EUROPEAN ANTI-CORRUPTION AGENCIES: PROTECTING THE COMMUNITY'S FINANCIAL INTERESTS IN A KNOWLEDGE-BASED, INNOVATIVE AND INTEGRATED MANNER

ORGANIZATION: cies centro de investigação e estudos de sociologia iscte — centre for research and studies in sociology

IN COOPERATION WITH: ANU — THE AUSTRALIAN NATIONAL UNIVERSITY

CO-FINANCED BY: OLAF — OFFICE EUROPÉEN DE LUTTE ANTI-FRAUDE / COMISSÃO EUROPEIA ORGANISMO EUROPEU DE LUTA ANTIFRAUDE

ISCTE, Lisbon
17-19 May 2006

Expert testimony on "Statutory entrapments and inter-institutional relations"

António Santos Carvalho, Judge and former official of the Portuguese High Authority Against Corruption (*AACC – Alta Autoridade Contra a Corrupção)*

Presented at Roundtable 3

What can I contribute to this debate from my 13 years' experience of investigating corruption? Or, more specifically, 10 years in the 80s and 90s at the AACC (Portuguese High Authority Against Corruption), an independent agency of parliamentary supervision in the field of corruption and fraud among public officials, also connected with the social and economic aspects of Portugal's entry to the EEC. Then, 3 years in Macau in what is now the CCAC (Commission Against Corruption, Macao SAR), in connection with the transfer of the administration of the territory, as pre-agreed between Portugal and the People's Republic of China.

Both experiences presented problems – of greater or lesser importance – of obstruction to the implementation of the bodies' activities in complying with the institutional aims and purposes for which they were created. But the general balance was decidedly positive: I never witnessed real barriers to investigations and, in particular, the gathering of data, evidences and clues to be used in

establishing maps of the critical areas in the public administration, diagnoses of bad practice in the bureaucracy or recommendations for transparent improvements in the decision-making process or in the authorities' contact with the public.

However, misunderstandings, coordination difficulties and bureaucratic and intellectual resistance exist and cannot be underestimated. The independent anticorruption bodies must take them into account to ensure the success of the mission assigned to them by the law.

The aim of this roundtable will be to identify these obstacles and discuss the problem from the point of view of the individual experience of the different anticorruption organisations.

For this reason, I shall begin by introducing the issue of the link between independent anticorruption bodies and the legal apparatus. It seems productive to me, at this point, for us to recognize the idea, forthwith, that the strictly formal understanding of the separation of state powers is no longer sensible, valid or of heuristic value. If we take a careful look at the matter, it was not even a theoretical directive of the political thinking of Montesquieu, who was much more concerned, indeed, about truly contemporary problems: the distribution among distinct social forces of the different state powers, where the forces were co-involved with all the powers in a transparent manner that involved responsiveness, both in general and towards private citizens. Finally, one of the original milestones in the thinking on the Liberal State was the accountability about which we still talk today.

In Portugal this problem has been discussed within the framework of the principles of legal confidentiality and the protection of honour and this has not led to the best of solutions. The Attorney General's Advisory Council has argued that the fact that the law subjects the Authority to the *duty of confidentiality regarding the facts of which it is cognizant in the exercise of its duties* did not mean that the cases organised by it were subject to legal confidentiality.

The cases conducted under the auspices of the AACC are administrative in nature and do not involve legal confidentiality, an institution that is characteristic of judicial and, specifically, criminal cases.

Furthermore, on the basis of the administrative nature of the AACC, it considered that legal confidentiality can be invoked against it.

◊ *It is not legally admissible that any part of the AACC should directly consult criminal cases subject to legal confidentiality or receive extracts or photocopies of these cases or parts of them*

◊ *In principle, the legal confidentiality of criminal proceedings prevents administrative authorities, specifically the AACC, from being provided with information on cases covered by that confidentiality or with copies and extracts from them.*

However, the Advisory Council accepted derogation of the principle of confidentiality in the steps of the traditional doctrine

◊ *Derogation of the principle of confidentiality in criminal proceedings is admissible when it is strictly required in the interests of verifying the facts of the crime and the responsibility of its perpetrators and when it is carried out in such a way as not to breach the principle of the presumption of the defendant's innocence or cause unjustified damage to the protection of the private lives of those involved in the case;*

But the voting on the position adopted was not unanimous, with two minority votes being cast.

The first, which classified the AACC as an **atypical** and not merely administrative **body**, recognised the possibility of its requesting the courts to permit information and certificates to be provided from legally confidential cases.

The second argued (exclusively for the exercise of the AACC's powers) for less strict limits to the secrecy principle in the evidence-gathering for criminal cases: from this point of view, it would only be important to safeguard the presumption of the defendant's innocence and protect the private lives of the people involved. This point was argued in the name of ***strengthening certain interests, specifically the proper administration of justice and the fight against crime in areas in which the action of the AACC is restricted***.

This debate has taken on a classical profile from the viewpoint of the doubts about the relationship of independent anti-corruption agencies with other state bodies or even private bodies: the presumption of innocence and the safeguarding of private life, themes of criticism, though, in truth, the second is used to protect data on property and the genealogies of the acquisition of fortunes by private citizens, whether public officials or not. They are the *Trojan horses* of the age-old ill-will against transparency in collective public life in the interest of the public good.

They justify, however serious reflection on the matter and on innovative solutions. On the one hand, these may include the need to emphasise the idea of cooperation between the different state powers and sectors and between informal and private social powers. On the other hand, in contrast, they may assume the contours of the protection of diversity and competitiveness, though always under the banner of the *moral superiority* of the law. I shall leave any inclination towards a choice to our later debate.

Meanwhile, it seems to me that an original solution must be found for the problems of confidentiality and informalism in corruption investigation by independent anti-corruption agencies, one that, in the final analysis, derives from what may be defined as the most important objective of these new institutions: **prevention by presence**.

Confidentiality means, above all, discretion in their movements and activities and in the research, proposals and debates to obtain information and evidence

about corrupt practices. It must aim, precisely, to provide real and consistent protection for the presumption of the innocence of those in its sights and for their good name, above all in the exact exterior dimension of the effects demanded by a contemporary constitutionalism – fundamental rights among inalienable rights and freedoms. Without acrimony, it will have to have distinct, rigorous and first-rate case-by-case content, but it will not be a legal or intellectual impediment to the fact that the anti-corruption agencies may have access to any relevant data or lines of investigation.

But, in my experience, in correlation with this strategic directive, the informalism of the proceedings that allow the anti-corruption agencies to be flexible is arranged to allow, in the concrete reality of each case, an effective defence of the individual rights of those being focussed on that is not a barrier to the requirements of fair and honest transparency in public management or in management that in some way covers general interests.

We have therefore come back to an ethical and political core issue: who will have to carry the responsibility for any damaging failure or bad practice on the part of the anti-corruption agencies? In the Portuguese High Authority Against Corruption model this responsibility strictly belonged to the Commissariat, which was elected by a qualified majority of three-quarters of the members of parliament present, on the basis of a quorum of fifty percent plus one. It had direct legitimacy in contrast with the indirect legitimacy of the judicial and public prosecution service magistracies, it had a temporary mandate, it answered and reported to parliament and it could enter into dialogue with the courts and government or all the heads of the state apparatus and local government bodies, undamaged by the decision but subject to *personal effacement* and sanctioning for judicial crimes.