

Chapter 23 Presentation

Flight against and prevention of corruption

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IMPORTANCE

- the combating and prevention of corruption is an **integral part** of the European Union's internal and external policies. *Internal*, in that it is a priority in respect of the existing Member States and has also forms a key aspect of the acquis for the accession countries; *external*, in that it is a priority in respect of the European Union's approach to international relations.

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DEFINITIONS

(1) ACTIVE CORRUPTION

- to promise, offer or give, to a person or entity
- directly or indirectly, an undue advantage,
- for the person himself or herself or another person or entity,
- in order that the person act or refrain from acting in the exercise of his or her duty

AND (2) PASSIVE CORRUPTION

- to solicit or accept, directly or indirectly, an undue advantage,
- for oneself or another person or entity,
- in order to act or refrain from acting in the exercise of his or her duty.

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The linkages between corruption and

- good governance
- economic development
- fighting organised crime

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EC LEVEL

- I. Legislative instruments to date
- II. Policy statements
- III. Ongoing work

LEGAL INSTRUMENTS OF OTHER BODIES

1. Council of Europe
2. OECD
3. United Nations

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I. EC Legislative instruments to date

- (i) protection of the EC's financial interests
- (ii) addressing corruption involving officials of the EC or officials of Member States
- (iii) private sector corruption
- (iv) other instruments (money-laundering, public procurement)

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II. EC Policy statements

- Communication on a comprehensive EU Policy against Corruption
- Communication: The Hague Programme: Ten priorities for the next five years
- The Partnership for European renewal in the field of Freedom, Security and Justice
- Annex 1 "The Hague Programme" - European Council of 4-5 November 2004
- Action Plan implementing the Hague Programme
- Communication on Developing a Strategic Concept on Tackling Organised Crime

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III. EC ongoing work

- network of specialised anti-corruption bodies
- third countries
- Eurobarometer

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Other bodies

1. Council of Europe

- Criminal Law Convention on Corruption
- Civil Law Convention on Corruption
- Additional Protocol to the Council of Europe Criminal Law Convention on Corruption

2. OECD

- Convention on combating bribery of foreign public officials in international business transactions

3. United Nations

- Convention against transnational organised crime
- Convention against Corruption

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(i) protection of the EC's financial interests

Convention on the Protection of the European Communities' Financial Interests 1995 (OJ 95/C 316/03 27.11.95) and Explanatory report on the convention on the protection of the European Communities' Financial Interests, (OJ 97/C 191 23.6.97)

Establishing minimum standards of protection against fraud in relation to funds provided by the EC and to funds due from the MS to the EC, and provide for cooperation between MS.

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The MS are required to

- put in place criminal law penalties which are “effective, proportionate and dissuasive”
- provide that heads of businesses or any person having power to take decisions or exercise control within a business can be legally liable
- provide that they have jurisdiction over offences which take place completely or partially within their territory or where a person on their territory assists or causes the offence to be carried out or the offender is a national of the MS

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Protocol of 27 September 1996 to the Convention on the Protection of the European Communities' Financial Interests 1996 (OJ 96/C 313/01 23.10.96) and Explanatory report on the protocol to the convention on the Protection of the European Communities' Financial Interests, (OJ 98/C 11 15.1.1998)

The Protocol builds on the Convention's provisions about fraud - MS make corruption in relation to the Communities' financial interests, when carried out by a national or a Community official, a criminal offence under their national law.

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- definitions of national and Community official, which cover both elected and non-elected officials
- definitions of active and passive corruption, linking this to an act or omission which damages or is likely to damage the EC's financial interests
- MS apply their national law in the same way to national and Community officials

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Protocol of 29 November 1996 on the interpretation of the Convention by way of preliminary rulings, by the Court of Justice of the European Communities (OJ C 151/20.5.1997)

It enables MS to refer a case to the Court of Justice of the European Community for a preliminary ruling on the interpretation of the 1995 Convention and its associated Protocols.

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Second Protocol of 19 June 1997 to the convention on the protection of the European Communities' Financial Interests (OJ C 221/11 19.7.1997)

- MS to establish the offence of money laundering as a criminal offence
- legal persons, such as limited liability companies, could be liable for the offences of fraud, active corruption and money laundering
- sanctions have to be “effective, proportionate and dissuasive”, could include criminal or non-criminal fines, depending on MS' legal systems,

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(ii) corruption involving officials of the EC or officials of Member States

Convention on the Fight against Corruption involving officials of the European Communities or officials of Member States of the European Union 1997 (OJ 97/C 195/01 25.6.97) and Explanatory report on the Convention on the Fight against Corruption involving officials of the European Communities or officials of Member States of the European Union 1997 (OJ 98/C 391 15.12.1998)

Council Decision 2003/642/JHA of 22 July 2003 concerning the application to Gibraltar of the Convention on the Fight against Corruption involving officials of the European Communities or officials of Member States of the European Union 1997 (OJ 03/L 226 10.9.2003)

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Convention is general in nature but at the same time it repeats the provisions of the earlier Protocol on protecting EC financial interest:

- definitions of national and Community official (both elected and non-elected)
- definitions of active and passive corruption, linking this to an act or omission which damages or is likely to damage the EC's financial interests
- MS apply their national law in the same way to national and Community officials
- "effective, proportionate and dissuasive" criminal law penalties without prejudice to the exercise of disciplinary powers by the competent authorities

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(iii) private sector corruption

Joint Action of 22 December 1998 adopted by the Council on the basis of Article K.3 of the Treaty on European Union, on corruption in the private sector (98/42/JHA) (OJ L 358/2 31.12.98) repealed by

Council Framework Decision 2003/568/JHA of 22 July 2003 on combating corruption in the private sector (OJ L 192/5 of 31.7.2003)

- both active and passive corruption in the private sector are criminal offences in all MS,
- that legal persons may also be held responsible for both active and passive corruption

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- criminal law penalties which are “effective, proportionate and dissuasive”; “...punishable by a penalty of a maximum of at least one to three years imprisonment”
- applies to both profit and non-profit organisations.
- for a limited period, a MS can continue to limit the scope of the offences of corruption could distort, competition in relation to the purchase of goods or commercial services. This will be reviewed before 2010.

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(iv) other instruments

- public procurement

Directive [2004/18/EC](#) of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ L 134/114 of 30.04.2004)

Directive [2004/17/EC](#) of the European Parliament and of the Council of 31 March 2004 on the coordination of procurement procedures of entities operating in the water, energy, transport and postal services sectors (OJ L 134/001 of 30.04.2004)

concept of mandatory exclusion clauses in relation to a number of criminal offences, including corruption, and of money laundering.

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•money laundering

Council Directive 2005/60/EC of 26 October 2005 on prevention of the use of the financial system for the purpose of money laundering and terrorist financing (OJ L 309/15 of 25.11.2005)

Council Directive 2001/97/EC of 4 December 2001 amending Council Directive 91/308/EEC on prevention of the use of the financial system for the purpose of money laundering (OJ L 344 of 28.12.2001)

Council Directive 91/308/EEC of 10 June 1991 on prevention of the use of the financial system for the purpose of money laundering (Official Journal L 166 of 28.06.1991)

- mentions corruption as one of the predicative offences for money-laundering
- the directive will be implemented by the member states by 2007.

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II. EC Policy statements

Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee - On a comprehensive EU policy against corruption (COM(2003) 317 final - Not published in the Official Journal)

- the way forward in reducing and preventing corruption within the EU institutions, Member States and with regard to third countries - it sets out the principle elements of a future EU anti-corruption policy that are elaborated in the different sections
- adopts the definition of corruption used by the United Nations' Global Programme against Corruption, i.e. "abuse of power for private gain"

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- **Giving effect to criminal law instruments** - need to agree on common definitions of offences and common forms and range of penalties and to elaborate a multidisciplinary EU policy. Key elements:
- the ratification of European and international anti-corruption instruments,
 - the monitoring of their implementation and the fight against corruption in the private sector.

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- the detection and punishment of all acts of corruption, confiscation of illegal proceeds and reductions of the opportunities for corrupt practices through the establishment of transparent and accountable public administration standards
- Member States to enact swiftly all relevant supra national and international anti-corruption instruments - the crucial role of monitoring and peer review evaluation between countries participating in these initiatives

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- recommends a multi-disciplinary approach to integrity-enhancing strategies for both the public and the private sector
- **Preventing corruption** - designed to avoid conflicts of interest and to introduce systematic checks and controls: to raise integrity **in the public sector**; a comprehensive dialogue on minimum standards and benchmarking; question of public procurement in the light of the introduction of new rules

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- to raise integrity **in the private sector**: certain professions to tighten up their self-regulatory regimes; to apply modern accounting standards; to adopt adequate internal audit schemes and codes of conduct; to establish clear rules on whistle blowing
- special bodies and organisations that are at **the interface** between the public and the private sector, such as political parties and trade unions - transparency in the financing

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- **External aspects** - to reduce the level of corruption in developing countries and transition economies, the Commission suggests the inclusion of ten general principles into the national anti-corruption strategies of EU, acceding and candidate countries as well as other EU partners
- a list of 10 General Principles is provided in the Annex to the Communication -“Ten principles for improving the fight against corruption in acceding, candidate and other third countries
- insert anti-corruption clauses into cooperation agreements and external aid programmes

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- COM recommends to establish in countries a single anti-corruption unit or body; training and specialisation in this area
- for all countries the biggest challenge remains the effective implementation of the comprehensive anti-corruption strategies
- The Commission takes the view that it is reasonable to expect that each candidate country or co-operation partner should ideally subscribe to these principles, and integrate them into their national political, legal and administrative systems.

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The 10 General Principles address issues within both the public and private sectors, like

- the need for strong, political support to address corruption
- becoming fully aligned with the relevant international instruments
- implementation of legislation in an effective manner
- safeguards in relation to recruitment etc of civil and public servants
- the integrity, accountability and transparency of all sections of the public administration

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- development of codes of conduct for all sections of the public administration
- protection for whistle-blowers in both the public and private sector
- encouraging the general public to recognise the impact of corruption
- ensuring that particular entities do not have undue influence over the policy-making process
- supporting the private sector in recognising and combating corruption

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Other bodies – 1. Council of Europe **Criminal Law Convention on Corruption (1999, European Treaty Series No. 173)**

Additional Protocol to the Criminal Law Convention on Corruption (2003 ETS 191)

Chapters including:

- Measures to be taken at national level
- Monitoring (GRECO) (Parties to the Convention automatically join it)
- International cooperation

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- to develop common standards concerning: certain corruption offences; trading in influence; money laundering the proceeds of corruption offences; account offences
- provides for corporate liability, a state does not have to impose a criminal liability, it can continue to impose a civil or administrative law liability. Penalties have to be “effective, proportionate and dissuasive”
- **Protocol to this Convention** brings jurors and arbitrators within the scope of the Convention.

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Civil Law Convention on Corruption (1999, ETS No. 174)

- enabling persons who have suffered damage as a result of corruption to receive fair compensation. The act of corruption is not confined to the public sector. Liability arises even if all parties to it are in the private sector

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- States are required to provide that a person (individual or legal person) has the right to initiate an action before the courts for full(!) compensation for damage.
- Further, states must provide that a contract undermined by corruption can be declared void by the courts; no sanction taken against an employee who reports suspicions of corruption in good faith and on reasonable grounds and annual accounts of companies are drawn up clearly and give a true and fair view of the company's financial position.

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2. OECD

OECD Convention on combating bribery of foreign public officials in international business transactions (DAFFE/IME/BR(97)20).

- bribery of foreign officials and officials of international organisations is made a criminal offence. Without prejudice to questions of jurisdiction the offence should cover corruption with regard to officials of any State or international organisation.

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3. United Nations

➤ UN Convention against Corruption (UNCAC - 2003)

- adopted in October 2003; ever first global instrument tackling fighting corruption. Entered into force on 14th December 2005 - signed on behalf of the EC on 15th September 2005, **conclusion procedure is ongoing**
- among the wide-ranging topics covered are public procurement, bribery, illicit enrichment, embezzlement, misappropriation, money laundering, protection of whistle-blowers, freezing of assets and cooperation between states in the sharing of information, recovery of assets etc.

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- calls for the criminalization of acts of corruption in both the public and the private sector, including bribery, the embezzlement of public funds and obstruction of justice;
- establishes a framework for cooperation among states to prevent, investigate and prosecute offenders as well as to return the proceeds of corruption;
- with agreement on asset recovery as a fundamental principle of the Convention, another important measure has been introduced to combat corruption

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➤ UN Convention against transnational organised crime (UNTOC- 2000)

- adopted 15 November 2000; entered into force on 29 September 2003 - concluded on behalf of the EC on 21 May 2004
- aims to enable different countries' law enforcement authorities to co-operate effectively in combating organised crime by eliminating differences and different definitions of crimes among national legal systems, so a crime in one country will be recognised as crime in other countries.

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- States to ensure that four serious types of crime are regarded as a crime in their domestic laws: participation in an organised criminal group, money laundering, corruption, and the obstruction of justice.
- UNTOC only deals with organised crime and public sector corruption ie that one of the parties to the transaction must be a public official (either national or foreign).
- improve co-operation on extradition, mutual legal assistance, transfer of proceedings and joint investigations; provisions for victim and witness protection, shielding legal markets from infiltration by organised criminal groups.

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