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Compatibility of the Estonian Penal Law to the Need for Protection of Financial Interests of the European Union

1. Introduction

The objective of this study is to analyse and assess compatibility of the Estonian penal law to the need for protection of financial interests of the European Union.

The compatibility is assessed on three levels:

(1) a description of the status quaestionis of the financial protection of the EU financial interests in Estonia (lex lata). This level describes the law as it stands with respect to the given question. It explains how the financial interests of the EU are protected under the Estonian positive law;

(2) a description of the short-term perspectives in view of accession (lex ferenda). This level describes the Estonian efforts to make its legislation compatible with the acquis communautaire. It describes the laws that have been adopted and the draft legislation that has been proposed with this objective;

(3) a description of the long-term perspectives (lex desiderata). This level addresses the question of the compatibility of the Corpus Juris 2000 with the current Estonian legal order. The following question are addressed: would there be legal obstacles to the introduction of the Corpus Juris in the Estonian legal order and, if so, can these obstacles be overcome and how.

1.1. Acquis communautaire

1.1.1. Treaty bases

Following the entry into force of the Treaty of Amsterdam on 1 May 1999, the main basis in Community law for the fight against fraud is provided for by article 280 (ex 209a) of the EC Treaty. The other main strand of Treaty *acquis* is Title VI of the Treaty on European Union (as amended by the Amsterdam Treaty) concerning police and judicial co-operation in criminal matters.*1

1.1.2. Pre-accession pact on organised crime

"Fifteen principles" of the Pre-accession Pact on Combating Organised Crime*2 encompass the essential elements of a co-operation strategy between the EU and the accession states in the combating of organised crime. Given the connection between organised crime and fraud against the EU budget it is appropriate to list these principles here. Principle 2 contains an important commitment by the accession countries to adopt and implement relevant international criminal conventions. Principles 12 (on corruption) and 13 (money laundering) are also relevant in the context of this study.

1.1.3. The most important third pillar *acquis*

On the same date as the Pre-accession Pact was adopted, the Council of the European Union published a list of "third pillar" *acquis* (and associated texts) extending *inter alia* to the fields of the fight against organised crime, fraud and corruption, police and judicial co-operation in criminal matters, plus human rights instruments.

The list of "third pillar" *acquis* published contemporaneously with the Pre-accession Pact was drafted in 1998 and after the date some new documents have been published:

- the Convention on Mutual Assistance in Criminal Matters between the EU Member States which was adopted by Council Act of 29 May 2000*3;
- a statement of European Union priorities for Policy Objectives in Foreign Law Enforcement Policy*4;
- a Commission "Scoreboard" regarding implementation of the five-year programme of measures for completion of the "Area of Freedom, Security and Justice" established by the Amsterdam Treaty, published by the Commission in March.*5 The Scoreboard will be updated once during each EU Presidency;
- an EU Strategy Paper published in May 2000 on "The Prevention and Control of Organised Crime: A European Union Strategy for the Beginning of the New Millennium".*6

1.1.4. First pillar instruments

There are a number of "first pillar" instruments on combating fraud against the Community budget. The most important of the instruments relating to fraud are:

- **Council Regulation 2988/95 (EC, EURATOM)** of 18 December 1995 on the protection of the European Communities financial interests*7;
- **Council Regulation 2185/96 (EC, EURATOM)** of 11 November 1996 concerning on-the-spot checks and inspections carried out by the Commission in order to protect the European Communities' financial interests against fraud and other irregularities*8;

1 OJ 1997, C 340, 10/11.

2 Pre-accession pact on organised crime between the Member States of the European Union and the applicant countries of Central and Eastern Europe and Cyprus, approved by the JHA Council on 28 May 1998, OJ 1998, C 220, 15/07.

3 OJ 2000, C 197, 12/7, pp. 1–2.

4 Council, 6 June 2000, Doc 7653/00.

5 Brussels, 24.03.2000, COMM (2000) 167 final.

6 OJ 2000, C 124, 3/5, pp. 1–33.

7 OJ 1995, L 312, 23/12, pp. 1–4.

8 OJ 1996, L 292, 15/11, pp. 2–5.

- **Regulation 1073/99 (EC) of the European Parliament and the Council** of 25 May 1999 concerning investigations conducted by the European Anti-fraud Office (OLAF)*[9];
- **Council Directive of 10 June 1991 on prevention of the use of the financial system for the purpose of money laundering**.*[10]

1.2. *Lex lata*

The question as to what is *lex lata* is a confusing issue, because the answer may be different, depending on whether one looks at it from the perspective of the EU or from the perspective of national legal systems. From the perspective of the EU, an impressive number of international instruments exists that, directly or indirectly, protect the financial interests of the Union. Many international conventions on the subject exist, not only in the EU ("Third Pillar Conventions") but also in the Council of Europe. Both the EU and the Council of Europe have drafted conventions dealing with issues such as extradition, mutual assistance in criminal matters, execution of foreign sentences, *etc*. Some of these conventions have been widely ratified by all member states, others still need to be ratified. A prominent example is the "PIF Convention" of 1995*[11], which has not yet been ratified by **all** member states. Quite often, ratification is lagging behind because member states have failed to adopt the necessary domestic legislation. The paradoxical result of this is that while the EU requires the candidate states to adopt these conventions (ratification, domestic implementation) as part of the *acquis communautaire*, many of the current EU member states still need to adopt elements of the *acquis* themselves. For example, the execution of foreign penal sentences is impossible under most domestic laws of the EU member states, even though a convention on the subject exists since the 1970s. On the other hand, all EU member states have ratified and implemented the 1957 Convention on Extradition.

1.3. *Corpus Juris*

The *Corpus Juris* was drafted in 1997*[12] and revised in 2000, after an in-depth study of the compatibility with the proposed system in the 15 member states.*[13] Although *Corpus Juris* does not, as such, belong to the *acquis communautaire*, it incorporates many elements of the *acquis* and it integrates elements of the criminal procedure systems of the 15 member states.

The "vertical" system proposed in the *Corpus Juris*, based on a European Public Prosecutor with Union-wide jurisdiction in the **European legal area**, is meant to overcome the problems inherent in traditional co-operation between states (extradition, mutual assistance, *etc*.), which is of a more "horizontal" nature. The *Corpus Juris* proposes a more "vertical" system based on a European Public Prosecutor who would have investigative and prosecutorial powers throughout the Union. For example, if a European arrest warrant would exist (article 25ter *CJ* 2000), extradition would become superfluous and all the current obstacles to the inter-state surrendering of suspects and convicted criminals (fiscal exception, double criminality, economic exceptions, *etc*.) would disappear. In the same way, letters rogatory (*e.g.* requesting searches and seizures) would be replaced by European Enforcement orders and drastically replace traditional mutual assistance in criminal matters.

At this stage, the *Corpus Juris* belongs to the *lex desiderata*, whereas the *lex lata*, from a European point of view, constitutes a labyrinth of conventions with varying success as to ratification. Until these conventions have been effectively ratified and implemented by the states, domestic legislation in the field of co-operation in criminal matters remains crucial. Paradoxically, the adoption of the *Corpus Juris*, even though it is now only a long term *lex desiderata* project, may be an easier solution from a pragmatic point of view than the ratification and implementation of the labyrinth of conventions that constitute the *acquis communautaire*.

9 OJ 1999, L 136, 31/05, pp. 1–7.

10 OJ 1991, L 166, 28/6, pp. 77–83.

11 OJ 1995, C 316, 27/11.

12 M. Delmas-Marty. Corpus introducing penal provisions for the purpose of the financial interests of the European Union. – Economica, 1997.

13 M. Delmas-Marty, J. Vervaele (eds). The implementation of the Corpus Juris in the member states. – Intersentia, 2000.

1.4. The scope of the study

This study focuses on offences which apply or might apply to protecting the Community budget. To this end, the analysis breaks down into two stages. *The first stage* gives consideration to how national legislation, including draft legislation currently before the *Riigikogu* (Estonian parliament), complies with the "***acquis communautaire***".

At this stage the following issues are analysed:

(1) provisions of Estonian law designed to protect Estonian national financial interests, with a view to assessing their protective function;

(2) extent of application of these national provisions in like manner to protecting the financial interests of the Community;

(3) compatibility of the national provisions concerned with the instruments constituting *acquis communautaire* in this field, *viz*.:

- the Convention of 26 July 1995 on the protection of the European Communities' financial interests ("PIF Convention")*[14];
- the Second Protocol of the PIF Convention*[15];
- the Convention on laundering, search, seizure and confiscation of the proceeds from crime (Council of Europe) of 8 November 1990*[16]
- the Action Plan of 28 April 1997 to combat organised crime*[17];
- the EU Strategy Paper of May 2000*[18];
- the Joint Action on making it a criminal offence to participate in a criminal organisation in the Member States of the European Union.*[19]

The second stage of the analysis aims to assess the compatibility of the Estonian law with the provisions described in articles 1 to 4 of the *Corpus Juris 2000*.

The study analyses not only offences that directly injure financial interests but the offences which are often regarded as the "prerogative" of the civil servant, due to the fact that they assume a particular function — public (or similar) office — on the part of the perpetrator, as well. Offences of this kind have important implications for the protection of national financial interests (and possibly also those of the Communities). Apart from the fact that they may signal the mismanagement of public funds, offences of this kind are often found in the criminological context to dovetail with offences which are immediately detrimental to financial interests. Consequently, it is essential to take such offences into account when devising an effective system to protect financial interests, even if this leads us to consider the importance of these provisions in protecting other fundamental interests which might equally arise at Community level, such as impartiality and a properly functioning administration of state affairs.

2. Fraud

2.1. Present legal framework

The submission to a competent authority of incomplete or incorrect declarations concerning facts which might influence a decision to grant aid or subsidy or to cancel a fiscal debt, in the event that such a submission might be detrimental to national finances is punishable in Estonia. In the Estonian Criminal Code*[20] (ECC) general fraud (section 143) and tax fraud (section 148[1]) are separate types of offence. Subsidy fraud is not a separate offence and is punished as general fraud.

14 Note 11, pp. 48–52.

15 OJ 1997, C 221, 19/07, pp. 12–22.

16 European Treaty Series, No. 141.

17 OJ, 1999, C 251/ pp. 1–18.

18 Note 6, pp. 1–33.

19 OJ 1998, L 351/2, pp. 1–2.

20 Riigi Teataja (The State Gazette) I 1999, 38, 485; last amended Riigi Teataja (The State Gazette) 2000, 57, 373. Major Estonian legal acts (including Criminal Code, Code of Criminal Procedure, *etc*.) are available at: http://www.legaltext.ee/indexen.htm.

In the cases of **general fraud (ECC section 143)** a person receives another legal or physical person's property, property right or other proprietary benefit through deception. General fraud is punishable by a fine, detention or up to three years' imprisonment, in aggravated cases by up to six years' imprisonment.

The criminal offence is completed if the offender **has received a proprietary benefit**. The submission to a competent authority of incomplete or incorrect declarations concerning facts that might influence a decision to grant aid or subsidy **constitutes an attempt** to commit a general fraud.

In the cases of **tax fraud (ECC section 1481)** a person submits to a taxation authority false or incomplete information or fails to submit required information. Tax fraud is punishable by fine, detention or up to three years' imprisonment. The tax fraud is completed by submission of the declaration or failing to submit one, no actual proprietary benefit is required.

The failure, having requested or received a subsidy or some other fiscal benefit, to comply with an obligation to inform the competent authority of any change relating to important circumstances which might influence a decision to grant the said subsidy, aid or fiscal benefit, or to refuse, decrease, cancel or recover it, in the event that this decision affects national financial interests is neither a crime according to the ECC nor a punishable offence.

The misappropriation of funds intended as a subsidy or aid that have been obtained by regular means is general fraud (ECC section 143) if the misappropriated funds were already obtained with a purpose not to use them for the purpose declared in the application for the subsidy or aid. If the intention to misappropriate the funds arose later, the misappropriation is neither a crime nor a punishable offence.

ECC section 143 is applicable in like manner to protecting the financial interests of the European Communities. ECC section 148[1] applies only to the acts and omissions which are in violation of the Estonian Taxation Act and therefore is not applicable to protecting the financial interests of the European Communities. The submission to a competent authority of incomplete or incorrect declarations concerning facts which might influence a decision to cancel a fiscal debt, which has as its effect the illegal diminution of the resources of the general budget of the European Communities or budgets managed by, or on behalf of, the European Communities, is punishable as general fraud (ECC section 143).

The Estonian law on fraud partially conforms to the definition in article 1 of the PIF Convention. There are no disagreements with the first clauses of paragraphs 1 (a) and 1 (b). In respect of expenditure any intentional act or omission relating to the use or presentation of false, incorrect or incomplete statements or documents, which has as its effect the misappropriation or wrongful retention of funds from the general budget of the European Communities or budgets managed by, or on behalf of, the European Communities and in respect of revenue any intentional act or omission relating to the use or presentation of false, incorrect or incomplete statements or documents, which has as its effect the illegal diminution of the resources of the general budget of the European Communities or budgets managed by, or on behalf of, the European Communities constitutes a criminal offence punishable by penalties involving deprivation of liberty which can give rise to extradition.

But the Estonian law on fraud does not comply with the second and third clauses of paragraphs 1 (a) and 1 (b), non-disclosure of information in violation of a specific obligation, with the same effect, and the misapplication of such funds for purposes other than those for which they were originally granted and misapplication of a legally obtained benefit, with the same effect is not a criminal offence.

2.2. The provisions of the new draft Estonian Penal Code

In the new draft Estonian Penal Code (DEPC)*[21] there are separate sections for subsidy fraud (section 221) and tax fraud (section 404).

The subsidy fraud (section 221) will criminalise both the fraudulent obtaining of a subsidy (submission of a false or incomplete declaration will still be only an attempt) and misappropriation of a

[21] The Draft Estonian Penal Code is right now before the Riigikogu. Bill No. 119 SE II-3. Available at: http://www.riigikogu.ee/ems/saros-bin/mgetdoc?itemid=991610004&login=proov&password=&system=ems&server=ragne1, 10.11.2000 (in Estonian). After this paper was written, the text of the DEPC was amended and a new version of the new Estonian Penal Code was adopted by the Riigikogu on 6 June 2001 (published 6 July 2001, Riigi Teataja (The State Gazette) I 2001, 61, 364) (in Estonian). It has not been decided yet when exactly the new code will enter into force. The amendments concerning the issues of this paper have been taken into account during the editing phase of the paper.

legally obtained subsidy. The penalty is a fine or up to five years' imprisonment, *i.e.* the penalties are decreased as compared to ECC section 143.

The failure, having requested or received a subsidy or some other fiscal benefit, to comply with an obligation to inform the competent authority of any change relating to important circumstances which might influence a decision to grant the said subsidy, aid or fiscal benefit, or to refuse, decrease, cancel or recover it is not a criminal offence according to the DEPC.

Most of the types of conduct addressed by article 1 of the *Corpus Juris* 2000 are subject to sanctions under the ECC. Omitting to provide information to the competent authority in breach of a requirement to provide such information is neither a criminal offence under the ECC nor under DEPC. There are no significant obstacles to amend the DEPC and include the wording of the *CJ* article 1 paragraph 1 (b). Diverting Community funds (subsidies or grants) obtained legally is not a criminal offence under the ECC; the DEPC (section 221) criminalises the act.

The punishments provided by the ECC (section 143 — general fraud, up to six years' imprisonment) and DEPC (section 221 — subsidy fraud, up to five years' imprisonment) are lower than the punishments in *CJ*. The Estonian penal policy is generally changing towards shorter custodial sentences, but as the popular opinion prefers more severe punishments, the increase in possible maximum period of incarceration for fraud would face no major criticism from any influential opinion leaders. The punishments for crimes in the area of receipts are close to the *CJ*. Section 148[1] of the ECC provides in cases involving 1,000,000 or more Estonian kroons (approximately 65,000 euros) of avoided taxes for up to seven years' imprisonment, but as *CJ* considers fraud committed in the context of a conspiracy to be aggravated fraud and ECC section 148[1] does not, therefore in cases involving lesser amounts of avoided taxes the ECC has lower maximum sanctions. In the DEPC tax fraud (section 404) is punishable by up to ten years' imprisonment.

As for the idea of criminalising the risk created (*CJ* article 1), the Estonian penal provisions are not in line with this purpose, because in general fraud presenting misleading information is only an attempt. As the DEPC is still under discussion in the *Riigikogu* it is feasible to change the wording of section 220 to exclude the actual proprietary benefit from the constitutive elements of subsidy fraud. In tax fraud, presenting misleading information is already a fully completed crime.

The definitional elements would not cause great problems in the implementation of this *CJ* article. The major obstacles would lie within the assimilation of gross negligence to intentional fault. For general fraud intent is required. Tax fraud may be punished even if the misleading information was provided negligently, but in this case precondition is that administrative punishment has been earlier applied for a similar offence. It is feasible to criminalise reckless and gross negligent inaccurate declarations in the area of subsidies as well.

3. Fraud related to the award of contracts (market rigging)

3.1. Present legal framework

There is no special type of offence concerning market rigging in the Estonian criminal law. The general provisions on fraud (section 143), bribery (sections 164, 165) or extortion (section 142) are applicable under their normal conditions of punishability. Illegal cartels are regulated and sanctioned in the Competition Act.*[22] Section 4 of the Competition Act prohibits all agreements and co-operative activities that have a purpose or in result hinder free enterprise or restrict, hamper, limit or distort free competition. The legal persons engaging in the prohibited activities are subject to an administrative fine in the amount of up to five percent of the legal person's last economic year net realisation (Competition Act subsection 45 (2)). The physical persons that have breached the Competition Act may be subject to an administrative punishment if they have committed an offence listed in the Code of Administrative Offences.

Provisions of the Competition Act prohibit all activities that hinder free competition notwithstanding whether the activity hinders free competition inside Estonia or internationally and whether the goods

22 Riigi Teataja (The State Gazette) I 1998, 30, 410; last amended Riigi Teataja (The State Gazette) 1999, 89, 813.

or services involved are offered to an Estonian counterpart or foreign, international or supranational institution.

The Estonian provisions are not fully compatible with article 2 of the *CJ*. Estonian provisions prohibit all the activities mentioned in *CJ* article 2, but the breach of the Competition Act does not constitute a crime.

3.2. The provisions of the Draft Estonian Penal Code

The DEPC (25 October 2000 version) did not criminalise the market-rigging either. As the Estonian public opinion is very much favouring free competition, the change in the DEPC criminalising market-rigging faced no significant opposition. The text of the DEPC has been amended and in the version of the new Estonian Penal Code adopted by the *Riigikogu* on 6 June 2001 (it has not been decided yet when exactly the new code will enter into force) four crimes against competition were introduced.

Section 400 makes agreements restricting competition punishable by up to three years 'imprisonment. There may arise some doubts whether market-rigging should be punishable by up to seven years' imprisonment as the *CJ* suggests. Section 400 will be applicable to any agreements restricting competition, including tenders in the context of adjudication process governed by Community law. The difference from article 2 of the *Corpus Juris 2000* is that *CJ* criminalises making a tender, but new section 400 criminalises agreement already before any tender is made.

4. Money laundering and receiving stolen goods

4.1. Present legal framework

Money laundering is, according to ECC section 148^{15}, a criminal offence punishable by a fine or detention or up to four years' imprisonment. The act is punishable by two to seven years' imprisonment if committed:

(1) by a group of persons, or

(2) repeatedly.

Money laundering is punishable by three to ten years' imprisonment if committed:

(1) on a large-scale*[23] basis, or

(2) by a criminal organisation.

Money laundering is defined in section 2 of the Money Laundering Prevention Act*[24] as conversion or transfer of or other legal procedures concerning assets, acquired directly through criminal offences, with a purpose of or resulting in concealing the real ownership or illicit origins of the assets.

Receiving stolen goods is criminalised as well. Acquisition or distribution of property knowingly obtained through criminal activities (ECC section 203) is punishable by a fine or detention or up to one year imprisonment. Same acts, if committed on a regular basis, are punishable by detention or up to two years' imprisonment and if committed on a large scale, punishable by detention or up to three years' imprisonment.

Both money laundering and receiving are of a general application (are not restricted to any category of criminal offences). All criminal offences detrimental to Community finances are triggering ECC sections 148^{15} and 203 mechanisms.

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[23] The *Riigikohus* (Estonian Supreme Court) has interpreted the phrase "on a large-scale basis" to characterise criminal offences involving assets equal to "major proprietary damage" (Case No. 3-1-1-21-99; Riigi Teataja (The State Gazette) III 1999, 10, 106) (in Estonian)). "Major proprietary damage" is defined as "damage exceeding 100 times the minimal monthly wage, established by the Government of the Republic at the time the crime was committed" (Act on the New Version of the Criminal Code, Riigi Teataja (The State Gazette) 1992, 20 287; last amended Riigi Teataja (The State Gazette) 1996, 31, 631) (in Estonian)). Since 1.01.2000 the minimal wage is 1400 Estonian kroons (Minimal Wages Regulation, Riigi Teataja (The State Gazette) I 1999, 88, 881) (in Estonian)) and hence, the phrase "on a large-scale basis" means today involvement of assets having value not less than 140,000 Estonian kroons (*ca* 9000 EURO).

[24] Rahapesu tõkestamise seadus (Money Laundering Prevention Act) – Riigi Teataja (The State Gazette) I 1998, 110, 1811.

The Estonian Money Laundering Prevention Act (MLPA) is congruent with the provisions of EC Directive No. 91/308 on the Prevention of the Use of the Financial System for the Purpose of Money Laundering. The definition of money laundering is narrower in the Estonian MLPA than in Directive 91/308/EEC. It does not include the second and third paragraphs of the definition in the Directive. The activities mentioned in the second paragraph (the concealment or disguise of the true nature, source, location, disposition, movement, rights with respect to, or ownership of property, *etc.*) are criminalised as aiding if the activities were promised to the perpetrator before the criminal offence was executed. If not promised before, the activities are criminalised as concealment of criminal offence (ECC section 180) only if the criminal offence is punishable by more than eight years' imprisonment. The activities mentioned in the third paragraph (the acquisition, possession or use of property, *etc.*) are criminalised as receiving (ECC section 203).

The ECC is incompletely congruent with the Second Protocol to the Convention on the Protection of the European Communities' Financial Interests (1997) — the activities listed in the second paragraph of the definition of money laundering in Directive 91/308/EEC are not criminalised if the assets result from a criminal offence punishable by up to eight years' imprisonment and the activities were not promised beforehand.

There are the same incompatibilities with the *CJ* — article 3 paragraph 1 b) is, if not promised beforehand, criminalised only if the assets result from a criminal offence punishable by more than eight years' imprisonment. The sanctions provided in the ECC are lower — receiving (ECC section 203) is punishable only by up to two years' (three years' if committed on a large scale basis) imprisonment. Money laundering, in the narrow sense, (ECC section 148^{15}) has lower potential punishments in the case if the money laundering is committed by a single person and does not involve large amounts of assets (ECC subsection 148^{15} (1)).

4.2. The draft Estonian Penal Code

The DEPC does not change the situation significantly. The definition of money laundering will remain incompatible to Directive 91/308/EEC. The sanction for unaggravated money laundering (DEPC subsection 407 (1)) is increased to five years (hence, there will be no incompatibility in money laundering sanctions).

Receiving (DEPC section 213) will remain a distinct criminal offence punishable by up to one year (three years' if committed by a group of persons or in conspiracy, for at least a second time, or on a large scale) imprisonment.

The scope of both money laundering and receiving will remain to be of general application, including the proceeds of all criminal offences.

Concealment will be punishable if promised beforehand (aiding) or if the original offence is punishable by more than five years' imprisonment. The incompatibility with the *CJ* is decreasing, but there will still remain uncriminalised the not-promised-beforehand concealment of criminal offences punishable by up to five years' imprisonment.

The compatibility of the Estonian money laundering and receiving provisions with Directive 91/308/EEC, the Second Protocol to the PIF Convention and the *CJ* will be most practical to achieve through the modification of the definition of money laundering in the Estonian Money Laundering Prevention Act in the line of the Directive. The modification would bring about criminalisation of all activities mentioned in *CJ* article 3 without any need for changes in the text of the ECC or DEPC. In Estonia receiving (fencing) has not attracted much attention as a prerequisite and facilitator of theft and other crimes and therefore it is punishable today (and according to the DEPC as well) by relatively low sanctions, but the increase of sanctions for typical receiving will most probably face no major opposition. The main opposition to the change will most probably be against introducing high potential punishments (up to five years' imprisonment even in unaggravated cases) for using the proceeds of crime (*e.g.* a 18-year-old daughter living in her father's apartment while the utilities once were paid by her father from the proceeds of a petty theft and the daughter knows it).

5. Conspiracy

5.1. Present legal framework

Section 196[1] of the ECC criminalises the general offence of conspiracy. Membership in a criminal organisation, *i.e*. a permanent organisation consisting of three or more persons who share a distribution of tasks and whose aim is or whose activities are directed at the execution of criminal offences in the first or second degree (ECC section 196[1]), is punishable by three to eight years' imprisonment. Forming an organisation specified above, recruiting of members thereto or leading such organisation or a part thereof is punishable by five to ten years' imprisonment. A member of a criminal organisation who did not participate in the preparation, attempt or execution of any of the criminal offences committed by such organisation shall be released from punishment if he or she voluntarily gives notice of his or her membership in such organisation.

Conspiracy embraces only criminal offences in the first and second degree, meaning that **only crimes punishable by imprisonment** are considered. Conspiracy is a crime notwithstanding whose interests the crimes intended to commit or committed are detrimental to, hence the offences detrimental to the Community financial interests are embraced as well.

Conspiracy is distinguished from participation in an offence by its permanent nature. If a criminal offence is committed in conspiracy, the perpetrators are punished both for committing the criminal offence and for conspiracy.

Section 196[1] of the ECC is in full compliance with the Joint Action of 21 December 1998 adopted by the Council on the basis of article K.3 of the Treaty on European Union, on making it a criminal offence to participate in a criminal organisation in the Member States of the European Union (JAonOC).

According to article 1 of the JAonOC an organisation of **more than two persons** may be a criminal organisation. ECC section 196[1] uses a different wording (**three or more persons**), but the meaning is exactly the same. JAonOC uses the expression **structured association** — ECC section 196[1] uses a different expression **a distribution of tasks**, but the meaning of the expressions is not excessively different. JAonOC uses the expression **established over a period of time** — ECC section 196[1] uses a different expression **permanent**, but the meaning of the expressions is not excessively different. According to the JAonOC offences committed by the criminal organisation should be punishable by deprivation of liberty or a detention order of a maximum of at least four years or a more serious penalty — wording of ECC section 196[1] is even broader including all offences punishable by imprisonment.

The wording of section 196[1] is quite similar to the wording of article 4 of the *CJ*. Both require membership of three or more persons. *CJ* uses the term **stable**, section 196[1] has been translated using the term **permanent**, but the Estonian term "*püsiv*" has a very close meaning to stable. The other attribute used in *CJ* is **operational**, meaning most probably that the organisation has to be able to function in the intended manner. Section 196[1] of the ECC does not require the organisation to be operational. Even if the permanent/stable organisation is not likely to function in the intended manner, the organisation may be considered to be a conspiracy. Section 196[1] requires that there should be **a distribution of tasks** inside the organisation. Article 4 of the *CJ* does not explicitly require a distribution of tasks, but it may be implied from the expression operational, it is impossible to have an operational organisation without any distribution of tasks. The wording of the purpose of the organisation is quite similar as well:

- *CJ* — **carrying out several offences**;
- section 196[1] — **execution of criminal offences** (in plural).

All the offences listed in *CJ* article 4 qualify for ECC section 196[1] as all the *CJ* offences are punishable by imprisonment.

5.2. The draft Estonian Penal Code

The DEPC criminalises conspiracy as well — sections 265, 266. But as in the DEPC conspiracy is designed to be an extremely serious crime punishable by up to 12 years' imprisonment (organisers up to 15 years), the offences considered have to be serious criminal offences punishable by **more than 5 years** imprisonment. As the JAonOC obliges to criminalise organisations acting with a view to committing criminal offences punishable by deprivation of liberty or a detention order of a maximum of at least **four years**, DEPC sections 265 and 266 are not criminalising all the organisa-

tions referred to in the JAonOC. As organised crime is of utmost public concern in Estonia and the draft in its current version is actually decriminalising various crime-oriented organisations, the needed change in the draft (to comply with the JAonOC) would face no major opposition. After the changes DEPC would comply fully with *CJ* as well.

6. Corruption

6.1. Present legal framework

In the ECC there are four distinct offences corresponding to passive corruption:

(1) ECC section 164. An official who, personally or through an intermediary, receives property, proprietary rights or other proprietary benefits as a bribe for performing or refraining from performing an act in the interests of the person who gives the bribe, and the official is required to perform or can perform such act using his or her official position, shall be punished by up to four years' imprisonment and deprivation of the right of employment in a particular position or operation in a particular area of activity, in aggravated cases by up to seven years' imprisonment.*[1]

(2) ECC section 164[2]. An act of corruption is the making of undue or unlawful decisions or performance of such acts, or failure to make reasoned and lawful decisions or perform such acts by an official through the use of his or her official position for receiving income derived from corrupt practices or other self-serving purposes and is punishable by a fine or deprivation of the right of employment in a particular position or operation in a particular area of activity, in aggravated cases by up to six years' imprisonment.*[2]

(3) ECC section 166[3]. The acceptance of a more than adequate remuneration determined by an Act or other legislation for the provision of services or making of decisions by an official, or acceptance of remuneration for services without charge is punishable by up to two years' imprisonment together with deprivation of the right of employment in the particular office or operation in the particular area of activity if (1) significant proprietary damage or other serious consequence to the rights or interests of a person, the state or a local government protected by law has been caused thereby, or if (2) administrative punishment has been imposed on the offender for the same act.*[3]

(4) ECC section 161. Intentional misuse by an official of his or her official position, if it significantly violates the rights or interests of a person, enterprise, agency or organisation, which are protected by law, or national interests, is punishable by a fine or up to three years' imprisonment.*[4]

There are two offences corresponding to active corruption:

(1) ECC section 165. Giving a bribe is punishable by up to four years' imprisonment, in aggravated cases by up to seven years' imprisonment.

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1 This definition includes both, acts in the performance of the public servant's function in a manner which contravenes his or her official duties and acts where the person has acted in accordance with his or her duties. Unsuccessful solicitation is only an attempt. This definition does not include acts of public servants in return for non-proprietary benefits.

2 This definition was designed for offences where there is no active bribery. But as the definition does not explicitly state that the self-serving purposes may not be achieved via acts of a person who is interested in the undue or unlawful decisions or performance of acts, it may be considered that this definition may be interpreted to include all acts of passive bribery that are not covered by ECC section 164 (*i.e.* the cases in which the gained benefits were of non-proprietary character). But this definition includes only undue and unlawful acts. Hence, accepting illegal non-proprietary benefits for due and lawful acts is not covered by this definition.

3 This definition was designed for offences where there is no active bribery, the remuneration is offered in good faith, but as the definition does not explicitly state that it includes only remuneration offered in good faith, it may be possible to interpret the section as criminalising also passive bribery not criminalised by ECC sections 164 and 164[2]. The problem is whether it is possible to interpret remuneration to include non-proprietary benefits. There are no court cases on the point and most probably the courts would not accept the interpretation.

4 This definition was designed also for cases not involving active bribery. But as the definition does not explicitly state that it includes only misuse of office that does not involve active bribery, it may be possible to interpret the section as also criminalising such passive bribery not criminalised by ECC sections 164 and 164[2]. The problem is that only significant violations of interests trigger ECC section 161 mechanisms. There is no difference whether the advantages are solicited, offered or accepted before the public servant acts in his or her public capacity or the public servant acts first and receives benefits thereafter. But it has to be proven that there is a link between the act and the benefit. If the public servant had no knowledge that he or she will receive a benefit afterwards, it may be considered to be passive bribery only if it can be proven that the benefit was offered to achieve future favourable acts by the public servant.

(2) ECC section 165[1]. Giving a bribe to an official of a foreign state or an international organisation is punishable by up to four years' imprisonment, in aggravated cases by up to seven years' imprisonment.

As both these sections depend on the definition of bribe given in ECC section 164, only proprietary benefits trigger the mechanisms of ECC sections 165 and 165[1].

The provisions criminalising active bribery make no difference as to whether the public servant involved is a national or a foreign or a public servant of an international organisation, only the numbers of respective sections are different. The wording of ECC section 165[1] does not mention officials of supranational organisations (like EC), but most probably the term international organisation will be interpreted to include transitional organisations as well.

It is not entirely clear whether passive corruption by a foreign official is punishable according to ECC section 164. The English translation of ECC section 160 defines an official as a person who has an official position in an agency, enterprise or organisation based on any form of ownership and to whom administrative, supervisory, managerial, operational or organisational functions, or functions relating to the organisation of movement of tangible assets, or functions of a representative of state authority have been assigned by the state or the owner. In the Estonian language definitive articles are not used. Therefore the definitive article before the word state is not from the Estonian original text, but from the interpretation of the translator. But, as the Legislator found necessary to establish a distinct active bribery section for criminalising giving bribes to foreign officials, the most likely interpretation will be that the foreign official accepting a bribe in Estonia cannot be punished according to ECC section 164. If the Estonian courts accept the interpretation, the Estonian law on bribery will be in conflict with the Criminal Law Convention on Corruption (1999) articles 5 and 9 to 12, that requires criminalisation of active and passive corruption involving a public official of any other State or official or other contracted employee of any international or supranational organisation, *etc*., and does not comply with the Convention on the Fight against Corruption involving Officials of the European Communities or Officials of Member States of the European Union articles 3 and 4 that require criminalisation of passive bribery of officials of European Communities and officials of the Member States. The sanctions for non-aggravated passive and active corruption are lower in the ECC than in the *CJ*.

6.2. The draft Estonian Penal Code

The draft Estonian Penal Code (DEPC) criminalises both passive (sections 303 and 304) and active corruption (sections 307 to 310) and makes no difference of what kind of benefits are accepted/offered (all non-proprietary benefits (advantages) will trigger sections 303 to 304 and 307 to 310 mechanisms as well as proprietary ones).

The DEPC makes differences between cases in which the advantages are accepted/offered for an action/omission in the performance of the public servant's function in a manner which contravenes his or her official duties (section 304 — passive corruption and sections 308 and 310 — active corruption) and acts where the person has acted in accordance with his or her duties (section 303 — passive corruption and sections 307 and 309 — active corruption).

The DEPC explicitly criminalises *a posteriori* corruption. It is not required that the official involved should be aware about the future advantage at the time he or she acted in his or her public capacity, if he or she understands that the advantage accepted/offered *a posteriori* was for the earlier action/omission in his or her public capacity it will suffice.

As the DEPC (25 October 2000) made the same distinction between giving bribes to Estonian officials and foreign/international officials.*[5] The new version of the Estonian Penal Code (adopted on 6 June 2001; not yet in force) does not include distinct offences of bribing foreign/international officials. The definition of official (section 288 / former section 298) was not amended. Therefore, it is not clear whether the sections criminalising bribing foreign officials were removed to imply that corruption (active and passive) involving foreign officials will be punishable via the same sections as corruption involving Estonian public officials and officials of private legal persons or to decriminalise bribing foreign officials. The second interpretation is not likely in the current political

[5] The DEPC does not explicitly criminalise giving a bribe to an official of a supranational organisation, but the term "official of an international organisation" will be interpreted to include supranational organisations. There will be no opposition to amending the DEPC to explicitly include officials of supranational organisations as well.

situation, but it is closer to the text of the new Penal Code. If the second interpretation prevails, the DEPC will not comply with the Criminal Law Convention on Corruption (1999), the EU Convention on Corruption involving EC Officials (1997) and the *CJ*. An amendment criminalising passive corruption by foreign, international and supranational officials will most probably face no opposition.

The sanctions for corruption are increased in the DEPC — non-aggravated corruption may be punished by up to five years' imprisonment and aggravated corruption (*e.g.* in conspiracy or on a large scale) by two to ten years' imprisonment.

7. Misappropriation of funds

7.1. Present legal framework

According to the Estonian Criminal Code (ECC) there are two distinct criminal offences corresponding to misappropriation of funds:

(1) wrongful appropriation through taking possession or wasting or abuse of office (ECC section 141^1), punishable by a fine or detention or up to four years' imprisonment, in aggravated cases by up to eight years' imprisonment;

(2) intentional misuse by an official of his or her official position, if it significantly violates the rights or interests of a person, enterprise, agency or organisation, which are protected by law, or national interests (ECC section 161), punishable by a fine or up to three years' imprisonment.

In the cases of misappropriation, ECC section 141^1 is applied if an offender (or some other person) has wrongfully obtained any goods. Section 161 of the ECC is applied if an offender (or some other person) has wrongfully profited from a settlement of a fiscal dept.

The same provisions apply in the cases in which the Community funds are involved. The only obstacle being that if the official involved is a foreign, international or supranational official, he or she can be punished for wrongful appropriation through taking possession or wasting the property trusted to the person (some acts described in ECC section 141^1), but not for wrongful appropriation through abuse (the other acts described in ECC section 141^1) of office or abuse of office (ECC section 161) because as the general definition of an official (ECC section 160) most probably does not include foreign, international and supranational officials (see discussion in the paragraph on corruption, 1.2.5.1), these categories of officials cannot be prosecuted for abuse of office.

The sanctions provided for abuse of office (ECC section 161) and non-aggravated misappropriation (ECC subsection 141^1 (1)) are lower than in the *CJ*.

7.2. The draft Estonian Penal Code

The draft Estonian Penal Code does not change the situation much. Wrongful appropriation by an official is punishable by a fine, detention or up to three years' imprisonment (DEPC subsection 212 (2) 3)), but there is no extra subsection for aggravated wrongful appropriation by an official. Therefore the DEPC sanctions are lower than the ECC sanctions especially in the cases involving groups, large amounts of assets or conspiracy.

The abuse of office charge is applicable for misappropriation cases in which the offender (or any other person) does not gain any property, but wrongfully profits from settlement of a fiscal dept (DEPC section 299). The abuse of office is punishable by a fine or detention or up to five years' imprisonment. As there is no aggravated abuse of office charge in the DEPC, the DEPC is having lower potential punishments than the *CJ*.

The definition of an official is in the DEPC the same as in the ECC, therefore the DEPC faces the same insurmountable obstacles in criminalising foreign, international and supranational officials as the ECC is facing today.

8. Abuse of office

8.1. Present legal framework

In the Estonian legal system any abuse of power on the part of a public servant which affects funds under his or her management is criminalised as abuse of office (ECC section 161) if the perpetrator cannot be charged for some other more serious crime (accepting a bribe, wrongful appropriation, *etc.*).

The misuse of official position is defined as a criminal offence that requires:

- intentional misuse by an official of his or her official position and,
- that misuse must cause a significant violation of the rights or interests of another physical person, enterprise, agency or organisation, which are protected by law, or national interests.

If an intentional misuse of a person's official position causes significant violation of the European Community financial interests the misuse will be punished as a misuse of office (ECC section 161).

As the general definition of an official (ECC section 160) most probably does not include foreign, international and supranational officials (see discussion in the paragraph on corruption, 1.2.5.1), these categories of officials cannot be prosecuted for misuse of office under ECC section 161.

Section 161 of the ECC mostly complies with *CJ* article 7. The disagreements being that the foreign, international and supranational officials cannot be prosecuted under ECC section 161 and that ECC section 161 requires **significant** violation of rights or interests, but *CJ* article 7 will be triggered by any violation of the Communities' financial interests. Section 161 of the ECC provides for lower potential maximum punishment (up to three years' imprisonment) than the *CJ*.

8.2. The draft Estonian Penal Code

The draft Estonian Penal Code makes only minor changes in criminalising abuse of office. Section 299 of the DEPC is a little bit broader the phrase: public interest is substituted for the phrase in the ECC national interests and the resulting significant violation of rights or interests is outside of the constitutive elements if the aim of the abuse was the significant violation. The maximum potential punishment is increased to five years (three years in ECC section 161).

The definition of an official is the same as in the ECC, therefore the foreign, international and supranational officials are most probably not covered.

The potential maximum punishment for abuse of office has been increased in the DEPC as compared to the ECC (up to five years' imprisonment), but as there is no aggravated abuse of office charge in the DEPC, the *CJ* still has higher potential maximum penalties.

9. Conclusions

The Estonian penal law is for the most part compatible to the need for protection of financial interests of the European Union. The new draft Estonian Penal Code will eradicate several discrepancies existing in the current Estonian Criminal Code.

There are still some provisions that need to be amended:

- omitting to provide information to the competent authority in breach of a requirement to provide such information is neither a criminal offence under the ECC nor under the DEPC. There are no significant obstacles to amend the DEPC and include the wording of *CJ* article 1 paragraph 1 (b);
- as for the idea of criminalising the risk created (*CJ* article 1), the Estonian penal provisions are not in line with this purpose, because in cases of general fraud presenting misleading information is only an attempt. It is feasible to change the wording of DEPC section 220 to exclude the actual proprietary benefit from the constitutive elements of subsidy fraud;
- major obstacles would lie within the assimilation of gross negligence to intentional fault. For general fraud intent is required. Tax fraud may be punished even if the misleading information was provided negligently, but in this case precondition is that administrative punishment has earlier been applied for a similar offence. It is feasible to criminalise reckless and gross negligent inaccurate declarations in the area of subsidies as well.

- the definition of money laundering in the Estonian Money Laundering Prevention Act is narrower than in EC Directive No. 91/308;
- as the Joint Action on Organised Crime obliges to criminalise organisations acting with a view to committing criminal offences punishable by deprivation of liberty or a detention order of a maximum of at least **four years**, DEPC sections 265 and 266 are not criminalising all the organisations referred to in the JAonOC. As the organised crime is of utmost public concern in Estonia and the draft in its current version is actually decriminalising various crime-oriented organisations, the required change in the draft (to comply with the JAonOC) would face no major opposition.