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EU and European Criminal Procedure

**EU ACTION AGAINST CORRUPTION:
Steps forward and setbacks in a strategic
policy for Europe**

TEAM FRANCE

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INTRODUCTION

'The European Union is built on compromises, but when it comes to human rights, the rule of law, the fight against corruption, there can be no compromise', European Commission President Jean-Claude Juncker recently declared.¹ Indeed, corruption is a major challenge for the European Union (EU). However, recent events, such as the murder of journalists investigating corruption, make it a persistent issue in the EU.

Definition of corruption

The non-governmental organisation Transparency International defines corruption as *'the abuse of entrusted power for private gain'*. However, this generally accepted definition only lays emphasis on the corrupted and not those who corrupt.² In this essay, corruption should be defined in a broad sense. It goes beyond the narrow definition of bribery, which refers to giving bribes to a person to have them unlawfully accomplish an act within the exercise of their duties (active bribery) or taking such bribes (passive bribery). Corruption also includes other criminal offences such as favouritism, trading in influence and diversion of public funds. It can also hide behind conflicts of interest or the *'revolving door'* between public and private jobs. It goes from *'grand corruption'*, which involves high-profile officials, to *'petty corruption'* involving lower level officials. All aspects of corruption should therefore be discussed: corruption of public officials and private individuals, active and passive corruption, national or international corruption.

Corruption in the EU

According to the 2018 Corruption Perceptions Index (CPI), the European Union is considered as one of the least corrupt regions of the globe. Ten of the world's top 20 performers are members of the European Union. However, the scope of corruption greatly differs across EU Member States.³ Five groups emerge from the 2017 Special Eurobarometer. In Scandinavia and Luxembourg, the perception of the situation is positive and the experience of bribery is low. In countries such as Germany, Switzerland, Estonia and France, more than half of the respondents feel that corruption is widespread even though their actual experience of having to pay bribes is low. In Central and Eastern European countries, personal

¹ JUNCKER (2019), Speech for the opening ceremony of the Romanian Presidency of the Council of the EU, p. 1

² COUNCIL OF EUROPE (2015), *Basic anti-corruption concepts: A training manual*, p. 12

³ TRANSPARENCY INTERNATIONAL (2019), *Corruption Perceptions Index 2018*, p. 2

experience of bribery is high but limited to certain sectors, mainly healthcare. In Portugal, Spain, Italy and Slovenia, corruption in general is a serious concern even though bribery itself is rare. Finally, the most vulnerable to corruption appear to be Croatia, the Czech Republic, Lithuania, Bulgaria, Romania and Greece where experience of bribery is significant and perception of corruption goes through the roof.⁴ In addition, corruption also varies across fields of activity. Corruption risks are higher at regional and local level than at central level due to generally weaker regulation and accountability. Public procurement is particularly vulnerable to corruption and most risk-prone sectors include urban development, construction and healthcare.⁵ However, recent allegations of corruption involving high-profile personalities have hit countries from all groups. In Poland, the head of *'the KNF'*, the financial regulator, resigned in November 2018 after he was accused by a bank owner of soliciting a bribe. In June 2018, Spanish Prime Minister Rajoy was ousted by a no-confidence vote following court rulings condemning prominent personalities with close ties to the People's Party and the party itself in *'the Gürtel case'* involving bribery, money laundering and illegal party funding. In Denmark, still one of the least corrupt European countries, the head of Danske Bank resigned last September following whistleblower revelations that the bank's Estonian branch may be involved in a 200-billion-euro money-laundering scandal.

The impact of corruption

'Corruption seriously harms the economy and society as a whole'.⁶ Firstly, corruption hinders economic development and sound business because it creates uncertainty, distorts competition and generates additional costs. According to the 2017 business-focused Flash Eurobarometer, four out of five companies in the EU consider corruption as an issue when it comes to doing business, especially for smaller companies less equipped to compete.⁷ In addition, grand corruption often goes hand in hand with tax evasion.⁸ In the Anti-Corruption Report, the European Commission estimated that the cost of corruption in the EU was around 120 billion euros, almost as much as the European Union annual budget⁹. However, this figure only includes losses in tax revenue and investments and does not take further indirect cost components into account. According to a more recent study, the actual damage from

⁴ TNS POLITICAL AND SOCIAL (2017), *Special Eurobarometer 470: Corruption*.

⁵ EUROPEAN COMMISSION (2014), *The EU Anti-Corruption Report*, pp. 16-17

⁶ *Ibid.*, p. 2

⁷ TNS POLITICAL AND SOCIAL (2017), *Flash Eurobarometer 457: Businesses' attitudes towards corruption in the EU*, pp. 4-5

⁸ EUROPEAN COMMISSION (2014). *Op.cit.*, pp. 17-18

⁹ *Ibid.*, p. 3

corruption in the EU would range between 179 and 990 billion euros annually.¹⁰ At a national level, the cost of corruption varies from 0.76% of national GDP in the Netherlands to 15% in Romania.¹¹

Secondly, as a facilitator of crime, corruption also threatens our security. Indeed, corruption and organised crime are linked.¹² The United Nations Convention against Transnational Organized Crime defines an organised criminal group as '*a group of three or more persons existing over a period of time acting in concert with the aim of committing crimes for financial or material benefit*'. The weight of organised crime in Europe is significant. In 2017, there were 5,000 active organised crime groups currently under investigation¹³ and the cost of organised crime is estimated at around 1% of the EU's GDP¹⁴. The financing of organised crime is often linked to corruption, as organised crime corrupts public officials with a risk of infiltrating institutions. According to Europol, organised crime groups use corruption to get information, stay off the radar and facilitate their activities. For some of them, corruption is an integral part of how they work.¹⁵

Finally, and perhaps most importantly, corruption is a threat to democracy. It weakens the rule of law, generates inequalities and undermines trust in public institutions. For instance, in Brazil a major corruption scheme revealed by '*lava jato*' led to an unprecedented political crisis, deeply undermined the trust of the public in their institutions and determined the results of the polls. This example could easily be translated to Europe. According to the Director of the Europe Programme at the Center for Strategic and International Studies, '*the level of corruption has now reached a point where it is an existential threat to the democratic integrity and national security of EU Member States as well as the unity of the EU itself*'.¹⁶

The emergence of anti-corruption norms

Prior to the 1990's, corruption was regarded as unavoidable and even beneficial in developing countries insofar as it facilitated and accelerated business transactions. However, by the 1980's and 90's, corruption ceased to be viewed as a booster of the economy and

¹⁰ EUROPEAN PARLIAMENTARY RESEARCH SERVICE (2017), *The Cost of non-Europe Report*, p. 11

¹¹ *Ibid.*, Annex II, p. 43

¹² EUROPEAN PARLIAMENT (2016) resolution of 25 October 2016 on the fight against corruption and follow-up of the CRIM resolution (2015/2110(INI))

¹³ EUROPOL (2017), *Serious and Organised Crime Threat Assessment*, p.14

¹⁴ EUROPEAN PARLIAMENTARY RESEARCH SERVICE (2017), *op. cit.*

¹⁵ EUROPOL (2017), *op. cit.*, p. 16

¹⁶ CONLEY Heather. In: DEMPSEY (2018), *Judy Asks: Is the EU Too Lax on Corruption? Carnegie Europe* [website]. Available from: <https://carnegieeurope.eu/strategieurope/77468> [Accessed 23/03/19]

began to be considered as an obstacle.¹⁷ In the same period, a series of bribery scandals emerged in European countries. Anti-corruption norms slowly started to emerge in a utilitarian approach to protect business intertwined with value-based commitments from governments and NGOs¹⁸. Transparency International was founded in 1993 and the first international conventions on anti-corruption appeared in the 1990's. At the end of the Cold War, the fight against corruption took a new turn as it became a requirement for former Soviet countries to enter the European Communities.

However, the emergence of anti-corruption norms did not prove sufficient to limit corruption. Some authors argue that international norms are inefficient because of their lack of enforcement, their predominantly repressive approach, and their inadequacy with local social cultures¹⁹. Moreover, corruption today is facilitated by new technologies such as cryptocurrencies, which make it harder to detect illicit financial flows in the case of pecuniary bribery for example. Therefore, there is still a long way ahead to end corruption.

The EU anti-corruption legal framework

The 1992 Treaty of Maastricht created the '*Justice and Home Affairs*' pillar to reinforce European cooperation in criminal matters. However, the EU's competence in this field was constrained and the process of adopting legislation in the area of corruption was cumbersome. Indeed, policy-making in the third pillar was dominated by Member States. The European Commission and the European Parliament had limited powers as opposed to the Council. Decisions of the Council had to be taken unanimously. The Court of Justice of the European Union had no jurisdiction over criminal matters. Things slowly evolved at the turn of the millennium. In 1997, the Amsterdam Treaty established the goal of creating an '*area of freedom, liberty and justice*' which boosted the action of the EU in criminal matters. Finally, at the entry into force of the Treaty of Lisbon, the three-pillar structure disappeared. The ordinary legislative procedure putting the European Parliament and the Council on an equal footing applied to criminal matters, and the Court of Justice gained jurisdiction in this field in 2014.

Most importantly, since the entry into force of the Lisbon Treaty, corruption has become a '*Eurocrime*' for which the European Union has the capacity to adopt directives in order to define criminal offences and establish sanctions. Article 83 of the Treaty on the

¹⁷ ANAGOSTOU *et al.* (2014), *Background report on international and European law against corruption*, p. 6-7

¹⁸ *Idem*

¹⁹ *Ibid.*, p. 10.

Functioning of the European Union defines Eurocrimes as *'particularly serious crimes with a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis'*.

Competing with other international organisations

In the fight against corruption, the EU has followed in the footsteps of other international organisations. Unlike the EU, these organisations lack hard enforcement mechanisms and directly applicable legislation, but they have other assets.

The Organisation for Economic Cooperation and Development (OECD) was one of the first international organisations to tackle corruption. The approach of the OECD is mainly an economic one. The 1997 Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, often referred to as the *'Anti-Bribery Convention'*, focuses on the supply side of bribery of foreign public officials. Its implementation is monitored by the Working Group on Bribery in International Business Transactions (WGB).

The Council of Europe follows a much broader approach as it sees corruption not only as an economic problem but also as a social, political and democratic issue, which is reflected in the conventions it has adopted.²⁰ The Council of Europe's strong point is its monitoring mechanism based on mutual evaluation and peer pressure. The Group of States against Corruption (GRECO) conducts evaluations through four stages: country self-assessments, followed by on-site visits, publication of evaluation reports containing country recommendations and subsequent assessment of the measures taken to implement the recommendations. In 2017, GRECO achieved its fourth evaluation round focused on *'prevention of corruption in respect of members of parliament, judges and prosecutors'*.²¹

The United Nations (UN) also intervenes in the fight against corruption through the United Nations Office for Drugs and Crime (UNODC). The 2003 United Nations Convention against Corruption (UNCAC) was the first global convention to address corruption in a comprehensive manner.

The fight against corruption should be of utmost importance for public policies in Europe today. Therefore, this essay aims to evaluate the action of the EU against corruption and identify its assets and weaknesses. What has the EU done so far to deter corruption? Have EU anti-corruption policies proved useful to deter corruption? How does the EU position

²⁰ *Ibid.*, p. 16.

²¹ GRECO (2018), *18th General Activity Report: Anti-corruption trends, challenges and good practices in Europe & the United States of America. Op. cit.*, p. 7.

itself *vis-à-vis* other international organisations fighting corruption? Is EU anti-corruption legislation coherent and compliant with the most ambitious international anti-corruption standards?

In other words, the problem that will be addressed in this essay is the following: **is anti-corruption a weak spot in EU policies in criminal matters?**

In this essay, it will be argued that although the action of the EU specifically addressing corruption has brought poor results (I), corruption has been addressed indirectly in an efficient and innovative manner through other policies (II).

I. The apparent weaknesses in the EU's action against corruption

For the last two decades, the EU has taken action against corruption, especially by issuing legislation dealing specifically with this problem. However, this action is subject to much criticism as to its usefulness (A) and efficiency (B).

A) Superfluous action against corruption?

The OECD, the Council of Europe and the UN have all developed their own anti-corruption frameworks which seem to leave little room for a genuine EU policy in this area.

The OECD framework

First of all, the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions was adopted on 21 November 1997. Even though this convention has a very specific scope, namely the offence of active public international bribery, it entails a full set of measures dealing with many aspects of anti-corruption: criminalisation, criminal sanctions, enforcement, international cooperation, prevention, etc. The convention is applicable to OECD members but remains open to non-members as well. As a result, 23 EU Member States have ratified it to date.²² The OECD keeps this legal framework up to date by issuing Recommendations for Further Combating Bribery, which are official statements interpreting and complementing the convention (the latest to date are the 2009 Recommendations).

²² OECD (2019) *Ratification Status as of May 2017* [website]. Available from: <http://www.oecd.org/daf/anti-bribery/WGBRatificationStatus.pdf> [Accessed 16/03/19].

The Council of Europe framework

Secondly, the Council of Europe had two conventions adopted in 1999 and established the GRECO, with the aim of implementing them efficiently. On the one hand, the Criminal Law Convention on Corruption imposes rules on criminalisation, sanctions, enforcement and prevention. On the other, the Civil Law Convention sets out common standards on civil liability, the validity of contracts, the protection of employees, the auditing of accounts and the acquisition of evidence in relation to corruption. These conventions have a broader scope than the OECD's, insofar as they are applicable to all forms of bribery (passive and active, national and international, public and private) as well as trading in influence. To date, all EU Member States have ratified these conventions.²³

The UN framework

Finally, the United Nations Convention against Corruption (UNCAC) was adopted by the UN General Assembly in 2003. This convention sets out the first universal legally binding anti-corruption framework and has a comprehensive content. It entails rules on prevention, criminalisation, enforcement, asset recovery, money laundering and mutual legal assistance in relation to corruption. It also identifies a wider range of offences than other conventions. To date, all EU Member States have ratified the UNCAC.²⁴

Overlapping legal frameworks

It therefore comes as no surprise that the specific legislation passed by the EU in relation to anti-corruption overlaps with these three international legal frameworks. For instance, the EU Council drew up a Convention in 1997 on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union, which notably compels State Parties to ensure that active and passive bribery of these officials is a criminal offence under their national law.²⁵ However, two of the aforementioned international conventions already require corruption to be criminalised both in its active and passive form²⁶ and all of them do so as to corruption of public officials from

²³ COUNCIL OF EUROPE (2019) *Chart of signatures and ratifications of Treaty 173* [website]. Available from: https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/173/signatures?p_auth=XB645pJH [Accessed 16/03/19]; *ibid.* *Chart of signatures and ratifications of Treaty 174* [website]. Available from: https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/174/signatures?p_auth=XB645pJH [Accessed 16/03/19].

²⁴ UNODC (2019) *Signature and Ratification Status* [website]. Available from: <https://www.unodc.org/unodc/en/corruption/ratification-status.html> [Accessed 16/03/19].

²⁵ Articles 2 and 3 of the EU Convention

²⁶ Articles 2 and 3 of the CoE criminal law convention, article 15 of the UNCAC

an international organisation²⁷. To give another example, Council framework decision 2003/568/JHA of 22 July 2003 on combating corruption in the private sector aimed at criminalising active and passive corruption in the private sector, whereas such an obligation was already provided for by other texts, especially the OECD 1997 Convention.²⁸ Similar overlaps can be found as to jurisdiction, judicial cooperation and extradition.

Consequently, it is arguable whether the EU can bring added value in regulating anti-corruption, given the narrow window of opportunity still available in this area. On the contrary, the development of an additional EU framework could lead to a diversion of resources through a duplication of efforts. For this reason, some observers advise that the EU should refrain from issuing new law related to anti-corruption and should rather endorse initiatives launched by other international organisations.²⁹ For example, it could play a supervising role in bringing together all organisations fighting corruption in Europe within a '*platform*' to coordinate their actions.³⁰

Joining existing anti-corruption frameworks?

The accession of the EU to the existing international frameworks is also an alternative to a go-alone strategy against corruption. Since the entry into force of the Treaty of Lisbon in 2009, the EU has the legal capacity to become a member of an international organisation. It already joined the UNCAC on 12 November 2008 as a '*regional economic integration organisation*', which gives it full member status that is independent from those of the EU Member States.³¹ However, it has not accessed the Implementation Review Group of the convention. Indeed, questions have arisen as to the competence of the EU in the relevant matters and the peculiarity of EU Member States participating in the review of the EU. The EU has not become a member of the GRECO despite repeated announcements in that sense.³²

Regardless of the very question as to whether there is still a need for EU action against corruption, the EU anti-corruption framework is subject to criticism as to its efficiency.

²⁷ Article 1 of the OECD convention, article 9 of the CoE criminal law convention and article 16 of the UNCAC

²⁸ Article 2 of the Council Framework Decision 2003/568/JHA

²⁹ EUROPEAN PARLIAMENT (2016) *Organised Crime and Corruption - Cost of Non-Europe Report*. PE 558/779, p. 8

³⁰ SALAZAR (2012) Monitoring international instruments against corruption. *Eucrim*, Vol. 2012/1, p. 24

³¹ PRIBORSKY (2012) The European Union and the UN Convention against Corruption. *Op.cit.*, pp. 35-37

³² EUROPEAN COMMISSION (2011) *Report to the Council on the modalities of the European Union participation in the Council of Europe Group of States against Corruption*. COM(2011) 307 ; EUROPEAN PARLIAMENT (2016) *European Parliament resolution on the fight against corruption*. 2015/2110(INI), recommendation no. 8

B) Inefficient action against corruption?

The EU has now been taking specific action against corruption for about two decades, allowing conclusions to be drawn on its achievements in this area. Globally, many aspects point to a lack of ambition on the part of the EU to catch up with the most modern legislation against corruption. Indeed, since the entry into force of the Treaty of Lisbon, corruption is a so-called '*Eurocrime*' for which the EU has competence to adopt directives approximating the definition of criminal offences and sanctions.³³ However, the EU has not made use of this power to update the pre-Lisbon legal framework, apart from directive (EU) 2017/1371 on the fight against fraud to the Union's financial interests by means of criminal law ('*PIF*' directive). The fact that many stakeholders have already taken measures against this can partially explain the EU's disengagement (cf. IA). But this might be perceived by the public as a lack of interest and can be harmful for the EU in political terms.

The following shortcomings can be identified in the EU instruments targeting corruption: a lack of harmonisation, incomplete implementation, evolving standards and cumbersome international cooperation.

A lack of harmonisation

Firstly, these instruments may not provide for standards that are effectively common to all EU Member States. As an example, the 1997 EU Convention and framework decision 2003/568/JHA allow Member States to unilaterally depart from the rules laid down in relation to the incrimination of corruption in the private sector, jurisdiction or the *ne bis in idem* defence. For a long time, these instruments did not succeed in imposing a truly uniform notion of a public official either, recalling the EU's failed attempts to approximate the definitions of organised crime under laws of the Member States.³⁴ Indeed, according to the 1997 EU Convention, national officials are to be defined by reference to the law of the official's Member State.³⁵ As a result, discrepancies remained in the definition of a public official in national laws and might still do nowadays, as will be discussed further (cf. IB).³⁶

³³ Article 83(1) TFEU

³⁴ CALDERONI (2008) A Definition That Could Not Work: The EU Framework Decision on the Fight against Organised Crime. *European Journal of Crime, Criminal Law and Criminal Justice*, Vol. 16, pp. 265-282

³⁵ Article 1 (c) of the EU convention

³⁶ EUROPEAN COMMISSION (2014). *Op. cit.*, p. 9

Incomplete implementation

Secondly, the transposition of EU instruments against corruption seems to be incomplete. For instance, the Commission noted that several Member States had not implemented the provisions of framework decision 2003/568/JHA relating to the full criminalisation of corruption in the private sector and the liability of legal persons.³⁷ Admittedly, since 2014, the Commission is entitled to launch infringement procedures against Member States that have failed to implement EU law in the field of judicial cooperation in criminal matters.³⁸ But the EU is deprived of a monitoring mechanism aiming at ensuring full compliance with anti-corruption standards through mutual evaluation and peer pressure, even though article 70 TFEU would offer an adequate legal basis. Such soft-law mechanisms were set up within the frameworks of the OECD (Working Group on Bribery) and of the Council of Europe (GRECO) and have proven a deterrent.³⁹ They are based on thematic evaluation cycles carried out by the State Parties themselves through peer reviews. They include on-site visits, press releases and the publication of reports. The Commission's attempts to create an EU monitoring mechanism ended up in the publication of the EU Anti-Corruption Report in 2014.⁴⁰ The purpose of this report was to assess the threats emanating from corruption in Europe and to point out best practices in Member States. However, the idea of publishing it every two years was abandoned and the report was replaced by a discussion within the European Semester.⁴¹

Evolving standards

Thirdly, the EU instruments directly targeting corruption seem to be outdated as they do not take into consideration the most modern trends in anti-corruption, which focus on detection and prevention rather than on repression. Conversely, the other international anti-corruption frameworks entail relevant provisions. The 1997 OECD Convention⁴² and the 1999 Council of Europe Criminal Law Convention⁴³ compel State Parties to criminalise the intentional falsification of accounts, books and financial statements for the purpose of

³⁷ EUROPEAN COMMISSION (2011) *Report to the European Parliament and the Council based on Article 9 of Council Framework Decision 2003/568/JHA of 22 July 2003 on combating corruption in the private sector*. COM(2011) 309 final

³⁸ Article 10 of Protocol No. 36 to the TFEU

³⁹ SALAZAR, *op. cit.* pp. 21-22

⁴⁰ EUROPEAN COMMISSION (2011) *Communication to the European Parliament, the Council and the European Economic and Social Committee. Fighting corruption in the EU*. COM(2011) 308 final

⁴¹ TRANSPARENCY INTERNATIONAL (2018) *Skipping another semester on anti-corruption* [website]. Available from: <http://transparency.eu/skipping-anti-corruption/> [Accessed 17/03/19].

⁴² Article 8 of the 1997 OECD convention

⁴³ Article 14 of the 1999 CoE criminal law convention

committing or hiding bribery. The UNCAC emphasises the prevention of corruption in the public and private sectors, the publication of codes of conduct, public reporting and the participation of civil society.⁴⁴ Some EU Member States also have ambitious national preventive frameworks, like the United Kingdom or France, to name just a few. In France, anti-corruption is at the heart of the ‘*Sapin II*’ Act passed on 9 December 2016. The latter laid down a new comprehensive anti-corruption framework focused on the detection and prevention of corruption.⁴⁵ Large companies or groups that are located in France are to carry out compliance programmes entailing eight specific items: risk-mapping, due diligence, the adoption of a code of conduct, disciplinary sanctions for infringers, the training of exposed staff, independent accounts auditing, channels for whistleblowing and the regular assessment of the measures in place. The law created a special body, the French Anti-Corruption Agency, which checks that these companies have implemented these measures and is entitled to issue pecuniary sanctions of an administrative nature if they do not. The Agency also monitors anti-corruption programmes in companies that have been convicted of bribery. The United Kingdom has also strengthened the prevention of corruption with the UK Bribery Act of 8 April 2010. This legislation incriminates the mere failure of companies to adopt adequate procedures to prevent corruption and has an extra-territorial reach.

Cumbersome international cooperation

These various shortcomings in the EU anti-corruption framework may result in hurdles in European judicial cooperation. Admittedly, a specific contact-point network against corruption was created by Council decision 2008/852/JHA with a view to facilitating the exchange of information between authorities charged with preventing and combating corruption. But cross-border corruption cases cannot be handled properly if the condition of double criminality is not met and national criminal procedures differ too widely in stringency. Despite the principle of mutual trust, EU mutual recognition instruments such as the European Investigation Order or the European Arrest Warrant are hindered without a minimum level of approximation of national laws.⁴⁶ The relatively low rates of Eurojust monitoring and setting

⁴⁴ Chapter II of the UNCAC

⁴⁵ SEGONDS (2017) Les apports de la loi du 9 décembre 2016 à l'anticorruption. *Droit pénal*, Vol. 2, pp. 13-18

⁴⁶ MÖSTL (2010) Preconditions and limits of mutual recognition. *Common Market Law Review*, Vol. 47, pp. 420-422 ; MARTIN (2006) Franchir l'infranchissable ? Coopération judiciaire et reconnaissance mutuelle dans un espace européen de justice, liberté, et sécurité. *Culture & Conflits*. No. 62, pp. 63-67

up of joint investigation teams in corruption cases may suggest that there is little judicial cooperation in these matters.⁴⁷

However, one should not be too pessimistic about the action of the EU against corruption. Its real added value may not lie within the few EU instruments specifically targeting corruption, but in various other EU policies that indirectly contribute to combating this crime.

II. The actual added value of EU action against corruption

These other EU policies affecting corruption follow a dual approach: they provide effective preventive mechanisms on the one hand (A), combined with efforts to strengthen the repression of corruption on the other (B).

A) The EU's creativity in diversifying the prevention of corruption

The EU has long reflected upon the most efficient means to prevent corruption. Every single report issued concludes that high transparency and integrity standards, internal and external control mechanisms and protection for whistleblowers are necessary for the efficient prevention of corruption. Even though many fields are impacted by corruption, some are more sensitive than others due to high financial stakes and profitability.⁴⁸ The EU directives and regulations have thus firstly aimed at improving prevention of corruption in sensitive areas.

Prevention of corruption in the financial sector

As the financial sector is particularly vulnerable to corruption, the directive on markets in financial instruments imposed on employees of financial institutions sets out the obligation to declare any potential conflict of interests that could directly or indirectly arise between members of the institution or a controlled entity and a client.⁴⁹ Once the conflict of interests is known, firms have the means to manage not only the risk of damaging the client's interest, but also the risk of private corruption. The first step of identifying vulnerabilities is then satisfied. Firms are compelled to train employees in this obligation to prevent conflict of

⁴⁷ EUROJUST (2018) *Annual Report 2017*, pp. 23 and 25

⁴⁸ EUROPEAN COMMISSION (2014), *op. cit.*

⁴⁹ Article 18 of directive 2004/39/EC on markets in financial instruments amended by Directive 2014/65/EU, art. 23

interests.⁵⁰ Besides, banks and financial institutions have been asked to implement specific procedures regarding the declaration of any gift, entertainment, inducements given by a client or to a client as well as any personal transactions.⁵¹ A threshold amount had to be fixed both in granting and acceptance. These policies aimed at enhancing the social accountability of financial institutions as members of civil society in the fight against corruption. However, financial institutions are not the only risk-prone sectors.

Prevention of corruption in public procurement

Public procurement represents one fifth of the EU's GDP, and it is estimated that 20 to 25 percent of its cost is linked to corruption.⁵² Therefore, the sensitivity of the field leaves no doubt. Legislation tailored to public procurement issues has become a necessity. Within this context, the EU framework on public procurement has recently been renewed. A public procurement '*package*' composed of two directives was adopted in 2014 and entered into force in 2016.⁵³ It introduces incentive measures and reinforces the culture of integrity. These focus on ensuring high transparency, especially in the awarding of a procurement contract. One of the key provisions of this legal framework is the exclusion of all contractors already convicted of corruption.⁵⁴ Henceforth, it defines conflicts of interests and compels Member States to take adequate measures to detect and prevent them and resort to e-procurement. The objective behind these measures was to avoid any discretionary decision-making by promoting full transparency.

Prevention of corruption through anti-money laundering

However, detection measures are necessary to prevent corruption fully. For this purpose, both civil society and national or European institutions have been mobilised. The EU created a legal framework to combat corruption indirectly thanks to successive anti-money laundering directives.⁵⁵ Money-laundering is indeed closely linked to corruption as the undue advantage, which is a component of the offence, is often monetary. Therefore, the obligation to report any suspicious transaction punctually and to make an annual report of the activity

⁵⁰ EUROPEAN SECURITIES AND MARKET AUTHORITY (ESMA) 2012/388, Guidelines on certain aspects of the MiFID compliance function requirements, p. 8

⁵¹ Article 18 of Directive 2004/39/EC; articles 12, 21, 26 of Directive 2006/73/EC

⁵² EUROPEAN COMMISSION (2014), *The EU Anti-Corruption Report. Op. cit.*, p. 21

⁵³ Directive 2014/24/EU on public contracts and 2014/25/EU on concession contracts

⁵⁴ Article 57 of directive (EU) 2014/24 and article 38 of directive (EU) 2014/25

⁵⁵ Council Directive 91/308/EEC; Directive 2005/60/EC, on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing; Directive (EU) 2015/849 amended on 30th May 2018; Directive (EU) 2018/843

enables the European Securities and Markets Authority (ESMA) and national regulators to adapt their risk-based approach and revise the existing guidelines.⁵⁶ The significant exposure of an activity, transaction, or situation to corruption can then be met with an appropriate response.

The protection of whistleblowers

To continue the anti-corruption action, new measures are currently being discussed. The 2014 Anti-Corruption Report already strongly advocated that whistleblowing was not sufficiently encouraged and protected.⁵⁷ Multiple scandals in recent years have been revealed thanks to whistleblowers. The EU decided to seize the opportunity to legislate and set common minimum standards to protect whistleblowers. Although debates were arduous, the European Commission adopted the proposal on 23 April 2018.⁵⁸ Indeed, the lack of protection against retaliation was strongly criticised. Without such protection, informers refused the loss of anonymity. Consequently, the information was not legally exploitable by law enforcement.⁵⁹ This long-awaited procedure was already provided for in most European countries, but the processes were not harmonised. The directive would be a means to set minimum rules and facilitate the reporting of suspicion to law enforcement authorities.

Transparent EU policy-making

The EU is willing to achieve transparency and accountability in its own policy-making. Its institutions themselves are setting up controls of their own conduct. Updated internal ethics codes limit the taking of interests in the private or public sector for Members of the European Parliament. They have to submit a declaration of financial interests and the Advisory Committee on the Conduct of Members can give them advice on how to address potential conflicts of interest.⁶⁰ Willing to act as role-models, Members of Parliament committed to listing all their meetings with lobbyists by updating the rules of procedures of the institution on 31 January 2019.⁶¹

⁵⁶ FERNANDEZ SALAS (2005), The third anti-money laundering directive and the legal profession.

⁵⁷ EUROPEAN COMMISSION (2014), *op. cit.*, p. 20

⁵⁸ Proposal for a directive - COM(2018)218/973471

⁵⁹ EUROPEAN PARLIAMENT (2016) resolution of 25 October 2016 on the fight against corruption and follow-up of the CRIM resolution (2015/2110(INI)), p. 5

⁶⁰ Articles 3 and 4 of the Code of Conduct for Members of the European Parliament with respect to financial interests and conflicts of interest, Annex I to the Rules of Procedures of the European Parliament

⁶¹ EUROPEAN PARLIAMENT (2019), Press Release, 31 January [website]

<http://www.europarl.europa.eu/news/en/press-room/20190123IPR24128/ep-approves-more-transparency-and-efficiency-in-its-internal-rules> [Accessed 20/03/19]

A global overview through Cooperation and Verification Mechanisms (CVM)

In 2007, prior to Bulgaria and Romania's accession to the EU, a Commission report noted that progress in tackling corruption was insufficient. To ensure that the rule of law be properly safeguarded, benchmarks were defined and a periodic review of the action taken by Bulgaria and Romania against corruption was organised in agreement with the policy. This mechanism is called the CVM. In 2017, their judicial systems were reviewed and the Commission noted the progress made before addressing new recommendations to improve the protection of the rule of law and the prevention of corruption.⁶²

Preventive and detection measures are a prerequisite to efficient repression. *'Preventive measures may fail to produce the desired effects if there is no clear line from the top and if the rules are not enforced on the ground'*.⁶³ The EU could not then efficiently fight against corruption without inducing a more efficient repressive framework regarding corruption offences and has thus taken action that indirectly contributes to strengthening repression.

B) The EU's increasing efforts in strengthening the repression of corruption

Recent EU legislation attests to the central role of the repression of corruption in its criminal policy. Moreover, procedural reforms have been passed to fulfil this repressive objective.

An attempt to harmonise the definition of a public official

The efficiency of repression relies on clear definitions. The long-awaited PIF directive made a real difference. Indeed, the definition of corruption offences was finally harmonised. All Member States now have a common definition of fraud and corruption. Besides, it appears that a common EU definition of a public official is of paramount importance to avoid loopholes in the criminalisation of public corruption.⁶⁴ This was reached under the 1997 OECD Convention, which laid down a broad definition encompassing *'any person holding a*

⁶² EUROPEAN PARLIAMENT (2018), *Assessment of the 10 years' Cooperation and Verification Mechanism for Bulgaria and Romania*.

⁶³ EUROPEAN COMMISSION (2017), *European semester factsheet: fight against corruption*, p. 7 [website] https://ec.europa.eu/info/sites/info/files/file_import/european-semester_thematic-factsheet_fight-against-corruption_en_0.pdf [Accessed 20/03/19]

⁶⁴ Article 4 of directive (EU) 2017/1371

*legislative, administrative or judicial office, whether appointed or elected*⁶⁵, knowing that any person having an activity of public interest, even a *de facto* public function, ought to be considered as a public official⁶⁶. In the prior EU framework, the definition of public officials was based only on a referral to national laws. Even if the PIF Directive still refers to national law, it now gives a definition as a minimum standard, namely ‘*any person holding an executive, administrative or judicial office at national, regional or local level*’ or ‘*any person holding a legislative office at national, regional or local level*’.⁶⁷ However, this directive does not entirely clarify whether the definition of public officials should or should not include elected officials.

The European Public Prosecutor’s Office

The upcoming European Public Prosecutor’s Office (EPPO) may contribute to making investigation and prosecution of corruption cases more efficient. The creation of the EPPO was agreed upon by 22 Member States under enhanced cooperation and is to start its functions by the end of 2020 at the earliest.⁶⁸ It will have a decentralised but hierarchical structure composed of European prosecutors at EU level and European delegated prosecutors in each Member State. As its material competence is drawn up by a reference to the PIF directive, the EPPO will be competent in handling particular corruption cases, namely those affecting the financial interests of the EU.⁶⁹ Being an autonomous body, it will be able to overcome potential unwillingness of national authorities to investigate certain sensitive corruption cases. There are high hopes for the EPPO in this respect, because the Anti-Fraud Office (OLAF) seems to have been hindered in its actions by being too dependent on national prosecuting authorities and having no prosecution power.⁷⁰

Freezing and confiscation applied to corruption

The confiscation of criminal assets is another area in which the EU has indirectly brought added value to anti-corruption. Indeed, in corruption, the lure of profit is always an

⁶⁵ Article 1 (4) (a) of the 1997 OECD convention

⁶⁶ OECD (1997) *Commentaries on the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*. Commentaries 12 and 14

⁶⁷ Article 4 of directive (EU) 2017/1371

⁶⁸ CSONKA, JUSZCZAK and SASON (2017), The establishment of the European Prosecutor’s Office, the road from vision to reality. *Eu crim*, no. 2017/3, pp.125-135

⁶⁹ Article 4 (2), (3) and (4) of directive (EU) 2017/1371 of 5 July 2017 on the fight against fraud to the Union’s financial interests by means of criminal law

⁷⁰ MET-DOMESTICI (2012), The Reform of the EU’s Anti-Corruption Mechanism, *Eu crim*, no. 2012/1, pp. 26 and 29

incentive: the act accomplished by the corrupted is often pursued by the briber to make gain; the bribe handed down to the bribe-taker often consists of money. Since the 1999 Tampere Council, the EU has made freezing and confiscation of proceeds and instrumentalities of crime a major issue in its strategy against organised crime.⁷¹ Corruption falls within the scope of two recently adopted EU instruments partially repealing the pre-Lisbon legal framework in freezing and confiscation. On the one hand, directive (EU) 2014/42 imposed on Member States has provided for various forms of confiscation in their law: regular confiscation, confiscation in value, extended confiscation and confiscation from a third-party.⁷² On the other hand, regulation (EU) 2018/1805 has strengthened the mutual recognition of freezing and confiscation orders across the EU.⁷³ Common methods of confiscation will indeed be a deterrent for criminals according to the Members of the European Parliament.⁷⁴

The financing of action against corruption

Efficiency in the combat against corruption is also strongly dependent on the financing of anti-corruption action. Therefore, a step forward appeared with the Hercule III Regulation⁷⁵ and the diversified funding of repressive measures⁷⁶. In 2017, the new guarantee funds and durable development funds also undertook to specially provide financing for measures against corruption. For instance, a specific objective of the Hercule III programme is '*to prevent and combat fraud, corruption and any other illegal activities affecting the financial interests of the Union*'.⁷⁷ A budget of 14.95 million euros was made available to improve operation and administration capacities.⁷⁸ This sum is invested in investigation tools and methods, organisation of targeted specialised workshops and all forms of preventive activities.

Through all these global measures, it could be argued that the EU has managed to enhance its repressive action against corruption.

⁷¹ EUROPEAN COUNCIL (1999) Tampere European Council 15 and 16 October 1999 – Towards a Union of Freedom, Security and Justice. Conclusion 55 ; EUROPEAN COUNCIL (2000) Prevention and control of organised crime: a European strategy for the beginning of the new millennium, JO C 124 from 3.5.2000, p. 1, Recommendation n°1

⁷² Articles 4, 5 and 6 of directive (EU) 2014/42 of 3 April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union

⁷³ Article 7 of regulation (EU) 2018/1805 of 14 November 2018 on the mutual recognition of freezing and confiscation orders

⁷⁴ EUROPEAN PARLIAMENT, EUROPEAN COMMISSION (2016) Proposal for a regulation on the mutual recognition of freezing and confiscation orders. The final Regulation was adopted on the 28th November 2018.

⁷⁵ Regulation (EU) No 250/2014

⁷⁶ Regulation 233/2014, 11/03/2014; Regulation 235/2014

⁷⁷ EUROPEAN COMMISSION (2018) Annex concerning the adoption of the annual work programme and the financing of the Hercule III Programme in 2019, p. 3

⁷⁸ EUROPEAN COMMISSION (2018), *29th Annual Report on the Protection of the European Union's financial interests*.

CONCLUSION

Although the action of the EU against corruption may seem superfluous or inefficient at first sight, its efforts to tackle corruption indirectly, through specific policies in related areas such as financial regulation, anti-money laundering and public procurement and through procedural tools designed to improve cooperation and repression, have proven innovative and coherent.

Given the significance of anti-corruption policies to restore public trust in institutions, it is important that the European Union is visibly committed to fighting corruption and does not leave it up to other international organisations. Therefore, the EU as a legal person should consider ratifying the Council of Europe anti-corruption conventions and becoming a member of GRECO. As regards prevention, the EU should promote high transparency standards and encourage endeavours from civil society. In this regard, the future legislation on the protection of whistleblowers is particularly welcome. It may also reinforce its monitoring mechanisms by including EU institutions themselves in the Anti-Corruption Report⁷⁹ and by reverting to the idea of publishing it every two years. The EU should also consider extending to other countries the cooperation and verification mechanism (CVM) which reviewed Bulgaria and Romania's anti-corruption norms compliance.⁸⁰ As regards repression, the EU should update its existing criminal law instruments at least with a view to agreeing on a common definition of a public official. In doing so, the EU could seek inspiration in innovations experimented by certain Member States in their national law. Finally, the EU needs to reinforce its mutual recognition instruments, make the most of the European Public Prosecutor's Office and improve measures on freezing and confiscation of criminal assets so that corruption does not pay.

⁷⁹ EUROPEAN PARLIAMENTARY RESEARCH SERVICE (2017), *The Cost of non-Europe Report*, p. 8.

⁸⁰ EUROPEAN PARLIAMENT (2018), *Assessment of the 10 years' Cooperation and Verification Mechanism for Bulgaria and Romania*.

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