

CEIPA

The EU Anti -Corruption Challenge

Introduction

There is no commonly agreed definition of corruption. In broad terms it means the mis-use of bestowed power or position to acquire personal gain. Different forms of corruption include political corruption, mismanagement of public funds, fraud, bribery, embezzlement, activities committed by organised criminal groups as well as small-scale petty corruption. Yet, in spite of the absence of a definition everybody seems to know what corruption is and how bad it is for society. This was clearly shown by a European Commission survey and study launched in 2013, resulting in the EU Anti-Corruption report aimed at “stimulating a discussion on how to assist the anti-corruption action and identifying ways in which the EU dimension can help”. The report, issued in February 2014 was the first of its kind, and shall serve as a basis for a conference CEIPA is to organise in 2016..

The CEIPA event will focus on the results achieved since the publication of the report. It will review the report’s methodology, the initiatives launched by other European institutions and civil society, and the obstacles to further progress in the fight against corruption. CEIPA intends to widen the debate to all stakeholders; not only the EU institutions but also the EU member states, international organisations, civil society and the media.

EU Anti-Corruption tools and competences

Corruption is a social scourge causing harm to democracy, undermining citizens' trust in government and weakening the effectiveness of institutions. Because corruption is a very complex phenomenon, taking different forms and permeating all spheres of society, it is difficult to measure. Corruption is often hidden and unlike other types of crime there are often no direct victims. It sometimes covers other types of serious crime such as trafficking in human beings or trafficking in drugs and weapons. Corruption is both a human rights and security issue, as it nourishes inequality, endangers trust in political systems, causes social disruption and creates fertile ground for security and economic crisis. Fighting corruption is one of the main components of democracy and the rule of law – the pillars of any democratic system.

Corruption costs the EU up to €120 billion a year, 1% of its GDP.¹ Fighting corruption is a key issue for both the EU and member states, especially in times of low public confidence in EU institutions, protracted financial crisis and the growing importance of internal security.

Barring the two EU Directives protecting EU financial interests and the recent Directive on Money laundering [1] fighting corruption is not directly covered by EU legislation. As a rule, anti-corruption policies and procedures fall within the realm of national responsibility. At the same

¹ EU anti-corruption report, page 3.

time, the EU does have a general right to tackle corruption within the limits set by the Lisbon Treaty (TFEU-Treaty on the Functioning of the European Union). Article 67 stipulates the EU's obligation to ensure a high level of security, including through prevention and combating of crime and approximation of laws, while Article 83 lists corruption as a "particularly serious organised crime with cross-border dimension". Art. 310 of the treaty obliges member states to counter fraud and any other illegal activity affecting the financial interests of the Union.^[2] According to the Lisbon Treaty, the EU action itself must be based upon the principle of transparency (Article. 15). In addition, the EU Charter on Fundamental rights stipulates the enforceable rights of EU citizens to good administration (Article 41 of the charter).

However, corruption didn't always top the EU agenda. Several reasons account for the relatively recent initiatives against corruption. It is no coincidence that corruption has increased with globalisation. Increased mobility, easier cross-border movement and unprecedented technological advances provided fertile ground for those inclined to break the law. The downside of promoting open markets, which boosted trade and commerce, offering immense opportunities and benefits for society, was the impact of freeing economic activity from binding rules and the difficulty to control global money movements. That was a boon not only for criminal organisations but also for businesses and companies who saw the opportunity to increase profits using shady deals and arrangements.

Corruption became particularly relevant to the EU with its enlargement to central and eastern Europe. At the time, the candidate countries were in the middle of a transition from communism to the market-based economy. It was an unscripted process that offered huge opportunities for corruption and personal gain. It also gave wings to criminal organisations that flourished on trafficking in human beings, smuggling, money-laundering and other illicit activities. To counter these trends, the EU made membership (after a European Council meeting in 1993) conditional on the so-called Copenhagen criteria for establishing democracy, the rule of law, respect for human rights and a market-based economy. Democracy-building concurred with the fight against corruption. However, the EU candidate countries largely failed to carry through on their promises, concentrating mainly on the transposition of a huge body of EU law (*the acquis communautaire*) instead. Moreover the EU requirements were neither backed up by solid legal instruments or institutions that would guarantee the implementation of anti-corruption efforts, nor was the EU empowered to continue monitoring the state of corruption after the countries had actually become EU members. Hard lessons learnt following the first wave of enlargement prompted the European Commission to adopt more stringent anti-corruption criteria for the accession of Bulgaria and Romania, underpinned by the establishment of a post-accession monitoring mechanism.

A growing awareness of the pernicious effects of corruption gave a fresh impetus to “reduce all forms of corruption, at every level, in all EU countries and institutions and even outside the EU” as stipulated in the European Commission’s 2003 Communication on a comprehensive anti-corruption policy. In spite of its ambitious objectives it was a very general document, with a strong accent on criminal justice and a few vague recommendations on what should be done.

Because the EU has a weak legislative and institutional framework to tackle corruption, it relies on other international instruments, notably the UN Convention against Corruption and the Council of Europe Civil Law Convention on Corruption.^[3] Within the Council of Europe framework, 17 European countries set up in 1999 a monitoring mechanism, called GRECO (Group of States against Corruption) with the aim to “improve the capacity of its members^[4] to fight corruption by mutual evaluation and peer pressure”. According to the Lisbon Treaty (Article 220) and the EU Stockholm programme, the EU should become a member of GRECO so that EU institutions are subject to GRECO evaluation and establish higher standards within the EU to fight corruption. However, the European Commission has not yet managed to negotiate either a full participant status or the EU membership in GRECO ^[5]. The accession to GRECO would put the EU institutions under external scrutiny, helping to overcome

the image of a distant, unaccountable Brussels bureaucracy, which is not bound by the same rules as ordinary citizens.

Internally, with the growing number of EU funded public procurement contracts, the EU set up in 1999 the European Anti-Fraud Office OLAF to assist member states in investigating the management of EU funds. By protecting the financial interests of the European Union against fraud, corruption and other criminal offences, OLAF helps make sure that the tax-payers' money is used for the benefit of all. OLAF also investigates allegations of fraud, misconduct and other wrongdoing that involve members and staff of EU institutions and agencies that may result in disciplinary or criminal proceedings.

Concerned at persistent corruption practices across the EU the European Parliament set up an Intergroup on Integrity, Transparency, Corruption and Organised Crime in 2014. With the support of major political parties, the group developed an ambitious programme to protect whistle-blowers, improve the conduct of parliamentarians, set more transparent lobbying rules, and combat tax evasion and transnational organised crime. The group is a complement to the Committee on Organised Crime, Corruption and Money Laundering (CRIM) set up in 2012 whose task includes evaluating current implementation of EU legislation on organised crime and corruption in cooperation with COSI (Standing Committee on Operational Coordination on Internal Security) and Europol.

The panoply of EU tools and instruments is complemented by the involvement with European anti-crime agencies, with Europol and Eurojust in the lead. According to the Lisbon Treaty, Eurojust should evolve into the European Public Prosecutor, in order to boost the fight against crimes affecting the financial interests of the European Union.

The European Commission Anti-Corruption Report [6] - Critical Overview

In 2011, following the ratification of the Lisbon treaty, the European Commission issued a Communication on Fighting Corruption aimed at assessing member states' efforts and their willingness to fight corruption head on. The 2014 Report was the first to take stock of the progress made following the Communication. It was planned to be followed by subsequent assessments every two years. The report is certainly a good start for dealing with corruption at the EU level, as it establishes a valuable tool to consolidate anti-corruption efforts and promote high standards enshrined in the EU founding principles and values.

According to the report, no EU country can claim to be corruption-free. However, some countries are more affected than others, with certain economic sectors particularly prone to corruption (public procurement, health care being notable examples). Even though all EU countries have set up complex and sophisticated legal and institutional frameworks accompanied by strategies and programmes, on the whole effective monitoring mechanisms and

sanctioning regulations are still lacking. One issue of particular concern is systemic corruption (such as party financing and revolving doors between government and industry) which will require a comprehensive coordinated approach and anti-corruption strategy. The financing of political parties, although improved following recently amended legislation still lacks transparency. Regional and local level management of funds are pointed to as a weak link in the chain in an increasingly complex system of modern governance.

The Eurobarometer survey on perception and experience of corruption, carried out prior to the report, showed some interesting results: 8% of EU citizens interviewed said they had witnessed or experienced cases of corruption in the past 12 months, 73% stated that bribery and the use of connections is often the easiest way for obtaining certain public services, 67% of EU citizens thought the financing of political parties is not sufficiently transparent, whereas just 23% agreed that their government's efforts are effective in tackling corruption. More than four out of 10 companies considered corruption to be a problem for doing business, with smaller companies being more exposed to nepotism and corruption. Particularly worrying is the survey's conclusion showing that almost 50% of all EU citizens consider the level of corruption in their countries has grown in the last three years.

The report takes a close look at corruption in public procurement, as this an important mechanism for the functioning of the EU internal market. Public procurement

rules are well established at EU level although national public procurement administrative arrangements are left to the discretion of EU member states. The attribution of public contracts and allocation of EU funds are particularly prone to corruption, resulting in almost a quarter of the value lost to corrupt practices, as suggested by some studies.²

The report highlights some good practices, identifying a number of successful anti-corruption measures, thus encouraging the member states to make further steps in reinforcing control and monitoring. It paints a realistic picture of the situation in different member states, acknowledging that there is no one-size-fits-all solution to be applied across the EU. It also points to the need to strengthen accountability of regional and local administrations where business and politics tend to mingle unchecked and where the potential for conflict of interest is high.

The report correctly acknowledges the difficulty to compare data on criminal proceedings, as there is no unified criminal definition of corruption within member states. As a result, corruption (similar to trafficking in human beings) is often prosecuted though other criminal offences.

Independence of the judiciary is rightly highlighted as a key element of an effective anti-corruption policy, because it safeguards high ethical standards, and guarantees impartiality of the judicial system.

² See Public Observer of 13 March 2013: <https://euobserver.com/justice/119300>

If applied properly the list of conclusions and recommendations would certainly make a difference. However, implementation remains an issue due to the problem of rather weak control and sanctioning mechanisms.

At the other end of the spectrum, the report fails to address the issue of the integrity of the EU institutions, which should be an indispensable part of any comprehensive assessment of EU anti-corruption policies. Another weakness of the report is its descriptive nature and methodology, as it is based on the outcome of round tables, research and the results of the Eurobarometer survey. The results of perception pools have usually limited relevance and should be replaced by concrete findings.

While welcoming the report as a valuable tool many observers criticise the methodology, deploring the lack of involvement of member states in the fact-finding stage, which would have enhanced the political weight of the report. Future reports should draw conclusions on solid evidence with more light shed on cross-cutting issues and findings.

Although the report thoroughly addressed the phenomenon of corruption in public procurement, it paid less attention to other areas, especially political and financial corruption and the grey zone of political parties funding.

Finally, future reports should highlight the moral and integrity aspects of corruption to increase trust in the functioning of democratic institutions and build a

corruption-resistant culture across the continent. In particular, anti-corruption education must be seen a vital component of any anti-corruption strategy, coupled with a cross-sectoral approach to ethics and citizenship. There is a need to build demand for accountability to preserve the public good. In the long run, this objective can only be achieved through promoting EU values of justice, democracy and the rule of law by way of educating generations of citizens who have the skills and social power to condemn, resist and stand up to corruption.

Protection of Whistle-blowers

Whistle-blowers are often brave man and women who put at risk their career, social and economic status, private life and physical integrity to reveal information about wrongdoing, misconduct or corrupt practices in business or government. Few countries have specific legislation concerning the protection of whistle-blowers, although high media exposure has led to some positive steps being taken in recent years.

Transparency International, the leading NGO in the fight against corruption published in 2013 an extensive report on the adequacy of whistle-blowers protection in 27 EU countries.^[7] It mentions only four EU countries with appropriate legal frameworks for whistle-blower protection: Luxembourg, Romania, Slovenia and the United Kingdom. Other countries have either partial or no legal frameworks for employees who come forward to report

wrongdoings. Moreover, even when the provisions are in place, loopholes and exceptions render implementation very difficult with a poor enforcement record as a result.

The Transparency International report deplores the absence of whistle-blowers' protection from the political agenda, advocating “significant political and cultural changes in order to advance discussion on the issue”.

The EC Anti-corruption report also addresses whistle-blower protection, acknowledging the difficulties they face given the “general reluctance to report such acts within one’s own organisation for fear of retaliation”[8] It also recommends adequate whistle-blower mechanisms to allow official channels of reporting of irregularities or illegal acts.

All EU countries should ratify the United Nations Convention against Corruption of 2003 as well as the Council of Europe’s Civil Law Convention on corruption and the protection of whistle-blowers. There are some important legal differences as to the binding effect of these two documents. Whereas the UN Convention only recommends considering the appropriate protection measures, the CoE Convention (Article 9) stipulates that the parties *shall* provide the necessary legislation for the protection of whistle-blowers. Ratifying the Council of Europe Convention would ensure the monitoring by GRECO of compliance with stipulated standards.

Conclusions

Higher standards, better control and stricter sanctioning mechanisms initiated at the EU level against corruption would strengthen a corruption-resistant culture in Europe and would help improve the EU's eroded image.

The next EC Anti-Corruption report due to be issued in 2016 should reassess the concrete impact of recommendations made in the first report. Particular attention should be paid to:

Harmonisation of criminal policy on public procurement at the EU level (suggested by the European Parliament Budgetary affairs committee)

Tackling fragmentation of national, EU and international legislation and strengthening a wider integrity framework

Acceding to the GRECO monitoring mechanism which would considerably improve transparency and would make EU institutions, hitherto excluded from the anti-corruption review, more accountable. EU institutions and particularly the European Parliament and its committees are an important lobbying target. The majority of accredited organisations in Brussels have high stakes in EU laws and regulations, in whose adoption the Parliament shares the power of co-decision with member governments.

Improving investigative tools and allocating more staff to the fight against corruption.

Securing better control measures especially regarding the financing of political parties at regional and local level and

introducing stricter regulations on donations and financial disclosure mechanisms.

Improving the integrity of political leaders and public officials through clear codes of conduct and financial disclosure mechanisms.

The protection of whistle-blowers should be reinforced across the EU by an adequate legal framework and effective implementation mechanisms that would guarantee impartiality and protection.

Education programmes should be encouraged to strengthen a culture of zero-tolerance for corruption, increase public awareness and mobilise the public to stand up to corruption. Such programmes should include citizenship education in schools to equip young people for ethical decision-making in later life, and public and private sector ethics codes of conduct and training.

Support the free and independent press across Europe as a proxy for concerns of citizens and whistle-blowers, and strengthen the role of journalists in disclosing misconduct and corruption and giving voice to whistle-blowers.

[1] EU Convention on the Protection of the European Communities' Financial Interests (1995) and the EU Convention on the Fight against Corruption involving Officials of the European Communities or official of the EU Member States (1997)

In 2015 the EU adopted a Directive on the Prevention of the use of the financial system for the Purpose of Money laundering and terrorist financing following a protracted legislative procedure

[2] This article is the legal basis for the work of OLAF

[3] Worth mentioning is the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the Council of Europe Convention on Money Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and the Financing of Terrorism

[4] The group has been expanded to 49 members, including all EU member states

[5] The EC Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee on Participation of the European Union to the Council of Europe Group of States against Corruption GRECO COM (2012) 604 final, considers several steps towards the EU full membership. The difficulty is that GRECO's evaluation system applies to countries, not organisations which partly explain a delay.

[6] Report from the Commission to the Council and the European Parliament – EU Anti-Corruption Report COM(2014) 38 final

[7]http://www.transparency.org/whatwedo/publication/whistleblowing_in_europe_legal_protections_for_whistleblowers_in_the_eu

[8] EC Anti-Corruption report, page 20