(a) Possible Offenders

Under article 12 'anyone who asserts or confirms that he or she is able to exert an improper influence' can be a possible offender. Unlike UNCAC, no special differentiation between public officials and private persons is made.

However, the scope of the term 'public official' is quite wide under the CoE Convention, as its drafters desired to cover all possible categories of public officials in order to avoid loopholes. The exact definition of 'public official' is left to the states. But the national law should cover the persons mentioned in article 1(a) which defines the term for the purposes of the CoE Convention.

(b) Undue advantage

The scope of the term 'advantage' is comparable to its scope in UNCAC. The comments in the Explanatory Report on active and passive bribery also apply to article 12, in particular with regard to the benefits of corrupt activities. Accordingly, material and non-material values are covered. The offender or any other beneficiary must be placed in a better position than before the commission of the offence.⁴⁹ The advantage can be given to a third party, for instance a relative, or an organisation to which the official belongs. Even though the term 'entity' is not mentioned in the

⁴⁹ Explanatory Report on the CoE Convention, paragraph 37.

wording of article 12 (or article 2), the authors of the Explanatory Report are of the view that entities can be possible beneficiaries. According to them, the taker of the benefit must be a member of the organisation (for instance, a political party) which profits from the advantage. If he is not a formal member, he would therefore not act in contravention of the Convention provisions. If the advantage is destined for a person or entity other than the influence peddler himself, the latter must at least have knowledge thereof.

The Explanatory Report states that the term 'undue' should be interpreted as 'something that the recipient is not lawfully entitled to accept or receive'.⁵⁰ By using this term, advantages expressly permitted by law or internal rules (for instance, regarding socially accepted gifts) are excluded and thus not punishable.

(c) Conduct

The possible material components of the active form of trading in influence are the acts of promising, offering or giving an undue advantage, directly or indirectly, by the influence peddler. The three actions differ only slightly, and the elaborations in respect of UNCAC apply here as well.

Regarding the passive form of trading in influence, the conduct required includes the request, receipt or the acceptance of an advantage in exchange for a misuse of one's influence.

⁵⁰ Explanatory Report on the CoE Convention, paragraph 38.

(d) 'improper influence over the decision-making of any person referred to in articles 2, 4 to 6 and 9 to 11'

Article 12 of the CoE Convention presupposes the exertion of 'improper' influence, which means that a corrupt intent by the influence peddler is necessary.⁵¹ The term 'improper' is supposed to differentiate legitimate from illegitimate influence and is therefore of considerable importance for the practical application of the offence.⁵² The Explanatory Report clarifies that, for instance, acknowledged forms of lobbying should not be regarded as improper influence.⁵³

In the course of the trading in influence under article 12 of the CoE Convention, it is of no importance whether the influence was actually exerted, whether it leads to the intended result, or whether the ability to exert influence in fact existed.

The offence presupposes that a person affirms to exert improper influence over the decision-making of any person referred to in articles 2, 4 to 6 and 9 to 11. These provisions identify domestic and foreign public officials (articles 2 and 5), members of domestic and foreign public assemblies (articles 4 and 6), officials of international organisations, members of international parliamentary assemblies or judges and officials of international courts (articles 9 to 11) as possible agents of the offence. Hence, the person who is to be influenced can be a national public official as well as a public official of a foreign country. Interestingly, even members of domestic and foreign public assemblies exercising legislative or administrative powers are possible targets of influence peddling. This is especially delicate, as members of parliament are in the position to enact rules and laws regarding their own status, and are

⁵¹ Explanatory Report on the CoE Convention, paragraph 65.

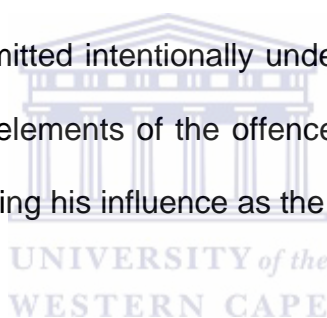
⁵² See Androulakis (2007: 328).

⁵³ Explanatory Report on the CoE Convention, paragraph 65: 'Improper' influence must contain a corrupt intent by the influence peddler: acknowledged forms of lobbying do not fall under this notion.'

generally not enthusiastic when it comes to the criminalisation of offences that are directly related to them. The extension to members of parliament takes into account that they are particularly attractive to corruptive outside influences because of their far-reaching powers. Furthermore, it takes into consideration that corruption is not only a reality in political circles but also a real danger to all democratic institutions of a country. By including foreign public officers and members of public assemblies, article 12 of the CoE Convention faces up to the reality that corruption is not limited to the territory of a state.

(e) *Mens Rea*

The offence can only be committed intentionally under article 12, and the intent has to cover all other substantive elements of the offence. Intent must relate to a future result: the influence peddler using his influence as the client desires.



3. African Union Convention on Preventing and Combating Corruption

The African Union (AU), founded in July 2002, is the successor organisation to the Organisation of African Unity (OAU). The AU covers the entire continent except for Morocco. The AU Convention on Preventing and Combating Corruption was adopted by the heads of state at the African Union Summit held in Maputo on 11 July 2003. The Convention entered into force on 5 August 2006 and is open for signature by the 53 Member States of the African Union. By July 2009, 43 states had signed the Convention, and 30 of them had ratified it. Among other provisions, the AU Convention demands of its members the criminalisation of various offences, such as bribery (domestic and foreign), diversion of property by public officials, trading in influence, illicit enrichment, money laundering and concealment of property. The AU

Convention does not limit its scope to the public sector, but also includes private sector corruption, both on the supply and on the demand side.

(1) The criminalisation under article 4(1)(f) of the AU Convention

The scope of application of the AU Convention is limited to the acts of corruption and related offences listed in article 4. Without expressly calling it ‘trading in influence’, article 4(1)(f)⁵⁴ contains an offence which criminalises the promising, offering or giving of an undue advantage to anybody who asserts that he or she is able to influence decision-making in the public or private sector in exchange for that person abusing his or her real or supposed influence in order to gain an advantage for the instigator. Article 4(1)(f) is a mandatory provision, but article 24 allows states to make reservations as long as they are compatible with the object and the purpose of the Convention. The wording of this provision is identical to article 12 of the CoE Convention, except for one fundamental term: Article 4(1)(f) is not limited to the use of improper influence over the decision-making process within a public authority, but also extends to the private sector.

As the other elements are the same as under article 12 of the CoE Convention, the elaborations made above apply here as well. The only aspect that requires further explanation is the inclusion of the private sector in the offence.

⁵⁴ AU Convention, Article 4(1)(f) classifies as an act of corruption :

‘the offering, giving, solicitation or acceptance directly or indirectly, or promising of any undue advantage to or by any person who asserts or confirms that he or she is able to exert any improper influence over the decision making of any person performing functions in the public or private sector in consideration thereof, whether the undue advantage is for himself or herself or for anyone else, as well as the request, receipt or the acceptance of the offer or the promise of such an advantage, in consideration of that influence, whether or not the influence is exerted or whether or not the supposed influence leads to the intended result.’

(2) Trading in influence in the private sector

Following article 4(1)(f), the manipulation of the decision-making process of any person performing functions in the private sector should be criminalised by the States Parties to the Convention. This obligation is a novelty in the armoury of both the international anti-corruption measures as well as the national legal regimes on this issue.

The reason for the criminalisation of the interaction of two private persons under article 18 of UNCAC and article 12 of the CoE Convention is that their conduct aims to manipulate the decision-making process of a public authority. The protected legal interests are the transparency and impartiality in the functioning of the public administration. Corruption in the public sector in its various forms can constitute a threat to the rule of law and the stability of democratic institutions. Furthermore it jeopardises trust in the public administration. The offence of trading in influence focuses on a close circle of insiders in public institutions, with the objective of preventing them from manipulating public authorities, even if the public officer concerned is not part of the bribery process and remains in the background.

The object of legal interest changes completely if the target of the influence peddling is a person performing functions in the private sector. Corruption in the private sector can distort competition and destabilise the affected market, which may have dire consequences for the entire economy. The fight against corruption in the private sector has long been a priority in the arena of international law, as can be seen from the various international initiatives on this issue.⁵⁵ For instance, the Council

⁵⁵ For instance: Joint Action 98/742/JHA, of 22 December 1998 on corruption in the private sector, adopted by the Council on the basis of Article K.3 of the Treaty on European Union; see the respective articles in UNCAC and the CoE Convention.

Framework Decision 2003/568/JHA of 22 July 2003 on combating corruption in the private sector⁵⁶ criminalises active and passive bribery in the private sector by taking into account the particularity of the circumstances in the private sector. Yet, until now no international anti-corruption treaty has stipulated the criminalisation of trading in influence in the private sector. The reason may be that many accepted parts of economic life could be the target of this extension and it would be enormously difficult to draw the line between a corrupt activity and a legal pursuit. For instance, in international as well as in national business relations, the use of middlemen is quite common and – to a certain degree – a legitimate form of commercial relationship.

The AU Convention gives no satisfactory answers to the question of how to apply the offence of trading in influence with regard to the specific characteristics of an economic market. It is, in the end, an interesting issue which is worthy of further consideration.⁵⁷ But it does not seem feasible merely to copy a provision (article 12 of the CoE Convention) which was modelled to protect the public administration and apply it to the private sector. It appears that the authors of article 4(1)(f) of the AU Convention did not take into consideration the consequences of the extension to the private sector while drafting the Convention. The approach to private-sector influence peddling in the AU Convention is unfortunately so nebulous and incomprehensive that a correction should be considered.

4. Southern African Development Community Protocol against Corruption

For the sake of completeness, the Southern African Development Community Protocol against Corruption (SADC Protocol) will be examined briefly. SADC began

⁵⁶ Council Framework Decision 2003/568/JHA of 22 July 2003 on combating corruption in the private sector, Official Journal L 192 , 31/07/2003 P. 0054 – 0056.

⁵⁷ See Abanto Vasquez (2008: 928).

as a loose coalition of states, formed in Lusaka, Zambia, in 1980, and was transformed from a Coordinating Conference into a Development Community (SADC) in 1992 by Declaration and Treaty in Windhoek, Namibia, at a Summit of Heads of State.⁵⁸

The SADC Protocol was adopted at the Summit of the SADC Heads of State held in Blantyre, Malawi, in August 2001 and came into force on the 6 July 2005. By July 2007, all States Parties of SADC (14 states) had signed the Protocol and nine had ratified it.⁵⁹ It was the first regional anti-corruption treaty in Africa, adding an African perspective to the globalisation of the fight against corruption.⁶⁰

The Protocol aims to promote co-operation in the fight against corruption by States Parties and to harmonise national anti-corruption laws in the region. Each State Party is required to adopt the necessary legislative or other measures to establish as criminal offences under its domestic law the acts of corruption described in article 3.

Under article 3(1)(f) of the SADC Protocol, the improper influencing of any person in the public or private sector relating to such person's decision-making functions should be criminalised by the States Parties.⁶¹ Article 3(1)(f) is a binding provision since the Protocol does not provide for the possibility of making reservations. The wording of article 3(1)(f) is identical to article 4(1)(f) of the AU Convention, including

⁵⁸ The member states are Angola, Botswana, the Democratic Republic of Congo, Lesotho, Malawi, Mauritius, Mozambique, Namibia, South Africa, Swaziland, United Republic of Tanzania, Zambia and Zimbabwe.

⁵⁹ Unfortunately, there are no updated data on the signature and ratification status available on the Internet.

⁶⁰ Matsheza (2001: 1).

⁶¹ SADC Protocol, Article 3 classifies as acts of corruption:

'offering, giving, soliciting or accepting, directly or indirectly, or promising of any undue advantage to or by any person who asserts or confirms that he or she is able to exert any improper influence over the decision making of any person performing functions in the public or private sector in consideration thereof, whether the undue advantage is for himself or herself or for anyone else, as well as the request, receipt or the acceptance of the offer or the promise of such an advantage, in consideration of the influence, whether or not the influence is exerted or whether or not the supposed influence leads to the intended result.'

the extension to the private sector. For that reason, I refer to the explanations made in that respect about the AU Convention.

5. Summary

The provisions examined are identical in that they all require the criminalisation of active and passive trading in influence. With respect to the influence peddler, the four provisions stipulate that this can be a private individual as well as a public officer. UNCAC contains the broadest definition of the term 'public officer'. The term 'undue advantage' is similar under all the instruments. Only UNCAC and the CoE Convention give further information regarding an entity as the beneficiary of the advantage. The target of the influence peddling is a public authority under all provisions. The CoE Convention is especially wide in this regard, as it also criminalises the exertion of influence with respect to foreign public officials, public assemblies and members of international organisations. Interestingly, under the SADC Protocol and the AU Convention, the exertion of influence within the private sector should be criminalised.

Under all four instruments it is irrelevant whether the influence was actually exerted, whether it leads to the intended result, or whether the ability to exert influence in fact existed.

Article 18 of UNCAC and article 12 of the CoE Convention are non-binding provisions, whereas the conduct described in the AU Convention and the SADC Protocol is mandatory.

These provisions may serve as models for the implementation of the offence into the domestic law of the member states. The legislator of each state has to take into account the particularities of its criminal law in general and its anti-corruption measures in particular, to enact a law that is compatible with the standards established by the international instruments and the fundamental rules of its own criminal law. Thus, it would be interesting to see how states have implemented the offence into their respective domestic laws.



Chapter III Three Country Reviews

1. The Legal Situation in France

In France, comparable to the provisions of passive and active bribery, the *Nouveau Code Penal* (NCP) of 1994 stipulates offences of passive and active trading in influence (*trafic d'influence*).⁶² Two forms of trading in influence are to be differentiated: in the first case, the influence peddler holds a public office, in the second case both he and the client are private persons. Systematically, these two forms are separated stringently. Unlike the offence of bribery, the status of the person who uses his or her influence to trade advantages is of little consequence, although the status of the influence peddler has an impact on the severity of the punishment.

Until 2007, the authorities upon which influence is illegally exerted (public authority or other body placed under the supervision of the public authorities) were understood as the French legislative, administrative and judicial authorities. By introducing articles 435-2 and 435-4, the French legislator extended the scope of the offence of trading in influence to the offer or acceptance to influence a public official or a person holding an electoral mandate of an international organisation (EU, UN, NATO, etc).⁶³ By this enlargement of the circle of persons upon which influence can be exerted illegally, the French legislator partly fulfilled its obligations under UNCAC and the CoE Convention. The French parliament decided not to extend the scope of the offence to public officials and elected persons of a foreign country because trading in influence

⁶² Passive trading in influence presumes that a person, taking advantage of real or assumed influence with the public authorities, solicits or accepts gifts or promises with a view to securing for the person providing the gifts, any benefit or favour of a public authority. Active trading in influence presupposes that a person offers a remuneration to someone whom he or she believes to have influence with the public authorities in order to obtain benefits or favours from those public authorities. See Larguier & Larguier (2002: 386).

⁶³ Law No. 2007-1598, 13 November 2007.

is not punishable in most of the countries with which France has strong economic ties.⁶⁴

(1) Historical Background

As far as we know, Roman law offered no definition of trading in influence. Nevertheless, this phenomenon was well known. Vitronius, a friend of the emperor Alexander Severus, is said to have accepted payment in exchange for exerting his influence on the emperor. When this was discovered he was sentenced to death by being choked with smoke.⁶⁵ Someone noted the words '*fumo punitur qui fumum vendidit*' on Vitronius' tomb,⁶⁶ expressing an understanding of his actions which we would share today: What is commercialised here is nothing tangible, but something rather more obscure – influence.⁶⁷

In Europe, the Napoleonic Code of 1810 may be regarded as a landmark by which tough penalties were introduced to combat corruption in public life, comprising both acts which did not conflict with one's official duties and acts which did.⁶⁸ The introduction of the offence of *trafic d'influence* into the French penal code with the passing of the law of 4 July 1889, was a reaction to a loophole in the criminal law which had become apparent in the course of several scandals that shook the government at the end of the 19th century.⁶⁹

⁶⁴ *Bulletin officiel du ministère de la justice, Circulaire de la DACG n° CRIM 08-02/G3 du 9 janvier 2008 présentant des dispositions de la loi n° 2007-1598 du 13 novembre 2007 relative à la lutte contre la corruption*, 5.

⁶⁵ Lemec Gantsou Ossebi (2001: 10).

⁶⁶ Chevallier (1935: 39).

⁶⁷ Abanto Vasquez (2008: 913 & 914).

⁶⁸ Guy Stressens (2001: 891).

⁶⁹ Jeandidier (2003: 40).

The most important of these was a case in which the corrupt practices of several members of parliament were revealed, among them a certain Mr Wilson MP, who had been paid to influence public servants in their choice of recipients of medals of honour and orders of merit.⁷⁰ MPs, as well as high-ranking members of the military, openly commercialised their contacts with important colleagues, friends and family members (for example Mr Wilson MP was the son-in-law of the then president, Jules Grevy).⁷¹ Mr Wilson was tried for fraud but found not guilty by the *cour d'appel*.⁷²

Here the loophole in the criminal law became evident: the elements of the crime of corruption only referred to civil servants or members of parliament accepting money in exchange for acts that were part of their official tasks and position anyway. However, peddling influence usually did not form part of the official functions of the perpetrator. The general influence that politicians or civil servants could exert on different levels of the public bureaucracy did not form part of the official functions of their office. In answer to this, the novel offence introduced into the penal code by the French parliament in 1889 fell under the category of corruption instead of fraud, as some MPs had suggested.

(2) Trading in influence under the *Nouveau Code Penal*

The main trading in influence offences are stipulated in article 432-11(1)(2) (passive trading in influence by public officials), article 433-2(1) (passive trading in influence by private persons), article 433-1(2) (active trading in influence by public officials) and 433-2(2) (active trading in influence by private persons). The French offences served as a model for the provisions of the international conventions mentioned above.

⁷⁰ Vitu, paragraph 44.

⁷¹ Lemec Gantsou Ossebi (2001: 10).

⁷² CA Paris, 26. March 1888, 1889, 87.

For instance, article 432-11 describes, in the second alternative, the offence of passive trading in influence committed by a public official.⁷³ In terms of the possible offenders, the advantage received and the way of receiving it (requesting or accepting), bribery and trading in influence are identical.

With regard to trading in influence, case law specifies that the potential benefits include 'any favourable decision of the public authorities which, instead of being obtained by legitimate means, is obtained illegally by means of influence'.⁷⁴ The elements of the offence are fulfilled as soon as the client and the influence peddler have concluded a corruptive contract (*pacte corrupteur*) about the exertion of influence.⁷⁵ Under Art 433-11, it is not necessary that the action desired by the client actually takes place.⁷⁶ It is not even necessary that there was ever a real possibility of influencing the public organ; provided this was alleged, the offence is committed.⁷⁷

The concept of influence is of great importance for the offence as it should enable those who apply the law to make a distinction between trading in influence and bribery. In the case of the offence of trading in influence, the influence peddler has to (mis)use his status to obtain a decision from a public organ in favour of the client. In contrast, for passive bribery it is required that the desired decision is part of the perpetrator's area of responsibility or that it is facilitated through his office (quasi-

⁷³ Article 432-11

'Persons exercising public authority, performing public duties or holding elective public office who unlawfully request or agree to, at any time, directly or indirectly, offers, promises, donations, gifts or any other advantages, for themselves or others, in exchange for:

1. performing or refraining from performing actions in accordance with or facilitated by their duties, functions or office;
2. or abusing their real or supposed influence to obtain from a public authority or department distinctions, employment, contracts or any form of favourable decision;

shall be punishable by ten years' imprisonment and a fine of € 150 000.'

⁷⁴ Cass Crim 20 March 1997. Bull crim 1997 no. 117.

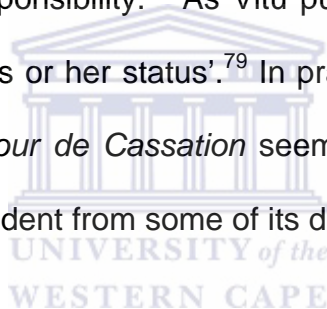
⁷⁵ Veron (2007: 72).

⁷⁶ Gattegno (2003: 350).

⁷⁷ Veron (2007: 73).

bribery). Thus, in the case of trading in influence, the public official who is commercialising his influence is not acting in the context of his office, but from the outside. He merely uses his professional position or social status to influence the decision of another public official, which decision he himself cannot take.

In an individual case, it appears quite difficult to make the distinction between passive bribery and passive trading in influence. French scholars are of the view that, with regard to trading in influence, the civil servant peddling his influence is acting beyond his functions and duties by taking advantage of his position or friendly working relationships with colleagues. Regarding passive bribery, he is commercialising his function within his area of responsibility.⁷⁸ As Vitu puts it, 'the guilty party does not peddle his or her office, but his or her status'.⁷⁹ In practice, this differentiation is not always clear and even the *Cour de Cassation* seems to have problems making a precise differentiation, as is evident from some of its decisions.⁸⁰



There is no abstract academic discussion in France about what exactly is to be protected through the criminalisation of corruption offences. Conclusions could be drawn from the systematic positioning of the offences under the heading 'violation of the authority of the state' and 'felonies and misdemeanours against the nation, the state and the public peace'. Thus, the objects of legal protection are the functioning and the integrity of the public service. As described above, for a contravention of article 433-11 to occur, it is not necessary that the actual ability to influence the decision of a public authority in fact existed. It suffices that the influence peddler pretended to have this influence. Thus, it is questionable how the functioning and the integrity of the public service could be affected if there was in fact never even the

⁷⁸ Jeandidier (2003: 40).

⁷⁹ Vitu A, *paragraph 124*, « *Le coupable trafique, non de sa fonction, mais de sa qualité* »

⁸⁰ Examples can be found in Lemec Gantsou Ossebi (2001: 18 & 334).

possibility of manipulating the decision of a person holding public office. In the case of an influence peddler fabricating his ability to influence the decision-making process of another public authority, it appears that his action is more punishable as a fraud or a similar offence, than as a corruption offence.

2. The Legal Situation in Spain

The Spanish Criminal Code provides three different versions of trading in influence in articles 428 to 430 of the sixth chapter of the ninth title under the heading '*del tráfico de influencias*'.⁸¹ Today, articles 428 to 430 complement the offences of active and passive bribery but differ from them in one important aspect: they refer only to passive trading in influence; the active form is not criminalised as an autonomous offence under the Spanish Criminal Code.

Passive trading in influence is subdivided into two main categories: articles 428⁸² and 429⁸³ refer to the exertion of improper influence by an influence peddler who is a

⁸¹ The offences of trading in influence were first introduced into the Spanish Criminal Code in 1928, but were altered in 1944 when the criminalisation of exerted improper influence disappeared and only peddling with fabricated influence was punishable as a serious form of fraud. It was only in 1991 that the complete offences were reintroduced. They have since been modified with regard to the benefit obtained by a public official, as well as to the severity of the penalty.

⁸² Article 428:

Exertion of improper influence by an authority/public official

The authority or public official that influences another authority or public official, by taking advantage of his/her post or of any other hierarchical or personal relationship with this person or with any other authority or public official so as to obtain a decision which may directly or indirectly generate an economic benefit for himself/herself or for a third party, will be punished with a prison sentence of six months to one year, a fine of up to double the value of the said benefit, and specific disqualification from any public employment or post for a period of three to six years. When the benefit sought is in fact obtained, the sanctions applied will range within the upper half of the scale.

⁸³ Article 429

Exertion of improper influence by private individuals

The individual that influences an authority or a public official taking advantage of his/her personal relationship with this person, or with any other authority or public official, so as to obtain a decision which may directly or indirectly generate an economic benefit for himself/herself or for a third party, will be punished with a prison sentence of six months to one year, a fine of up to double the value of the said benefit, and specific disqualification from any public employment or post for a period of three to six years. When the benefit sought is in fact obtained, the sanctions applied will range within the upper half of the scale.

public official and a by private individual respectively. Article 430 deals with the situation where a benefit is requested or accepted by a public official or a private person in order to exert his or her influence.

(1) Trading in influence under article 428 and 429 of the Spanish Criminal Code

Both articles require that influence is in fact exerted on the public official to obtain a decision from a public authority that creates an economic benefit in favour of the actor or a third person.⁸⁴ The question of fabricated influence is not covered by these articles.⁸⁵ Article 428 and 429 require that the person peddling his influence takes advantage of his or her personal or hierarchical relationship with the public official (*'prevalimiento'*, a form of a predominant position) in order to exert an improper influence over the decision-making of the latter. The decision that generates an economic benefit for the influence peddler or the client is the intended goal. The provisions fail to qualify the benefit as undue or unlawful. Thus 'any economic benefit', whether due or undue, is covered by the offence if it is the result of having influenced the decision-making process of a public official. The offence does not require that the desired decision is in fact achieved; it is sufficient that the exerted influence was intended and appropriate to generate the benefit.⁸⁶ If the benefit is in fact obtained, both articles 428 and 429 stipulate that this may have an aggravating impact on the severity of the punishment.

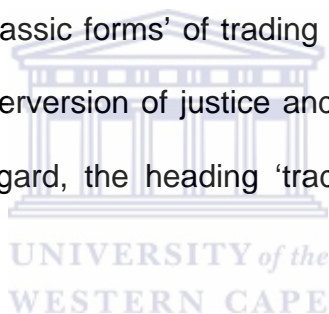
In comparison to the offences that have been analysed hitherto, articles 428 and 429 appear to be quite different. As described above, the common elements of trading in

⁸⁴ Abanto Vasquez (2003: 461).

⁸⁵ Abanto Vasquez (2008: 915).

⁸⁶ Morales Prats & Rodriguez Puerta (2005: 2151).

influence offences, stipulated in the laws of other countries or in international agreements, are characterised by the enlargement of the triangular relationship characteristic of corruption offences by a fourth person and the commercialisation of influence. The Spanish provisions lack both of these elements: they deal exclusively with the situation where a public official or a private individual directly influences a public authority, making use of the fact that they are in a predominant position to do so. They do not need to receive a benefit from a third party, but act in order to receive a favourable decision for themselves (yet this may include advantages for third persons). The public official or the private individual misuses his or her office or personal relationship (friendship, relatives, etc) to other officials without commercialising it as in the 'classic forms' of trading in influence. Thus, this offence appears more like a form of perversion of justice and is not properly comparable to the other offences. In this regard, the heading 'trading in influence' is somewhat misleading.⁸⁷



(2) Trading in influence under article 430 of the Spanish Criminal Code

Article 430 stipulates a genuine form of trading in influence as it requires the request for or acceptance of gifts or any other type of remuneration in order to exert an improper influence.⁸⁸

⁸⁷ Morales Prats & Rodriguez Puerta (2005: 2146).

⁸⁸ Article 430:

Request or acceptance of a benefit in order to exert improper influence

Those that offer to carry out the actions described in the previous articles, requesting sops, gifts or any other remuneration, from third parties, or accept offers or promises, will be punished with a prison sentence between six months and one year.

In any of the cases that this article refers to, the judicial authority may also impose the suspension of activities of the company, organisation or office and the closure of its public facilities for a period between six months and three years.

As the article refers to articles 428 and 429, both forms – the influence peddling by a private person as well as by a public official – are punishable under the Spanish Criminal Code. The reference to the previous articles emphasises that not every form of influence peddling is punishable. The intentional use of hierarchical or personal relationships with the public authority is required. The influence peddling has to lead to an economically favourable decision for the client.

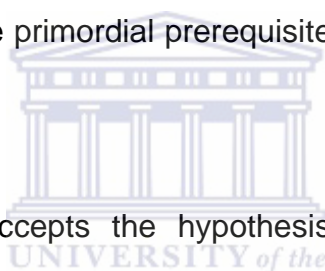
It should be emphasised again that only passive influence trading is punishable under the Spanish Criminal Code; the conduct of the person offering the advantage for the influence peddling is not expressly punishable (except in cases where an instigation can be considered).⁸⁹

The influence peddler has to obtain an advantage from the person who wants him to exert his influence in his favour. Unlike articles 428 and 429, article 430 does not refer to the term 'economic benefit'. In a recent case, where the influence peddler obtained a working contract for his wife, the Supreme Court had to decide whether this could be considered as 'sops, gifts or any other remuneration'. The Court stated that the wording 'any other remuneration' permits a wide interpretation which covers any benefit of whatever form and goes beyond the economic nature of the benefit received.⁹⁰

⁸⁹ Nogales (2006: 384).

⁹⁰ Case 335/2006 of 24 March 2006, p 4: '*Observamos que dentro de estos términos no se menciona el aspecto económico, aunque usualmente será esa contraprestación la que actúe, pero la amplitud de la frase 'cualquier otra remuneración' permite interpretar los términos del precepto de tal suerte que en el concepto puede comprenderse cualquier recompensa o beneficio del tipo que sea.*'

Furthermore, in its judgment, the Court spells out that it is not necessary under article 430 that the influence is actually exerted or that it leads to the intended result.⁹¹ It is not even necessary that the possibility of influencing a public authority in fact existed. The assertion of the trader in influence that he could exercise such influence is sufficient for the contravention.⁹² Earlier decisions of the Supreme Court had required that the influence indeed existed and could effectively enable the influence peddler to manipulate the decision of a public authority;⁹³ if not, the person was to be prosecuted for fraud. By contrast, in the above-mentioned judgment, the court stated that the Spanish legislator showed 'an atypical severity by criminalising a preparatory act which is remote from the object of legal protection: the objectivity and impartiality of public decisions which is the primordial prerequisite for a correct functioning of the public service'.⁹⁴



Thus, the Supreme Court accepts the hypothesis that even alleged influence peddling could be considered a threat to the impartiality of the public service. In contradistinction, Spanish academia is of the view that the objectivity and the impartiality of the public administration can be threatened neither by persons who in fact have no influence, nor if the influence is not actually exerted.⁹⁵ Some authors emphasise that article 430 punishes only preparatory acts in order to protect the good reputation of the public administration, which cannot be considered a valid

⁹¹ Case 335/2006 of 24 March 2006, p 4: '*Por lo demás, no es necesario para la consumación del delito que el acusado realmente tenga posibilidades de influir, o sea simplemente una falacia, como tampoco que aun teniendo tal posibilidad, se haya hecho o no la gestión y ésta haya sido exitosa o anodina.*'

⁹² Case 335/2006 of 24 March 2006, p 4.

⁹³ For example, case 8900/1992 of 4 December 1992.

⁹⁴ Case 335/2006 of 24 March 2006, p 4: '*El delito es de simple actividad, y en él, el legislador ha mostrado un rigor inusitado al criminalizar un acto preparatorio, todavía alejado de lo que sería el bien jurídico protegido: la objetividad e imparcialidad de las decisiones administrativas, exigencia primordial para un correcto funcionamiento de las Administraciones públicas.*'

⁹⁵ Muñoz Conde (2007: 1031).

object of legal interest.⁹⁶ Others maintain that the reference in article 430 to the previous articles implies that the possibility of influencing a public authority must exist in fact, so that there is at least a threat to the objectivity and impartiality of the public sector.⁹⁷

The prevailing opinion in academia supports the retention of the trading in influence offences as they play an important role in the reasoning of the Courts in respect of several political scandals.⁹⁸ Numerous court decisions have dealt with the provisions on trading in influence, as illustrated above.⁹⁹

3. The Legal Situation in Belgium

The Belgian anti-corruption provisions were altered fundamentally and modernised by the Law of 10 February 1999,¹⁰⁰ which aimed to meet Belgium's international commitments arising from the CoE Convention.

Among other modifications, a new article 247(4) was introduced which criminalises bribing a public official into using the influence that arises from his position in order to obtain certain behaviour from a public authority.¹⁰¹ Article 247(4) criminalises both the active and the passive forms of trading in influence.

⁹⁶ For that reason, Morales Prats & Rodriguez Puerta (2005: 2154) require the deletion of article 430.

⁹⁷ See Abanto Vasquez (2008: 918).

⁹⁸ Abanto Vasquez (2008: 919).

⁹⁹ According to the annual reports of the Attorney-General's Office, preliminary investigations were carried out in connection with 24 cases concerning trading in influence in 2006 (a 100 percent increase as compared to 2005); in 2007, 82 preliminary investigations had been initiated for trading in influence offences. (See: Greco Evaluation Spain (2008: 17).

¹⁰⁰ Law on the Fight against Corruption of 10 February 1999, published in the Belgian official gazette on 23 March 1999, 9281.

¹⁰¹ Article 247(4):

The Belgian legislator has incorporated trading in influence as a new kind of corruption offence by introducing paragraph 4 into article 247. Apart from bribery that involves lawful (paragraph 1) or unlawful (paragraph 2) acts by a public official, paragraph 4 criminalises trading in influence, using the same legal approach and basically sharing the same elements as active and passive bribery. The scope of the term 'public official' is rather wide, as it refers to any person performing public duties, regardless of his official status. The new articles 246 and 247 do not require an underlying 'corruptive pact or agreement', as was traditionally demanded under the Belgian Criminal Code.¹⁰² The benefit, requested or accepted by the official, can be any advantage.¹⁰³ This includes both material and non-material benefits with a link to the desired action of the public official. The advantage may also benefit a third person, as personal enrichment is not a requirement of the offence.

Probably due to the relative newness of the legislation, neither the academy in Belgium nor the case law has yet clarified what the term 'arising from their position' encompasses. It remains unclear what kind of link in fact is required between the ability to exert influence and the position of the public official.

Furthermore, it is questionable whether article 247(4) covers cases where influence is asserted but not exerted, or where the supposed influence does not lead to the intended result. If the public official actually 'used the influence arising from his duties', article 247(4)(3) emphasises that this may have an aggravating impact on the

§ 4. Bribing a person exercising public duties to use his real or supposed influence arising from his position to obtain an action or decision from a public authority or ensure that no such decision is made is punishable by six months' to one year's imprisonment and a fine of 100 to 10 000 francs.

When, in the case specified in the previous paragraph, the request as specified in article 246§1 is followed by an offer as specified in article 246§2, and in cases where an offer as specified in article 246§2 is accepted, the penalty shall be six months' to two years' imprisonment and a fine of 100 to 25 000 francs.

If the person who is bribed has actually used his influence arising from his duties he shall be punished by six months' to three years' imprisonment and a fine of 100 to 50 000 francs.

¹⁰² Flore (1999: 94).

¹⁰³ See article 246.

extent of the sanctions. Concerning the question of whether there is a contravention if the intended result is not achieved, the article is silent.

Although the Belgian legislator was inspired by the French anti-corruption legislation while drafting the offence of trading in influence,¹⁰⁴ the Belgian policy-maker decided not to criminalise trading in influence among private individuals, as was done in France. Article 247(4) does not cover situations in which a private individual receives an advantage from another private individual in exchange for exercising influence over someone performing public duties. This omission was highly controversial and was criticised by many Belgian scholars.¹⁰⁵

In response, the Belgian Senate passed a draft bill on 14 January 2008 aiming to include the criminalisation of private trading in influence into the Criminal Code¹⁰⁶ and sent it to the House of Representatives in February 2008. The drafted article 317¹⁰⁷ aims to comply with Belgium's commitments under the CoE Convention and UNCAC. The explanatory remarks of the draft refer expressly to article 12 of the CoE Convention. The House of Representatives is afraid to interfere with legitimate types of lobbying and has not yet adopted the legislation.

¹⁰⁴ Flore (1999: 92).

¹⁰⁵ Evrard (1999: 95).

¹⁰⁶ Parliament of Belgium (*Sénat de Belgique*), Document législatif n° 4-507/1.

¹⁰⁷ The new article 317 would read as follows:

§ 1. The action of a person not performing public duties within the meaning of article 246 who requests or accepts, directly or through the intermediation of other persons, for himself or others, offers, promises or advantages of any nature in exchange for using his real or supposed influence to obtain a decision from a public authority or ensure that no such decision is made constitutes passive trading in influence.

§ 2. The action of a person who provides or offers, directly or through the intermediation of other persons, to a person not performing public duties within the meaning of article 246, for himself or others, promises or advantages of any nature in exchange for using his real or supposed influence to obtain a decision from a public authority or ensure that no such decision is made constitutes active trading in influence.

§ 3. The penalty for trading in influence shall be six months' to two years' imprisonment and/or a fine of 100 to 10 000 francs.

§ 4. When trading in influence concerns a public department or authority in a foreign state or in an organisation governed by public international law, the penalties shall be those stipulated by § 3.

4. Summary

The comparison reveals different levels of criminalisation in the countries reviewed: whereas the French offences of trading in influence are quite extensive and complex – including passive and active trading in influence of public officials as well as of private individuals –, the Spanish provisions penalise only the passive type of influence trading.¹⁰⁸ The Belgian norms are limited to the criminalisation of public officials who commercialise their influence and therefore do not cover cases of ‘anyone’ within the meaning of article 12 of the CoE Convention. Furthermore, the Belgian provision does not stipulate precisely whether or not the influence actually has to be exerted in order to constitute an offence. In this respect, the French and Spanish provisions are somewhat unambiguous, as it is not necessary under these provisions that the influence is actually exerted or leads to the intended result.

All three countries do not meet their obligations arising from the CoE Convention to penalise influence peddling with respect to foreign public officials or members of a foreign public assembly.

The French example exposes the difficulties of drawing an exact line between the offences of bribery and trading in influence. In this context, the offence of trading in influence seems to serve as a ‘residual’ yet useful offence.¹⁰⁹

The academic or jurisprudential debate about the object of legal protection of trading in influence is being fought in all three countries. As the pretence of the ability to

¹⁰⁸ It would be possible to punish any private individual according to the general rules on participation. In this respect, it is noteworthy that the Spanish prosecution service could not demonstrate any cases of active trading in influence during the third GRECO evaluation round in 2008.

¹⁰⁹ See, for instance, on the 27 October 2009 Jean-Christophe Mitterrand and ex-Interior Minister Charles Pasqua were convicted by a Paris Court for trading in influence after having accepted bribes to facilitate arms deals to Angola from 1993 to 1998. (BBC News, available on the internet: <http://news.bbc.co.uk/2/hi/europe/8328314.stm>)

exert influence on a public authority is sufficient to fulfil the elements, it is highly controversial whether the legal object, namely, the objectivity and impartiality of public decisions, could be affected by this conduct. Be that as it may, the respective countries have decided to retain or implement the offence in their criminal codes.



Chapter IV Trading in influence and Lobbyism

The offence of trading in influence does not aim to criminalise every exertion of influence with a public authority but only the illegitimate, improper exertion or the abuse of influence in order to induce a public authority to act or refrain from acting. In a particular case, it might be difficult to draw the line between legitimate and illegitimate forms of influencing, as various occupational areas are in part or completely dedicated to exert some sort of influence with the objective of manipulating public authorities. At the international level, the drafters of the CoE Convention were aware of the hypothetical interference of article 12 with legitimate forms of influence. With respect to article 12 of the CoE Convention, the Explanatory Report states that 'recognised forms of lobbyism should not be criminalized'.¹¹⁰ Lobbying is understood as the practice of influencing decisions made by government and includes all attempts to influence legislators and officials, whether in groups or individually.¹¹¹ During the process of drafting UNCAC, several states expressed their desire not to penalise trading in influence and indicated that 'if there was consensus for inclusion, care should be taken to avoid inadvertent interference with legitimate political activity'.¹¹²

Also, at the national level, states expressed their difficulties on how to exclude legitimate influence from the offence. For instance, while drafting a new offence aimed at trading in influence between private individuals, the Belgian legislator stressed that the misuse or abuse of influence presupposes the intention to corrupt

¹¹⁰ Explanatory Report on the CoE Convention, paragraph 65.

¹¹¹ Leif & Speth (2006: 12).

¹¹² Ad Hoc Committee for the Negotiation of a Convention against Corruption, Doc. A/AC.261/3/Rev.1, 29, footnote 162.

somebody.¹¹³ Through this prerequisite, it is sought to exclude legitimate and transparent services offered by consultants, lobbyists, lawyers, etc from the scope of the offence of trading in influence.¹¹⁴ The proposed draft was not accepted by the Law Commission of the Belgian Parliament, as the offence, as drafted, would constitute a threat to all consultative occupations because of its indeterminacy and its wide scope.¹¹⁵ The Swiss legislator declined finally to incorporate the offence into the Swiss penal code as it would have resulted in the criminalisation of simple lobbying as it is practised all over the world, including Switzerland.¹¹⁶ Similar fears were raised by the British legislator while drafting a new Corruption Bill in 2003.¹¹⁷

The possible interference of the offence of trading in influence with consultative professions indeed cannot be dismissed. Precise and well-defined elements of the offence can counter this difficulty by taking into account the desired level of legitimate exercise of influence with respect to the public administration in the particular state. For instance, lobbyists are generally trying to influence legislation on behalf of a special interest group or a member of a lobby. Because they are financed by a special interest group in order to influence a public authority, the application of the offence of trading in influence seems to be self-evident.

However, in many countries the practice of lobbying is considered essential to the proper functioning of government and provides a forum for different and competing

¹¹³ Parliament of Belgium (*Sénat de Belgique*), Report made on behalf of the Committee on legal affairs by M. van Parys, Document législative n° 4-507/3.

¹¹⁴ Parliament of Belgium (*Sénat de Belgique*), Document législatif n° 4-507/1 : Comment on article 2: «...L'influence « abusive » doit contenir une intention de corrompre de la part du trafiquant d'influence: les formes de lobbying connues ne relèvent pas de cette notion ». Sont ainsi exclus du champ de l'incrimination les services rémunérés prestés dans la transparence par des personnes spécialisées dans les relations avec les administrations publiques comme les avocats, conseils ou lobbyistes. »

¹¹⁵ M. Coveliers during the debate of the Committee on legal affairs, see footnote 112.

¹¹⁶ Draft Corruption Bill of the Federal Council of Switzerland (*Botschaft über die Genehmigung und die Umsetzung des Strafrechts-Übereinkommens und des Zusatzprotokolls des Europarates über Korruption*), Document 04.072, 34.

¹¹⁷ House of Lords/House of Commons (2003: paragraph 79).

points of view. For instance, in many European countries¹¹⁸ and especially in the United States, lobbying is recognised as a desirable and necessary form of participation in the legislative process, as it can provide the responsible public authorities with information, data and assessments in complex fields of legislation. Often, the legislator is in dire need of information and know-how regarding areas of legislation of especially high complexity and comprehensiveness.¹¹⁹ Lobbyists regularly provide partial and not neutral information, but the public authority or the legislative authority presumably knows about the provenance of the data and their one-sidedness. However, lobbyists take part in the political decision-making process without possessing a democratic mandate; they are a power without any democratic legitimacy.¹²⁰ It is, therefore, of public interest to know which interest group is participating to what extent in the law-making process. To prevent the erosion of democratic institutions and the administration, lobbying activities must be regulated, generally through registers in each state¹²¹ and additionally should be governed by a code of ethics.¹²² This is a necessary prerequisite for effective and transparent communication between parliamentarians and public officials, on the one hand, and the country's stakeholders, on the other.¹²³

Even if this does not concern the area of criminal law, the regulations or codes of conduct can serve as a helpful indication for the determination of improper or proper

¹¹⁸ Lobbying is not limited to the decision-making process in European countries but also affects the European institutions. For instance, there are currently around 15 000 lobbyists in Brussels (consultants, lawyers, associations, corporations, NGOs, etc.) seeking to influence the EU's legislative process. About 2 600 interest groups have a permanent office in Brussels. See Lehman (2003: 5).

¹¹⁹ House of Commons (2008–09: 9): 'The practice of lobbying in order to influence political decisions is a legitimate and necessary part of the democratic process. Individuals and organisations reasonably want to influence decisions that may affect them, those around them, and their environment. Government in turn needs access to the knowledge and views that lobbying can bring.'

¹²⁰ Leif & Speth (2006: 13).

¹²¹ For an overview see Lehman (2003: 43).

¹²² For further information see Chari, Murphy & Hogan (2007: 433).

¹²³ Organisation for Economic Co-operation and Development (2006:1 & 3).

influence with respect to criminal offences. As the accepted level of lobbying varies from country to country, it appears preferable that each state decides individually which forms of influence trading should constitute an offence and which are deemed socially necessary.

Furthermore, corruption offences are generally clandestine in nature. A high degree of transparency in lobbying activities, could cause the secret use of influence to lose ground. Moreover, the persons involved are required to act with the intent to corrupt the public authority. In cases of legitimate and apparent lobbying, this condition usually would not be fulfilled.

However, when considering the implementation of an offence of trading in influence, states should not overestimate the impact of criminalisation on legitimate forms of lobbying. In my estimation, France, for example, has always known various forms of legitimate lobbying in its political and administrative system, which forms were not in the least negatively affected by the offence of trading in influence.

All arguments considered, the commercialisation of illegal forms of influence trading should be made an offence, the elements of which, however, need to be defined in a precise and unambiguous manner by legislation.

Chapter V Conclusion and Recommendations

1. Conclusion

Trading in influence is a corruption-related offence whose implementation is suggested by various international anti-corruption agreements and which is criminalised in numerous countries around the globe. Interestingly, it appears that it is mostly countries whose juridical background is rooted in the Romanic traditions that have the offence¹²⁴ whereas countries within the Anglo-American legal tradition are not familiar with the concept.

The offence of trading in influence stipulated in the international agreements is linked to the traditional offence of bribery, but differs in respect of two important issues from the classic bribery offences: Firstly, in contrast to bribery, trading in influence requires a multilateral relationship in which a public authority is induced to act or refrain from acting. The public official who performs the act is not part of the bribery process, which shows the indirect purpose and implicit character of the offence. Secondly, while bribery focuses on the act or omission by the public official, trading in influence seeks to criminalise the use of a person's influence to obtain an undue advantage for a third person from a public official. With respect to public officials acting as influence peddlers, the offence of trading in influence goes beyond the instances covered by the offence of bribery.

Under the most comprehensive and only truly international instrument, UNCAC, as well as the CoE Convention, the implementation of the offence is not mandatory, but

¹²⁴ Especially countries following the Ibero-American legal tradition like for instance Argentina, Peru and Colombia have implemented the offence of trading in influence.

left to the discretion of the states. The consensus for a non-binding implementation in the international arena reflects the justified doubts of many states about the offence.

However, the provisions stipulated in the international agreements reviewed above can provide only a vague concept of what should be criminalised in the respective countries. The analysis of the provisions in France, Spain and Belgium reveals the very different methods of implementation: In France, trading in influence is criminalised most comprehensively with the NCP, penalising the active and passive forms of both public officials and private individuals acting as influence peddlers. Under the Spanish Penal Code, only the passive form of influence peddling is punishable as a main offence, while the Belgian criminal law refers only to public officials acting as influence peddlers.

The analysis also reveals the three main difficulties which arise in the drafting of a clear and precise offence of trading in influence:

Firstly, states have to face the difficulty of how to differentiate precisely between the offence of bribery and the offence of trading in influence. This is especially difficult in cases where the influence peddler is a public official. For this distinction, the definitions of the individual elements of the offence of bribery are fundamental, which elements differ distinctly among countries. More precisely, it depends on the scope of what may be defined as 'the exercise of the public official's duties' within the offence of bribery. The question is whether actions of the public official which do not concern his area of responsibility or his official duties, but are facilitated by his status, are covered by the bribery offence. For instance, if a public official receives an advantage to manipulate the decision-making of another public official who is subordinated hierarchically to the first one, this could constitute the offence of bribery in some

countries, whereas in others it does not. The French example reveals quite illustratively how challenging the question of differentiation can be in practice.

Secondly, the criminalisation of influence peddling among private persons causes the problem of how to exclude legitimate forms of lobbying from the offence. As examined in Chapter IV, there is no general answer to tackling this problem, but states have to take into account the legitimate role that public or private interest groups play in their society, especially with regard to the legislative process.

Thirdly, the inclusion of pretended or supposed influence in the content of the provision (as stipulated, for example, by the CoE Convention or in the French provisions) leads to the question of which legitimate legal purpose is in fact being served by the offence. Trading in influence – like other corruption offences in the public sector – is aimed at protecting the impartiality and transparency of the functioning of public authorities. This protected legal interest can be affected even if it is only private persons trying to manipulate the decision-making of a public officer. But if the ability to influence a public authority in reality never existed, there could not be a threat to the object of legal protection. The assertion of fictive influence constitutes an offence of fraud – rather than of corruption – as the only legal interest which could be negatively affected is the private property of the person giving the bribe. As criminal law is an *ultima ratio* measure and must meet the basic principles of law – for example, the principle of proportionality – every criminal offence has to pursue a legitimate goal in the form of a protected legal interest. The criminalisation of pretended influence as a form of corruption, therefore, does not appear proportional, as it could not serve the purpose of protecting the legal interest of the functioning of public authorities. Even if the influence peddler decided from the outset

not to exert it, threat to the protected legal interest may be identifiable at least, if the ability to influence actually existed.

2. Recommendations

States ought to act with caution when implementing the offence of trading in influence, taking into account their domestic anti-corruption law and especially their definition of the offence of bribery. In some states, influence peddling may, at least as far as the official's side is concerned, already be punishable as passive bribery.

States have to consider limiting the scope of the offence of influence trading that depends on the official's position. Furthermore, they should consider defining influence trading as a result offence rather than as a conduct offence. At least, they should ensure that – in contrast to the recommendations stipulated by the international agreements – the pretence of influence is not be punishable as a corruption offence.

Once a state has dealt successfully with these questions, the implementation is without doubt recommendable, especially to fight against a certain type of 'backroom' corruption, which is certainly present in every country. The criminalisation of those who are in the 'corridors' of power, even if they do not take the decisions themselves, is indeed of great importance as their conduct is as corrosive to public trust in democracy and in public administration as the classic forms of corruption.

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