

# HANDBOOK ON **COMBATING CORRUPTION**

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## About the OSCE

With 57 participating States in North America, Europe and Asia, and 11 Partner countries for Co-operation,<sup>1</sup> the Organization for Security and Co-operation in Europe (OSCE) is the world's largest regional security organization.

It offers a forum for political negotiations and decision-making in early warning, conflict prevention, crisis management and post-conflict rehabilitation, and has a unique network of 17 field operations across South-Eastern Europe, Eastern Europe, the South Caucasus and Central Asia.

The OSCE takes a comprehensive approach to security that encompasses the politico-military, economic and environmental, and human dimensions. Promoting good governance, anti-corruption and anti-money laundering efforts are an integral part of this comprehensive approach.

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<sup>1</sup> Afghanistan, Algeria, Australia, Egypt, Israel, Japan, Jordan, Morocco, Republic of Korea, Thailand and Tunisia.

# Handbook on Combating Corruption

## Table of contents

Acknowledgements	1
Foreword	5
Introduction	7
<b>1. International and Regional Anti-Corruption Initiatives</b>	<b>9</b>
<b>2. Anti-Corruption Strategies</b>	<b>31</b>
<b>3. Anti-Corruption Bodies</b>	<b>43</b>
<b>4. Integrity in Public Sector Management</b>	<b>55</b>
<b>5. Codes of Conduct</b>	<b>65</b>
<b>6. Conflict of Interest</b>	<b>73</b>
<b>7. Public Financial Management</b>	<b>87</b>
<b>8. Public Procurement</b>	<b>97</b>
<b>9. Political Party Funding</b>	<b>111</b>
<b>10. Regulating Lobbying</b>	<b>119</b>
<b>11. Protection of ‘Whistleblowers’</b>	<b>131</b>
<b>12. Participation of Civil Society</b>	<b>141</b>
<b>13. Initiatives in the Private Sector</b>	<b>149</b>
<b>14. The Role of the Media</b>	<b>159</b>
<b>15. Judiciary</b>	<b>169</b>
<b>16. Criminalization of Corruption</b>	<b>179</b>
<b>17. Human Rights Issues in Anti-Corruption Investigations</b>	<b>199</b>
<b>18. Mutual Legal Assistance</b>	<b>207</b>
<b>19. Extradition</b>	<b>217</b>
<b>20. Anti-Money Laundering and the Confiscation and Recovery of Assets</b>	<b>225</b>
Abbreviations and Acronyms	240
Photo Credits	241



# Foreword



It is my pleasure to present to you the new OSCE *Handbook on Combating Corruption*. It has been produced by the Office of the Co-ordinator of OSCE Economic and Environmental Activities (OCEEA) of the OSCE Secretariat in collaboration with

the OSCE Office for Democratic Institutions and Human Rights (ODIHR), other OSCE executive structures, and partner organizations including the United Nations Office on Drugs and Crime (UNODC), Organisation for Economic Co-operation and Development (OECD), and Council of Europe's Group of States against Corruption (GRECO).

Corruption poses a significant threat to security and stability. It undermines democracy, diminishes the rule of law, and erodes the confidence of citizens in government institutions. Social and economic development is impeded, investment discouraged and markets are distorted in its path. The OSCE has rightfully placed high priority on preventing and combating corruption.

The OSCE participating States recognized in the Istanbul Charter for European Security (1999) that corruption poses a great threat to the OSCE's shared values, generates instability, and reaches into many aspects of the security, economic and human dimensions. Since then, and based on subsequent documents, the Organization has worked to promote good governance, public integrity and combating corruption, including in its comprehensive approach to security these important elements.

In recent years, the OSCE mandate to counter corruption has been further consolidated through the OSCE Ministerial Council's adoption of the Declaration on Strengthening Good Governance and Combating Corruption, Money-Laundering and the Financing of Terrorism (2012) and the Decision on the Prevention of Corruption (2014). As part of the intensified work of the OSCE in the anti-corruption field, and inspired by interest of delegations of the OSCE participating States, the OCEEA embarked on developing this new reference guide.

This publication brings together international standards, reflects main legal tools, outlines various regional initiatives, and describes many national experiences related to preventing and combating corruption. It seeks to offer guidance on a wide range of issues: from anti-corruption strategies to political party funding, and from regulating lobbying to protecting human rights in anti-corruption investigations. Finally, it looks at the different stakeholder roles, their contributions and challenges.

I hope that this Handbook will form a useful source of information and guidance for policymakers and practitioners in the OSCE region and beyond who seek to prevent corruption, unmask corrupt officials, and suppress this destructive phenomenon. These goals can be achieved only by joint efforts of many relevant actors at national level, and close co-operation between countries with the assistance of international organizations.

A handwritten signature in blue ink, which appears to be 'L. Zannier'.

**Lamberto Zannier**  
OSCE Secretary General



# Introduction

The *OSCE Handbook on Combating Corruption* follows and, in part, builds upon the 2004 OSCE Handbook of Best Practices in Combating Corruption. Yet it is innovative in several ways. Considerable efforts have been made to compile as well as synthesize, where possible, various international standards and recipes of a number of key international players in the anti-corruption field. The authors have also tried to present measures to prevent and fight corruption from a cross-dimensional perspective, drawing on legal, economic and human rights approaches. In addition, the Handbook outlines many regional initiatives and national examples as well as initiatives of civil society and the private sector.

The aim of the Handbook is to provide the 57 OSCE participating States and 11 Partners for Co-operation with a reference guide on available legal tools, the latest legislative and policy trends, and pertinent measures and practices to prevent and suppress corruption. The Handbook should raise awareness of the range of international instruments available to national policymakers and anti-corruption practitioners, and assist them in developing and implementing effective anti-corruption policies and measures, thereby reducing the possibilities for corruption, instability and transnational crime.

The Handbook is expected to contribute to further political dialogue, exchange of knowledge and good practices as well as strengthen international co-operation among policymakers, practitioners and experts in the OSCE region and beyond. It is envisaged that the publication will also be used for practical, tailor-made training seminars at regional and national levels in the OSCE region in the coming years.

## The structure of the Handbook

The first part of the Handbook presents the main international anti-corruption conventions, non-legally binding regional and international initiatives. It also addresses the development and implementation of anti-corruption strategies, and the creation and functioning of anti-corruption bodies. It emphasizes the importance, in the overall context of combating corruption, of building public sector integrity. Key legal instruments that guide many OSCE participating States, such as the United Nations Convention against Corruption, the OECD

Convention on Combating Bribery of Foreign Officials in International Business Transactions, and the Council of Europe's Criminal Law Convention on Corruption and the Civil Law Convention on Corruption, receive particular attention.

The second part outlines various prevention measures: the promotion of codes of conduct, addressing conflict of interest situations, establishing proper management of financial resources in the public sector, and creating an efficient and effective public procurement system. It also explores ways to ensure transparency and accountability in political party funding, and how to regulate lobbying activities. In view of the limited standards on lobbying available at the international level, a series of regional (EU) and national examples of regulating lobbying is provided to the reader.

The next part of the Handbook looks at the various anti-corruption actors: 'whistleblowers,' civil society, the private sector, the media, and the judiciary. This part stresses the fundamental principle of employing a multi-stakeholder approach towards combating corruption as it provides for more oversight and reporting channels, and reduces the opportunities and inclinations for corrupt activity. It demonstrates that the media is particularly capable of being a counter-force to corruption through its watchdog and informative functions. Further, it elaborates on preventing corruption within the judiciary, which is of vital importance for maintaining the rule of law and providing access to justice.

In the following part, the Handbook discusses criminalization of corruption-related offences, focusing on the offence of bribery in particular. It then explains how to safeguard human rights, including the right to privacy, in anti-corruption investigations. The Handbook goes on to outline the regional and international framework on Mutual Legal Assistance as well as to present concrete examples of inter-state co-operation, such as the European Evidence Warrant. It also explores extradition arrangements and procedures. Finally, the Handbook provides an overview of anti-money laundering regimes and processes - underlining the key role of the Financial Action Task Force Recommendations; describes practices to mitigate the money laundering risks associated with corrupt officials; and examines the legal bases and international co-operation mechanisms for the confiscation and return of illicit assets.



# CHAPTER 1

# International and Regional Anti-Corruption Initiatives

## CONTENTS

<b>1.1</b>	<b>Legal anti-corruption instruments</b>	<b>10</b>
1.1.1	United Nations Office on Drugs and Crime	10
1.1.2	Organisation for Economic Co-operation and Development	14
1.1.3	Council of Europe	16
1.1.4	European Union	17
<b>1.2</b>	<b>Non-legally binding regional and international initiatives</b>	<b>18</b>
1.2.1	Organization for Security and Co-operation in Europe	18
1.2.2	OECD activities	21
	1.2.2.1 Standard-setting activities	21
	1.2.2.2 Regional anti-corruption initiatives	22
1.2.3	United Nations Development Programme	23
1.2.4	The International Anti-Corruption Academy	24
1.2.5	Regional Anti-Corruption Initiative for South-Eastern Europe	24
1.2.6	The Stolen Asset Recovery Initiative	25
1.2.7	International Centre for Asset Recovery	25
1.2.8	Open Government Partnership	25
1.2.9	Financial Action Task Force	26
1.2.10	United Nations ‘soft law’ instruments dealing – fully or partially – with corruption	26
	A. International Code of Conduct for Public Officials	26
	B. United Nations Declaration against Corruption and Bribery in International Commercial Transactions	27
	C. United Nations Declaration on Crime and Public Security	28
	D. The Bangalore Principles	28
	<b>Selected Bibliography</b>	<b>29</b>
<i>Box 1.1</i>	<i>EU Anti-Corruption Report</i>	<i>18</i>
<i>Table 1.1</i>	<i>Content of international anti-corruption instruments</i>	<i>11</i>
<i>Table 1.2</i>	<i>OSCE’s strategic and policy commitments</i>	<i>19</i>

## CHAPTER 1

# International and Regional Anti-Corruption Initiatives

*The international community, acting through international and intergovernmental organizations, intensified efforts to fight corruption at the international level in the 1990s due to its undermining effects on the rule of law, democratic institutions, social cohesion and economic development, and its increasing threat to countries' stability and security. It enhanced this work by developing an international legal and co-operation framework, which consists of international and regional conventions, directives, recommendations, declarations and guidelines.*

*This Chapter will provide an overview of initiatives which are of relevance to the OSCE region. They range from binding 'hard law' (conventions, treaties) to non-binding*

*'soft law' (non-binding resolutions, recommendations) instruments.*

## 1.1 Legal anti-corruption instruments

There are four important anti-corruption conventions that have been acceded to by many<sup>1</sup> participating States of the OSCE. In chronological order these are:

- Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (the Organisation for Economic Co-operation and Development (OECD) Anti-Bribery Convention) (1997);
- Council of Europe Criminal Law Convention on Corruption (1999) and Additional Protocol to the Criminal Law Convention on Corruption (2003);
- The Council of Europe Civil Law Convention on Corruption (1999);
- United Nations Convention against Corruption (2003).

### 1.1.1 United Nations Office on Drugs and Crime (UNODC)

United Nations Office on Drugs and Crime (UNODC) assists Member States in their struggle against illicit drugs, crime and terrorism. In combating corruption the UNODC partners with the public and private sectors, as well as civil society. In recent years, the Office has stepped up its efforts to help States recover assets stolen by corrupt officials. For this objective, the UNODC established a partnership with the World Bank Group under the joint *Stolen Asset Recovery (StAR) Initiative*.<sup>2</sup>



OSCE flags in front of the Hofburg in Vienna

<sup>1</sup> By almost all OSCE participating States in the case of the United Nations Convention against Corruption.

<sup>2</sup> See [www.unodc.org](http://www.unodc.org)

**Table 1.1** Content of international anti-corruption instruments

International instrument	Content
OECD Anti-Bribery Convention (1997)	<p>“The OECD Anti-Bribery Convention establishes legally binding standards to criminalise bribery of foreign public officials in international business transactions and provides for a host of related measures that make this effective. It is the first and only international anti-corruption instrument focused on the ‘supply side’ of the bribery transaction.”</p> <p><i>Source:</i> <a href="http://www.oecd.org/daf/anti-bribery/ConvCombatBribery_ENG.pdf">http://www.oecd.org/daf/anti-bribery/ConvCombatBribery_ENG.pdf</a></p>
Council of Europe Criminal Law Convention on Corruption (1999)	<p>“The Council of Europe’s Criminal Law Convention on Corruption of 1999 [...] aims principally at developing common standards concerning certain corruption offences [...]. In addition, it deals with substantive and procedural law matters, which closely relate to these corruption offences and seeks to improve international co-operation. [...] By harmonising the definition of corruption offences, the requirement of dual criminality will be met by the Parties to the Convention, while the provisions on international co-operation are designed to facilitate direct and swift communication between the relevant national authorities.”</p> <p><i>Source:</i> Council of Europe, Explanatory Report, Criminal Law Convention on Corruption, (ETS No. 173), § 21. (<a href="http://conventions.coe.int/Treaty/en/Reports/Html/173.htm">http://conventions.coe.int/Treaty/en/Reports/Html/173.htm</a>)</p>
Council of Europe Civil Law Convention on Corruption (1999)	<p>“The [Council of Europe] Civil Law Convention [of 1999] aims at requiring each Party to provide in its internal law for effective remedies for persons who have suffered damage as a result of corruption, in order to enable them to defend their rights and interests, including the possibility of obtaining compensation for damage. This Convention, which is the first attempt to define common principles and rules at an international level in the field of civil law and corruption, [also] deals with the definition of corruption, [...] liability, contributory negligence, limitation periods, the validity of contracts, the protection of employees, accounts and audits, the acquisition of evidence, interim measures, [and] international co-operation [...]”</p> <p><i>Source:</i> Council of Europe, Explanatory Report, Criminal Law Convention on Corruption (ETS No. 173), §§ 22-25.</p>
United Nations Convention against Corruption (2003)	<p>The United Nations Convention against Corruption (UNCAC) contains four major elements. Chapter II of the Convention is exclusively dedicated to prevention measures, encompassing both the public and private sectors. Chapter II includes, for instance, standards in relation to anticorruption bodies and strategies or regarding enhanced transparency in the financing of election campaigns and political parties. States must further endeavour to ensure that their public services are subject to adequate safeguards. Chapter III sets standards to be followed by countries when establishing criminal offences to cover a wide range of acts of corruption and corruption-related wrongdoings. Chapter IV covers all aspects of international co-operation as it pertains to transnational aspects of the fight against corruption. Finally, Chapter V on asset recovery enshrines the recovery of stolen assets as a fundamental principle of the instrument; this Chapter is seen by many as the single most important element of the Convention.</p> <p><i>Adapted from</i> <a href="http://www.unodc.org/unodc/en/treaties/CAC/convention-highlights.html#Criminalization">www.unodc.org/unodc/en/treaties/CAC/convention-highlights.html#Criminalization</a></p>

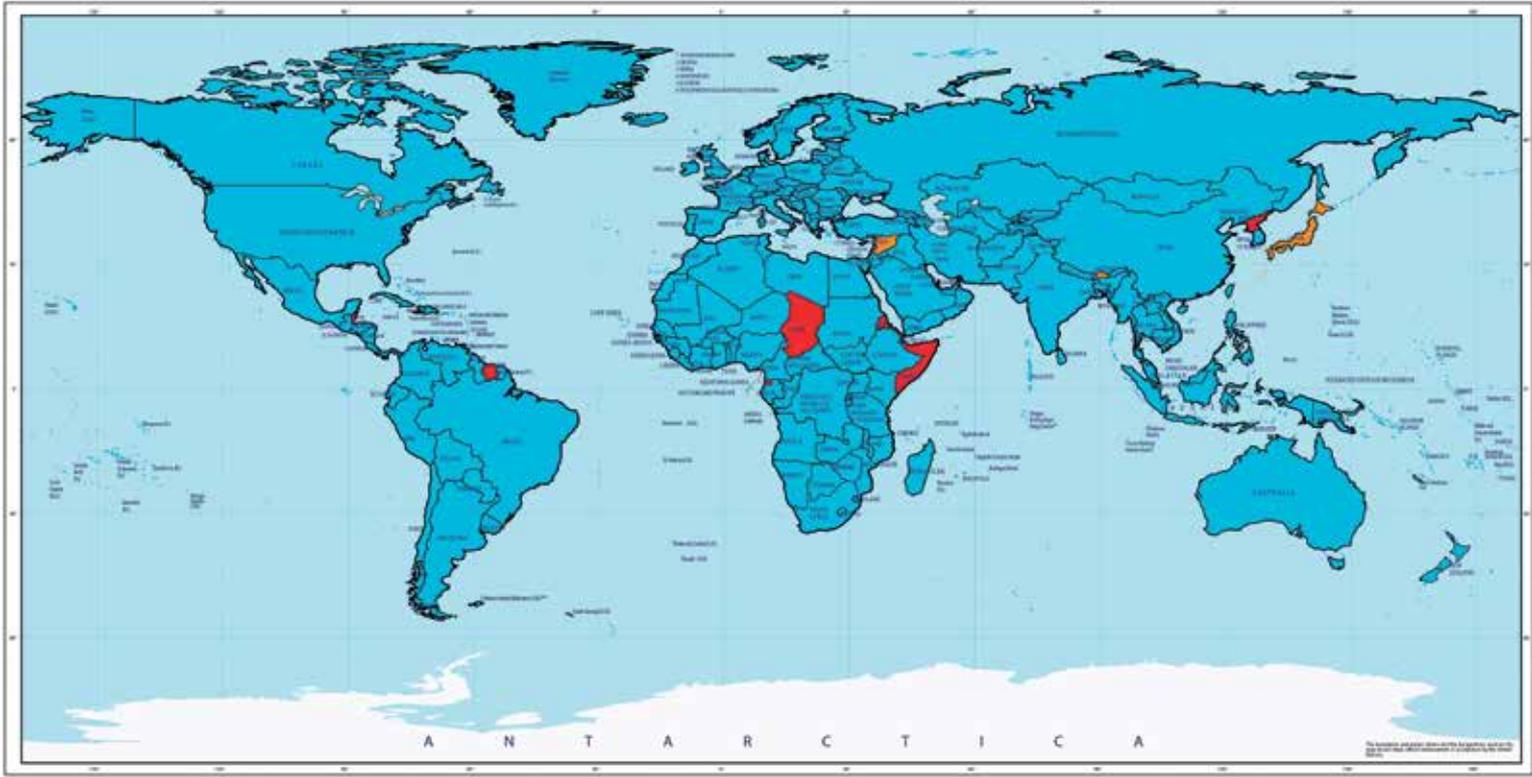
### United Nations Convention against Corruption

To date, the most significant effort by the international community is the *United Nations Convention against Corruption (UNCAC)*,<sup>3</sup> which draws on the earlier efforts of the United Nations General Assembly and the Economic and Social Council (ECOSOC) and other regional bodies such as the OECD, the Council of Europe and the African Union, to name but a few.

The Convention was adopted by the General Assembly by Resolution 58/4 of 31 October 2003 and opened for signature in Merida, Mexico, from 9 to 11 December 2003. The Convention entered into force on 14 December 2005 and by 1 December 2015, it had 178 Parties. It has been ratified by almost all OSCE participating States and OSCE Partners for Co-operation.<sup>4</sup>

<sup>3</sup> Available from [www.unodc.org/unodc/en/treaties/CAC/index.html#UNCACfulltext](http://www.unodc.org/unodc/en/treaties/CAC/index.html#UNCACfulltext)

<sup>4</sup> Andorra, Japan, Monaco and San Marino were not States Parties to UNCAC on 1 December 2015.



## UNCAC Signature and Ratification Status

- States Parties
- Signatories
- Countries that have not signed or ratified the UNCAC

**Signatories: 140**  
**Parties: 178**

Source: UNODC, UNCAC signature and ratification status as of 1 December 2015. Available from <http://www.unodc.org/unodc/en/treaties/CAC/signatories.html>

The UNCAC represents the only global and legally binding response to corruption, bribery and the corrosive effects they have on governance and state structures, and presents a blueprint for a holistic response to the problem. While earlier efforts focused only on the criminalization of bribery and corruption, the UNCAC takes an integrated approach to corruption and is built around five key responses:

- (1) Prevention (Chapter II);
- (2) Criminalization and law enforcement (Chapter III);
- (3) International cooperation (Chapter IV);
- (4) Asset recovery (Chapter V); and
- (5) Mechanisms for implementation (Chapter VII).

With regard to the first four pillars, States Parties are required, through a combination of mandatory and optional provisions, to put in place measures to give effect to the Convention. Given the wide range of issues addressed by the Convention, a large number of States Parties have had to review their existing legislative, administrative and institutional frameworks to incorporate both preventive and law enforcement measures.

For the Convention to meet its purposes there was a need to ensure that States Parties had access to both

technical know-how and international support to allow for effective implementation. In order to do so, Chapter VII of the UNCAC calls for the creation of a Conference of the States Parties (COSP),<sup>5</sup> the main aim of which is to seek ways to “improve the capacity of and cooperation between States Parties to achieve the objectives set forth in this Convention and to promote and review its implementation.”<sup>6</sup>

Since the Convention entered into force, there have been six sessions of the COSP, the latest of which was held in St. Petersburg, Russia, in November 2015. Each of the COSP sessions addressed specific aspects of the Convention and mandates the work of the UNODC through its resolutions.<sup>7</sup>

At the first COSP, held in Amman, Jordan, in 2006, States agreed to set up an Open-ended Intergovernmental Expert Working Group to consider ways in which implementation of the Convention would be reviewed. The Convention is deliberately silent on any review

<sup>5</sup> For more on UNCAC please see Polaine, M., *Guide to the UN Convention against Corruption (UNCAC)*, 2015, London Centre of International Law Practice, Anti-corruption Forum. Available from <http://www.iclip.org/wp-content/uploads/2015/02/Guide-to-the-UN-Convention-Against-Corruption-Martin-Polaine.pdf>

<sup>6</sup> See Article 63 (1) of UNCAC

<sup>7</sup> Information on regular sessions of the Conference of States Parties can be accessed at [www.unodc.org/unodc/en/treaties/CAC/CAC-COSP.html](http://www.unodc.org/unodc/en/treaties/CAC/CAC-COSP.html)



High-level opening of the Sixth Session of the Conference of the States Parties to the UNCAC in St. Petersburg, Russia, 2 November 2015

mechanism as no agreement could be reached during the negotiations on whether a review mechanism was necessary or desirable.

For the third session of the COSP, held in November 2009 in Doha, Qatar, draft terms of reference of the mechanism for the review of implementation of the UNCAC, a draft country report blueprint as well as draft guidelines for governmental experts participating in the review teams were prepared.

In parallel, a voluntary pilot review programme limited in scope was developed by the UNODC to offer opportunities to test methods to review the implementation of the Convention, with the overall objective of evaluating the efficiency and effectiveness of the proposed mechanism(s) and to provide information on lessons learned and experience acquired to the COSP.

The COSP in Doha adopted the landmark Resolution 3/1 establishing a review mechanism aimed at assisting countries to meet the objectives of the Convention through a peer review process and prescribing detailed terms of reference for the same.<sup>8</sup>

The Mechanism aims to maximize the potential of the Convention, by providing the means for countries to

assess how they are doing in the implementation through the use of a comprehensive self-assessment checklist, identify potential gaps and develop action plans to strengthen the implementation of the UNCAC at the national level.

In the *Terms of Reference of the Review Mechanism*,<sup>9</sup> adopted in Doha, it was specified that the reviews would take place in two cycles: Cycle 1 would look at criminalization and law enforcement, and international co-operation (Chapters III and IV respectively), and Cycle 2 would focus on preventive measures and asset recovery (Chapters II and V respectively). Furthermore, the executive summaries of all finalized country review reports would be made available as documents of the Implementation Review Group<sup>10</sup> for information purposes only. The option of publishing the full report would remain with the 'reviewed' State. While the focus would remain on self-assessment, a peer review mechanism was also introduced.

As demonstrated at the sixth session of the COSP in St. Petersburg, Russia, there is a growing body of knowledge arising from the country reviews (122 Executive Summaries by December 2015), allowing countries to take action to improve their own implementation efforts.

<sup>8</sup> See UNODC, *Action against Corruption & Economic Crime (2010-2011)*, Thematic Programme. Available from [http://www.unodc.org/documents/corruption/Thematic\\_Programme/Thematic\\_Programme\\_on\\_Corruption\\_-\\_April\\_2011.pdf](http://www.unodc.org/documents/corruption/Thematic_Programme/Thematic_Programme_on_Corruption_-_April_2011.pdf)

<sup>9</sup> Available from [https://www.unodc.org/documents/treaties/UNCAC/Publications/ReviewMechanism-BasicDocuments/Mechanism\\_for\\_the\\_Review\\_of\\_Implementation\\_-\\_Basic\\_Documents\\_-\\_E.pdf](https://www.unodc.org/documents/treaties/UNCAC/Publications/ReviewMechanism-BasicDocuments/Mechanism_for_the_Review_of_Implementation_-_Basic_Documents_-_E.pdf)

<sup>10</sup> For more information on the Implementation Review Group see <https://www.unodc.org/unodc/en/treaties/CAC/IRG-sessions.html>

At its fourth, fifth and sixth sessions, the COSP adopted comprehensive resolutions on the prevention of corruption and asset recovery, thus shaping policy making on these important issues. Also, at the sixth session of the COSP in St. Petersburg, the second review cycle of the Mechanism for the Review of Implementation of the UNCAC was launched.

In addition to the Review Mechanism, the COSP sessions established a number of subsidiary bodies.

As the guardian of the Convention, the UNODC acts as a Secretariat to COSP and its subsidiary bodies. It has developed a number of technical tools and guidance notes to assist policy makers and practitioners in implementing the Convention, and has also produced a range of other anti-corruption related publications,<sup>11</sup> including:

- Legislative Guide for the Implementation of the UNCAC
- Technical Guide to the United Nations Convention Against Corruption
- United Nations Handbook on Practical Anti-Corruption Measures for Prosecutors and Investigators
- Mutual Legal Assistance Request Writer Tool
- Resource Guide on Strengthening Judicial Integrity and Capacity
- Building Public Support for Anti-Corruption Efforts - Why Anti-Corruption Agencies Need to Communicate and How
- Guidebook on Anti-corruption in Public Procurement and the Management of Public Finances
- Joint World Bank/UNODC StAR (Stolen Asset Recovery) Initiative reports on progress achieved

The studies and reports supplement the Convention by setting out good practice and guidance on international standards, and should therefore be considered by policy makers and legislators when developing or amending their own anti-corruption legal and institutional framework. The UNODC delivers technical assistance and capacity building programmes to requesting countries, to assist them in meeting their UNCAC obligations. After the establishment of the Review of Implementation Mechanism of the Convention at the 4<sup>th</sup> session of the COSP<sup>12</sup> in Marrakech (2011), priorities and strategies were determined in accordance with the findings of the individual country reviews. The Review Mechanism is now the main interface for delivery and review of technical assistance in the field

of anti-corruption. The assistance is provided directly or through other initiatives in conjunction with other international organizations engaged in anti-corruption efforts (e.g., World Bank (StAR), OECD, the United Nations Development Programme and OSCE).

The TRACK *legal library*<sup>13</sup> that acts as a database of the laws and jurisprudence from over 175 States is a noteworthy initiative. This is of use to practitioners particularly in the context of international co-operation in general and asset recovery in particular.

### 1.1.2 Organisation for Economic Co-operation and Development

The Organisation for Economic Co-operation and Development (OECD) promotes policies that improve the economic and social well-being of people around the world. The OECD provides a forum for governments to work together, share experiences and seek solutions to common problems.<sup>14</sup>

The OECD takes a multidisciplinary approach to fighting corruption. This approach embraces work in such fields as fighting bribery of foreign public officials, public sector integrity, corporate governance, responsible business conduct, fiscal transparency, development aid, preventing corruption in export credits.

The organization has led the anti-bribery efforts in international business. The *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions* is the only globally legally binding instrument which focuses on the supply of bribes to foreign public officials. The main aim of this instrument is to create a level playing field in commercial transactions.

The OECD also seeks to enhance integrity and prevent corruption in public governance, governance of enterprises, budgetary governance. It has adopted guidelines and recommendations on ethical conduct in public service, managing conflict of interest in the public service, enhancing integrity in public procurement, on transparency and integrity in lobbying, as well as on transparent budgeting.

Building on its multidisciplinary approach to corruption, in 2011 the OECD launched the *CleanGovBiz* initiative with the goal to support governments to reinforce their fight against corruption and engage with civil society

<sup>11</sup> All the publications are available from [www.unodc.org/unodc/en/corruption/publications.html](http://www.unodc.org/unodc/en/corruption/publications.html)

<sup>12</sup> See UNODC documents CAC/COSP/2011/10, CAC/COSP/2011/10/Corr.1, and CAC/COSP/2011/11, available from [www.unodc.org/unodc/en/treaties/CAC/CAC-COSP-session4.html](http://www.unodc.org/unodc/en/treaties/CAC/CAC-COSP-session4.html)

<sup>13</sup> See <http://www.track.unodc.org/Pages/home.aspx>

<sup>14</sup> Its instrument of establishment is the Convention on the Organisation for Economic Co-operation and Development. Membership to the OECD now extends to 34 countries. Further information is available from [www.oecd.org/](http://www.oecd.org/)

and the private sector to promote real change towards integrity. The *CleanGovBiz* Toolkit for Integrity collects all international anti-corruption standards and good practices under a single umbrella.<sup>15</sup> In order to assess government's legal and institutional frameworks to prevent and fight corruption, an Integrity Scan can be conducted.

### OECD Anti-Bribery Convention

In 1997, the *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*<sup>16</sup> (OECD Anti-Bribery Convention) was signed. Today the Convention has 41 States Parties including the 34 OECD member states plus Argentina, Brazil, Bulgaria, Colombia, Latvia, Russia and South Africa. All States Parties to the Convention are obliged to make foreign bribery a criminal offence. This Convention encourages signatories to investigate and prosecute those who offer, promise or give bribes to foreign public officials in a context of international business and to subject those who bribe to adequate sanction. They are also required to deny the tax deductibility for such bribes.

Under the Convention, individuals and companies can also be prosecuted when third parties are involved in the bribe transaction, such as when someone other than the official who was bribed receives the benefit, including a family member, business partner, or even a charity favoured by the official. Foreign bribery is also a crime under the Convention even if corruption is tolerated in the foreign country. It also does not matter if the briber was entitled to the business advantage that the bribe was supposed to secure.

By joining the Convention, countries agree that foreign bribery is in no one's interest. It distorts competitive markets; it undermines good governance; and, worst of all, it ends up hurting the world's poorest and most vulnerable.

The OECD Anti-Bribery Convention is a rather short convention of 17 Articles and is supplemented by a number of related instruments adopted by the OECD Council or bodies.<sup>17</sup> At the heart of the Convention lies the requirement for all Parties to criminalize the bribery of foreign public officials by individuals and companies in their efforts to obtain or retain business advantages in their cross-border business deals.

A significant provision in the Anti-Bribery Convention is on the independence of prosecution. To maintain the integrity of the Convention, member countries need to ensure that investigation and prosecution of foreign bribery is not "influenced by considerations of national economic interest, the potential effect upon relations with another State or the identity of the natural or legal person."<sup>18</sup>

The Convention, which does not permit any derogation, is supported by detailed Commentaries that assist member countries in their implementation process. The monitoring of implementation and enforcement of the OECD Convention is the responsibility of the OECD Working Group on Bribery in International Business Transactions (the Working Group), which carries out this function principally through a peer review mechanism as provided by Article 12 of the Convention. Country monitoring reports stemming from the peer review process are published on the OECD website.<sup>19</sup>

The aim of the monitoring is to ensure the Parties take steps towards compliance with the Convention. Countries party to the Convention, are required to amend their laws, enforce the legislation more vigorously, strengthen institutions and take other steps as a direct result of the monitoring.

Although the Anti-Bribery Convention is centred on the active bribery of a foreign public official, the examinations of the Working Group on Bribery look at a range of criminalization, preventive, detection and sanctioning issues when reviewing Parties' implementation and enforcement of the Convention.

The monitoring takes place in three phases. Phase 1 evaluates the adequacy of a country's legislation to implement the Convention. Phase 2 assesses whether a country is applying this legislation effectively. Phase 3 focuses on enforcement of the Convention, the 2009 Anti-Bribery Recommendation, and outstanding recommendations from Phase 2. Phase 2 and 3 evaluations include on-site visits to the evaluated country, where meetings are held with a range of government representatives, including responsible government authorities, police, prosecutors, magistrates, tax, securities, parliament, and other authorities. In addition, exchanges with representatives of the private sector (lawyers, accounting firms, etc.) and civil society contribute to determining the impact the laws and enforcement have on behaviour, including compliance schemes.

<sup>15</sup> Available from [www.oecd.org/CleanGovBiz](http://www.oecd.org/CleanGovBiz)

<sup>16</sup> The full text of the Anti-Bribery Convention and related documents can be found at <http://www.oecd.org/corruption/oecdantibriberyconvention.htm>

<sup>17</sup> See [http://www.oecd.org/daf/anti-bribery/ConvCombatBribery\\_ENG.pdf](http://www.oecd.org/daf/anti-bribery/ConvCombatBribery_ENG.pdf)

<sup>18</sup> OECD, Article 5 of the Anti-Bribery Convention.

<sup>19</sup> <http://www.oecd.org/daf/anti-bribery/countryreportsontheimplementationoftheoecdanti-briberyconvention.htm>

### 1.1.3 Council of Europe

One of the main objectives of the Council of Europe (CoE) is to “develop throughout Europe common and democratic principles based on the European Convention on Human Rights.”<sup>20</sup> Any country seeking to join the Council of Europe is required to first and foremost ratify the European Convention of Human Rights. The protection of human rights, democracy and the rule of law is the organization’s main current focus.

The Council of Europe has developed more than 200 conventions, several of which relate directly to the fight against corruption: the *Criminal Law Convention on Corruption*<sup>21</sup> and *Civil Law Convention on Corruption*<sup>22</sup> (both adopted in 1999), the *Additional Protocol to the Criminal Law Convention on Corruption* – a separate treaty adopted in 2003. Moreover, a series of other treaties are pertinent from an anti-corruption perspective including, for instance, the 1990 *Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime* (revised and extended to the fight against terrorist financing in 2005), and the 2009 *Convention on Access to Official Documents*. The conventions often allow for accession by non-member States, both European and non-European.

The *Criminal Law Convention on Corruption* is supported by an Explanatory Report.<sup>23</sup> In 2005, the *Additional Protocol to the Criminal Law Convention on Corruption*<sup>24</sup> came into force and extended the scope of the Convention to arbitrators in commercial, civil, and other matters, as well as to jurors, thus complementing the Criminal Law Convention’s provisions aimed at protecting judicial authorities from corruption.

In 2003, the *Civil Law Convention on Corruption* came into force, which supplemented the efforts of the Criminal Law Convention on Corruption by setting up a legal framework for victims of corruption to initiate action for compensation. It was a historic step in the development of a comprehensive legal regime to address corruption and its consequences. Hitherto, the focus had remained firmly on preventive and law enforcement (criminal) measures. Article 4 of the Convention which has a narrower definition of corruption, requires States Parties to make provision for civil proceedings where:

- i. the defendant has committed or authorized the act of corruption, or failed to take reasonable steps to prevent the act of corruption;
- ii. the plaintiff has suffered damage; and
- iii. there is a causal link between the act of corruption and the damage.

Additionally, under Article 5, where the victim suffers damage “as a result of an act of corruption by its public officials in the exercise of their functions”, the claim lies against the State.

Both conventions, like the UNCAC and the OECD Anti-Bribery Convention, have a compliance monitoring mechanism through the Group of States against Corruption – GRECO, and it achieves this through evaluation reports. Other bodies/departments of the Council of Europe are responsible for capacity building training programmes and other technical co-operation activities. GRECO’s monitoring extends also to other anti-corruption (soft law) instruments, adopted by the Committee of Ministers of the Council of Europe in pursuance of the 1996 Programme of action against corruption: the *Resolution (97)24 on the twenty guiding principles for the fight against corruption, Recommendation Rec (2000)10 on codes of conduct for public officials* (which includes a model code in the annex) and *Recommendation Rec (2003)4 on common rules against corruption in the funding of political parties and election campaigns*.

The Group of States against Corruption<sup>25</sup> was established in 1999 by the Council of Europe. Membership in GRECO is not limited to Council of Europe member States. Currently, GRECO comprises 49 countries (the 47 Council of Europe member States, Belarus and the United States of America). It aims to improve the corruption-fighting capacity of its members by monitoring their compliance with Council of Europe standards. Through a dynamic process of mutual evaluation and peer pressure, it helps to identify deficiencies in national anti-corruption policies, prompting the necessary legislative, institutional and practical reforms. It also provides a platform for sharing best practices in the prevention and detection of corruption.

GRECO works in cycles: evaluation rounds, each covering specific themes. Its first evaluation round (2000–2002) dealt with the independence, specialization and means of national bodies engaged in the fight against corruption and the extent and scope of immunities of public officials from arrest and prosecution. The second round (2003–2006) focused on the identification,

<sup>20</sup> More information on the objectives of the Council of Europe is available from [http://www.coe.org.rs/eng/t/doc\\_sr/council\\_of\\_europe/about\\_coe/?conid=14](http://www.coe.org.rs/eng/t/doc_sr/council_of_europe/about_coe/?conid=14)

<sup>21</sup> Available from <http://conventions.coe.int/Treaty/en/Treaties/html/173.htm>

<sup>22</sup> Available from <http://conventions.coe.int/Treaty/en/Treaties/html/174.htm>

<sup>23</sup> Available from <http://conventions.coe.int/Treaty/EN/Reports/Html/173.htm>

<sup>24</sup> Available from <http://conventions.coe.int/Treaty/en/Treaties/html/191.htm>

<sup>25</sup> For further information on GRECO, see [www.coe.int/t/dghl/monitoring/greco](http://www.coe.int/t/dghl/monitoring/greco)

seizure and confiscation of the proceeds of corruption, the prevention and detection of corruption in public administration and the prevention of legal persons from being used as shields for corruption. The third round (2007- 2011) addressed the incriminations provided for in the Criminal Law Convention on Corruption and the transparency of political party funding. The fourth round (launched in January 2012) examines corruption prevention with regard to members of parliament, judges and prosecutors.

GRECO's country reports<sup>26</sup> are published with the agreement of the State concerned; by and large no State has withheld permission. However, some reports can remain confidential for a few months pending the country's publication agreement.

### 1.1.4 European Union

The European Union (EU) is a unique economic and political partnership among 28 European countries.<sup>27</sup>

The EU addresses corruption through the protection of EU financial interests in two ways:

- i. Crimes committed within a State: including 'direct' financial crimes such as fraud, theft, corruption of public officials as well as 'indirect' crimes (that is, those crimes that have a financial impact on a country such as money laundering).
- ii. Crimes against EU funds: namely fraud and economic crime connected to the EU general budget and any budget managed by, or on behalf of, the EU.

The First Protocol (27 September 1996)<sup>28</sup> to the *Convention on the Protection of the European Communities' Financial Interests* (1995) is often referred to as the 'Corruption Protocol'. It deals with corruption of officials of the EU or Member States who engage in corrupt activity which may have a direct or indirect impact on the EU's financial interests, and requires Member States to criminalize both passive and active bribery (Article 2); to take the necessary measures to ensure that such acts are punishable by "effective, proportionate and dissuasive criminal penalties, including in serious cases, penalties involving deprivation of liberty which can give rise to extradition" (Article 5).

<sup>26</sup> Available from [www.coe.int/t/dghl/monitoring/greco/general/4.%20How%20does%20GRECO%20work\\_en.asp](http://www.coe.int/t/dghl/monitoring/greco/general/4.%20How%20does%20GRECO%20work_en.asp)

<sup>27</sup> For more information on European Union, see [http://europa.eu/about-eu/index\\_en.htm](http://europa.eu/about-eu/index_en.htm)

<sup>28</sup> Available from <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:1996:313:0001:0010:EN:PDF>

The Second Protocol<sup>29</sup> to the Convention, which entered into force in 2009, builds on the Convention and the First Protocol. It requires Member States to create liability of legal persons for "fraud or active corruption and money laundering", penalize and confiscate the laundering of proceeds, and enhance co-operation between EU countries and not refuse mutual assistance on the grounds that it "concerns or is considered as a tax or customs duty offence."

Using the First Protocol as a basis, the EU established the *Convention on the Fight against Corruption involving Officials of the European Communities or Officials of Member States of the European Union*<sup>30</sup> through the Council Act of 26 May 1997.

In 2003, the Council adopted *Framework Decision 2003/568/JHA on Combating Corruption in the Private Sector*.<sup>31</sup> The Decision aims at criminalizing both active and passive bribery, setting up more detailed rules for the liability of legal persons and ensuring minimum standards for an effective penalty system. So far, two implementation reports on this Decision have been issued by the Commission.<sup>32</sup>

The EU has also widened its action into a global anti-corruption strategy developed through the Commission Communications of 21 May 1997 and 28 May 2003. The 2003 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<sup>33</sup> - represented a milestone in building a framework for an EU anti-corruption policy. The Communication called for the detection and punishment of all acts of corruption, the confiscation of illicit proceeds and a reduction of the opportunities for corrupt practices through the establishment of transparent and accountable public administration standards. The Commission also called upon Member States to swiftly enact all relevant supranational and international anti-corruption instruments, and emphasized the crucial

<sup>29</sup> Available from <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:1997:221:0011:0022:EN:PDF>

<sup>30</sup> Complete text is available from [http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:41997A0625\(01\):EN:HTML](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:41997A0625(01):EN:HTML)

<sup>31</sup> Available from <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32003F0568>

<sup>32</sup> Report from the Commission 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), available from: <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52011DC0309>; Report from the Commission to the Council based on Article 9 of the Council Framework Decision 2003/568/JHA of 22 July 2003 on combating corruption in the private sector (COM(2007) 328 final), available from <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52007DC0328>

<sup>33</sup> While not published in the Official Journal, it can be accessed at [http://europa.eu/legislation\\_summaries/fight\\_against\\_fraud/fight\\_against\\_corruption/l33301\\_en.htm](http://europa.eu/legislation_summaries/fight_against_fraud/fight_against_corruption/l33301_en.htm)

### Box 1.1 EU Anti-Corruption Report

While corruption varies in nature and extent from one country to another, it affects all EU Member States, as noted in the first EU Anti-Corruption Report, published on 3 February 2014 by the European Commission. The report examines the anti-corruption measures undertaken by Member States and finds that though the necessary laws and institutions are largely in place, their results are not satisfactory. The report looks at public procurement as a corruption-prone area across the EU, and provides additional analysis on the most pressing issues for each country, followed by suggestions for future steps. Progress will be measured every two years.

Topics in country chapters include integrity in politics and political party financing; immunity of elected officials; control and prevention measures; effectiveness of anti-

corruption agencies as well as the capacity and efficiency of law enforcement, prosecution and judiciary.

The report aims to encourage stronger political engagement to address corruption effectively. The need to step up the implementation of anti-corruption measures was confirmed by Eurobarometer surveys released in February 2014. Three-quarters (76 per cent) of Europeans think that corruption is widespread, and more than half (56 per cent) say that corruption in their country has increased over the past three years. In a separate poll of business people across the EU, four out of ten companies consider corruption to be an obstacle for doing business in their country.

Source: adapted from European Commission, <http://ec.europa.eu/anti-corruption-report/>

role of monitoring and peer review evaluation between countries participating in these initiatives.

In October 2008, the Council adopted a Decision on establishing a *contact-point network against corruption* (EACN). The Council Decision provides for the designation of national contact points in each of the Member States so that a network could exchange information on effective measures to prevent and fight corruption at the EU level. This network builds on the existing informal network *European Partners against Corruption (EPAC)* which brings operational anti-corruption agencies from EU countries together.

In November 2008, the European Commission ratified the UNCAC based on a Council Decision. The Convention has a provision that enables regional economic integration organizations to become parties to the Convention if at least one of its member States has done so.

On 6 June 2011, the European Commission adopted a comprehensive anti-corruption package setting up an EU anti-corruption reporting mechanism for periodic assessment of Member States' efforts against corruption. The first EU Anti-Corruption Report was published in February 2014, with subsequent editions planned every two years. The report aims to help intensify the anti-corruption measures and reinforce mutual trust among Member States by stimulating peer learning and encouraging compliance with EU and international commitments, and facilitating the exchange of best practices.

In September 2011, the European Parliament called for the harmonization of the rules on the protection of whistleblowers, criminalization of illicit enrichment,

and, an EU-wide definition of corruption and common penalties. The European Parliament also requested that preventive measures, in particular conflict of interest legislation, be improved within EU institutions and the Member States.

## 1.2 Non-legally binding regional and international initiatives

International organizations also contribute to anti-corruption efforts through non-binding resolutions, declarations, codes, and guidelines. There are a number of intergovernmental initiatives that focus on policy development, best practices and guidance commonly referred to as 'soft law'. The main initiatives relevant for the OSCE region are presented here.

### 1.2.1 Organization for Security and Co-operation in Europe<sup>34</sup>

For its 57 participating States in Europe, Asia and North America, the Organization for Security and Co-operation in Europe (OSCE)<sup>35</sup> constitutes a unique forum for political exchange, negotiation and decision-making, and a co-operation platform for security-related matters. The OSCE also maintains regular dialogue and co-operation with its 11 Asian and Mediterranean Partners for Co-operation.<sup>36</sup>

<sup>34</sup> This section uses materials from OSCE, *Strategic Approaches to Corruption Prevention in the OSCE Region*, Review Report on the Implementation of OSCE Commitments, EEF.GAL/20/12, Vienna, 5 September 2012.

<sup>35</sup> For more information see [www.osce.org/](http://www.osce.org/)

<sup>36</sup> Afghanistan, Algeria, Australia, Egypt, Israel, Japan, Jordan, Republic of Korea, Morocco, Thailand and Tunisia.

Table 1.2 OSCE's strategic and policy commitments

<b>Charter for European Security (1999)</b>	The 1999 Charter for European Security represents the first OSCE document to explicitly make reference to corruption as a threat to stability and as having a severe impact on security, economic and human issues. The Charter further presents the OSCE's programme of work to contribute to the international fight against corruption, namely by promoting better use of existing international anti-corruption instruments and international co-operation on the one hand, and the rule of law in co-operation with NGOs committed to the fight of corrupt practices on the other.
<b>OSCE Strategy Document for the Economic and Environmental Dimension (Maastricht, 2003)</b>	The 2003 Maastricht OSCE Strategy Document for the Economic and Environmental Dimension marks an important advancement in the Organization's efforts to promote good public and private sector governance and combat corruption. Making "the elimination of all forms of corruption a priority", the Strategy calls upon participating States to ratify and implement existing international anti-corruption instruments and to develop comprehensive long term anti-corruption strategies. In practice, the Strategy calls for corruption to be tackled through increased transparency and accountability. This, in turn, implies effective access to public information, free pluralistic media and active civil society participation. Furthermore, the management of public resources, including public procurement procedures which are particularly prone to corruption, is to be strengthened.
<b>Decision No. 11/04 on Combating Corruption (Sofia, 2004)</b>	The 2004 Ministerial Council decision on combating corruption encourages OSCE participating States to sign and ratify the UNCAC as well as to fully implement the Convention. It also entails concrete provisions as regards the responsibilities of the OSCE Secretariat and of the OCEEA when it comes to fighting corruption. It tasks the OCEEA, upon the request of the OSCE participating States, to "provide support in mobilizing technical assistance, including necessary expertise and resources, from relevant competent international organizations, with due regard to their respective mandates, in the ratification or/and the implementation of the United Nations Convention against Corruption."
<b>Declaration on Strengthening Good Governance and Combating Corruption, Money laundering and the Financing of Terrorism (Dublin, 2012)</b>	The Dublin Declaration communicates strong and wide political support for a comprehensive approach to securing good governance and transparency, and combating of corruption, money laundering and the financing of terrorism in the OSCE region. It acknowledges the multi-stakeholder roles of governments, civil society, the private sector and "the full and equal participation of women and men" in the development of good governance policies and activities. It reiterates the tasking to the OSCE Secretariat, in particular the OCEEA, to provide support to interested participating States to join and fully implement the United Nations Convention against Corruption. It also gives the OCEEA a new mandate "to support interested participating States in implementing their international asset recovery commitments". Furthermore, it strengthens the OSCE's mandate to support its participating States in implementing relevant regional and international instruments to counter money laundering and the financing of terrorism and the Financial Action Task Force Recommendations.
<b>Decision No. 5/14 on Prevention of Corruption (Basel, 2014)</b>	The 2014 Ministerial Council decision on prevention of corruption encourages the participating States to further develop and implement preventive anti-corruption legislation and policies; adopt, maintain and strengthen systems that prevent conflicts of interest in the public sector; foster the involvement of the private sector, civil society organizations, the media and academia in developing national anti-corruption strategies and policies; intensify individual national efforts to provide sufficient protection for whistleblowers; take the necessary steps to establish or enhance appropriate systems of public procurement; and facilitate the recovery of stolen assets.

The OSCE and its participating States have recognized that "corruption represents one of the major impediments to the prosperity and sustainable development of the participating States that undermines their stability and

security and threatens the OSCE's shared values."<sup>37</sup> The Organization has therefore adopted multiple measures

<sup>37</sup> OSCE Ministerial Council, Decision No. 11/04 Combating Corruption, MC.DEC/11/04.



Opening Session of the 21<sup>st</sup> OSCE Ministerial Council in Basel, Switzerland, 4 December 2014

to address the problem. As part of its anti-corruption strategy, the OSCE has placed its own anti-corruption commitments and activities in the wider context and has repeatedly encouraged participating States to ratify and implement existing international anti-corruption instruments. Since 1999, the OSCE has made several strategic and policy commitments, namely through the *Charter for European Security* (1999), the *OSCE Strategy Document for the Economic and Environmental Dimension* (2003), the *Ministerial Council Decision on Combating Corruption* (2004), a comprehensive *Declaration on Strengthening Good Governance and Combating Corruption, Money-laundering and the Financing of Terrorism* (2012), and the *Ministerial Council Decision on Prevention of Corruption* (2014).<sup>38</sup>

In addition, good governance in the economic and environmental sphere, and fighting corruption have been the focus of political dialogue in some of its annual Economic and Environmental Forum processes. It also undertakes and supports concrete anti-corruption activities through policy publications on good practices and capacity building events carried out regionally by the Office of the Co-ordinator of OSCE Economic

and Environmental Activities (OCEEA) of the OSCE Secretariat, and at the national level through its field operations. Increasingly, the assistance is focusing on corruption prevention measures, asset recovery and countering money laundering and the financing of terrorism through national risk assessments and strengthening international co-operation and financial investigative techniques.

The OSCE/OCEEA activities<sup>39</sup> include:

- promoting the ratification and full implementation of relevant regional and international instruments and standards to combat corruption, money laundering and the financing of terrorism, in particular the UNCAC and the Recommendations of the Financial Action Task Force (FATF);
- facilitating regional/national dialogue and the exchange of experience and good practices;
- capacity building and regional training activities for representatives of governments, the private sector and civil society;
- providing tools and guidance for policy makers and practitioners on good governance issues through publications such as the *OSCE Handbook on Combating Corruption* and *OSCE Handbook on Data Collection in support of Money Laundering and Terrorism Financing National Risk Assessments*.

<sup>38</sup> OSCE, *Charter for European Security* (SUM.DOC/1/99), Istanbul, 19 November 1999; *Strategy Document for the Economic and Environmental Dimension* (MC.DOC/1/03), Maastricht, 2 December 2003; *Ministerial Council Decision No. 11/04 Combating Corruption* (MC.DEC/11/04), Sofia, 7 December 2004; *Declaration on Strengthening Good Governance and Combating Corruption, Money-laundering and the Financing of Terrorism* (MC.DEC/2/12), Dublin, 7 December 2012; *Ministerial Council Decision No. 5/14 Prevention of Corruption* (MC.DEC/5/14), Basel, 5 December 2014. Available from [www.osce.org/](http://www.osce.org/)

<sup>39</sup> See the OSCE/OCEEA's *Good Governance Activities Factsheet*, 2012. Available from <http://www.osce.org/eea/98374>

## 1.2.2 OECD activities

### 1.2.2.1 Standard-setting activities

In its multidisciplinary approach to fighting corruption, the OECD also promotes *integrity in public administration* as a fundamental element of good governance. In this area, it has developed principles, guidelines and practical tools for identifying good practices for safeguarding integrity, mapping risks of fraud and corruption, and identifying the criteria to gain success. This work is based on a set of Recommendations to the OECD member countries, namely:

- *Principles for Managing Ethics in the Public Service* (1998);<sup>40</sup>
- *Guidelines on Managing Conflict of Interest in the Public Service* (2003);
- *Principles for Enhancing Integrity in Public Procurement* (2008); and
- *Principles for Transparency and Integrity in Lobbying* (2010).

These Recommendations support policy makers and practitioners in promoting integrity and developing corruption risk mitigation strategies in vulnerable areas, especially those with an interface between the public and the private sector such as public procurement and public-private partnerships.

In addition to the OECD Recommendations mentioned above, the OECD provides systemic analytical frameworks, solid implementation assessments and comparative, cross-country studies in each of its policy areas. This helps provide a systemic approach across the policy cycle from design, to implementation, to assessing effectiveness. The different policy areas are described below:

#### **Standards of ethical conduct and conflict of interest management**

Ensuring that the integrity of government decision-making is not compromised by public officials' private interests is a growing public concern. An effective conflict of interest policy seeks to identify risks; prohibit unacceptable forms of private interest; raise awareness of the circumstances in which conflicts can arise; and ensure effective procedures to resolve situations where there is a conflict of interest. The OECD has developed *Guidelines for Managing Conflict of Interest in the Public Service* in 2003 as well as a *Toolkit for Managing Conflict*

*of Interest* to provide practical advice to policy makers on how to handle concrete situations, e.g. public disclosure of private interest. To promote evidence-based policy making, the OECD collects comparative data across member countries on a bi-annual basis through the *Government at a Glance reports* on the management of conflict of interest policies.

#### **Public procurement**

Public procurement is the government activity most vulnerable to fraud and corruption due to its complexity, the size of the financial flows it generates and the close interaction between the public and the private sectors. The 2008 *OECD Principles for Enhancing Integrity in Public Procurement* provide a unique instrument to address risks to integrity in the entire public procurement cycle, from needs assessment through the tendering process until contract management and payment. This instrument has four pillars: transparency, value for money, resistance to fraud and corruption, and accountability and control. Comparative data is also collected through the *Government at a Glance Reports* on aspects such as transparency in public procurement or remedial systems. Country specific reviews are also conducted to support countries in the reform of their procurement systems in line with the OECD Principles at both, the government and sector-specific level.

#### **Whistleblower protection**

The risk of corruption is significantly higher in environments where the reporting of wrongdoing is not supported or protected, especially in the workplace. The importance of whistleblower protection was reaffirmed at the global level by the Group of 20 (G20) Anti-Corruption Working Group, which recommended that the G20 leaders use the OECD-developed *Guiding Principles for Whistleblower Protection Legislation and the Compendium of Best Practices*,<sup>41</sup> as a reference for enacting and reviewing their whistleblower protection rules. The OECD has also developed the brochure *Whistleblowers protection: encouraging reporting*<sup>42</sup> including a checklist and implementation guidance on whistleblower protection systems.

#### **Open government, lobbying and political financing**

Open government policies promote a government that is transparent and exposed to public scrutiny, accessible to anyone, anytime, anywhere; and responsive to new ideas and demands. This new paradigm provides an opportunity for governments to rethink their role and promote a new culture based on transparency,

40 A new OECD recommendation on Public Sector Integrity is currently being developed and could be adopted in 2016, replacing this one.

41 <http://www.oecd.org/g20/topics/anti-corruption/48972967.pdf>

42 <http://www.oecd.org/cleangovbiz/toolkit/50042935.pdf>

accountability and integrity, notably in the framework of the Open Government Partnership (OGP, please also see section 1.2.8). The OECD developed *Principles on Open and Inclusive Policy-Making* to guide governments in the promotion of open government. It also helps governments reinforce transparency and minimize the risk of corruption in susceptible areas such as lobbying practices and political financing. To help decision makers address concerns in lobbying, the OECD developed the *Principles for Transparency and Integrity in Lobbying* in 2010.

### 1.2.2.2 Regional anti-corruption initiatives

The OECD has also put in place various regional anti-corruption initiatives, including the *Anti-Corruption Network for Eastern Europe and Central Asia*, *Asian Development Bank (ADB)/OECD Anti-Corruption Initiative for Asia and the Pacific* and the *MENA-OECD Governance Programme*.

The *Anti-Corruption Network for Eastern Europe and Central Asia (ACN)*<sup>43</sup> was set up in 1998 as a regional forum for the promotion of anti-corruption reforms, exchange of information, elaboration of best practices and donor co-ordination. The ACN is a regional anti-corruption programme established under the OECD Working Group on Bribery. The Secretariat is located in the OECD Anti-Corruption Division. The ACN is open to all countries in Eastern Europe and Central Asia. OECD countries participate in the ACN as partners or donors. The ACN is also open to participation from international and non-governmental organizations and business associations.

The *Istanbul Anti-Corruption Action Plan (IAP)* is a sub-regional country peer review programme launched in 2003 within the framework of the ACN. Its objective is to support anti-corruption reforms in selected ACN countries through country reviews and continuous monitoring of implementation of recommendations, which promote the UNCAC and other international standards and best practices. 9 countries participating in the IAP are Armenia, Azerbaijan, Georgia, Kyrgyz Republic, Kazakhstan, Mongolia, Tajikistan, Ukraine and Uzbekistan. In 2012, the ACN concluded its second round of peer-review monitoring of the IAP countries, and in 2015 - completed its third round of monitoring.<sup>44</sup> Each round assessed compliance with the

country recommendations adopted during the previous round. Specific attention is given to assessing practical implementation and enforcement of anti-corruption measures. In 2016, the fourth round of monitoring will start, which will also include in-depth analysis of corruption in specific sectors.

The IAP monitoring reports have three pillars: anti-corruption policy and institutions; criminalization of corruption and law enforcement; and prevention of corruption (civil service, administrative discretion and transparency, public procurement, financial control and audit, political corruption, corruption in the judiciary and integrity in the private sector).

Another field of ACN's work is cross-country thematic studies and peer learning, which is aimed to promote sharing of experience and good practice among practitioners. ACN organizes regional expert seminars and develops cross-country analytical studies. A wide range of issues have been addressed by the ACN through its thematic work, such as asset declarations for public officials, anti-corruption strategies and action plans, anti-corruption agencies, integrity in the judiciary, prevention of corruption in the public sector, criminalization of corruption, liability of legal persons, foreign bribery offence, business integrity.

The *ADB/OECD Anti-Corruption Initiative for Asia and the Pacific*,<sup>45</sup> launched in 1999, includes 31 countries and jurisdictions of the Asia-Pacific region. The members have jointly developed the *Anti-Corruption Action Plan for Asia and the Pacific* and work together towards its implementation. The Action Plan sets out the goals and standards for sustainable safeguards against corruption in the economic, political and social spheres of the countries in the region. The Initiative supports the member governments' efforts through three mechanisms: fostering policy dialogue, providing policy analysis, and capacity building. The Initiative's meetings and publications aid the development of technical assistance programmes and are relied upon by the UNODC, amongst others.

Other OECD regional programmes include the *Middle East and North Africa (MENA) Initiative*<sup>46</sup> and *Support for Improvement in Governance and Management (SIGMA)*,<sup>47</sup> a joint EU and OECD initiative which provides support predominantly to Central and Eastern European and the Mediterranean regions in institution building and developing legal frameworks to address public

<sup>43</sup> For participating countries and organizations, see [www.oecd.org/corruption/acn](http://www.oecd.org/corruption/acn)

<sup>44</sup> Monitoring reports are available from <http://www.oecd.org/corruption/acn/istanbulactionplancountryreports.htm>

<sup>45</sup> Available from [www.oecd.org/corruption/asiapacific](http://www.oecd.org/corruption/asiapacific)

<sup>46</sup> See [www.oecd.org/mena](http://www.oecd.org/mena)

<sup>47</sup> Available from <http://www.sigmaxweb.org/>

administration reforms. It conducts progress assessments of EU candidate countries and potential candidates on behalf of the EU. The reports can be accessed<sup>48</sup> on its website. The OECD conducts regional policy dialogue with Middle East and North Africa (MENA) countries on issues related to corruption and public and private sector integrity as well as public procurement. In the framework of the Group of 8 (G8) Deauville Partnership, a *MENA-OECD Network on Public Procurement* was launched at the ministerial level in September 2012 in Caserta, Italy. The Network is composed of senior public procurement officials and practitioners from MENA and OECD countries and experienced representatives from international organizations. The objectives of the Network are to share good procurement practices and identify the needs for support in this area based on the assessment of country procurement systems against the *OECD Recommendation on Enhancing Integrity in Public Procurement*.

### 1.2.3 United Nations Development Programme

United Nations Development Programme (UNDP)<sup>49</sup> supports international efforts to combat corruption “as it diverts resources allocated for activities that are vital for poverty eradication and sustainable development for private gain.”<sup>50</sup> It does so by working with national partners to enhance openness, transparency and accountability throughout public administrations, promoting effective and responsive public institutions. More specifically, it supports the governments of developing nations and countries in transition to fulfill their international anti-corruption obligations such as the UNCAC and the Open Government Partnership. It also supports NGOs and civil society engagement in monitoring corruption and holding public institutions accountable, as well as multi-stakeholder dialogues and co-operation on preventing and suppressing corruption. Furthermore, it engages in advising anti-corruption agencies and national integrity systems (supreme audit institutions, procurement offices, integrity commissions) on anti-corruption measures.

Most of its activities are carried out through the *Global Anti-corruption Initiative (GAIN)* (2014-2017). GAIN builds on the successes of the *Global Thematic Programme on Anti-corruption for Development Effectiveness (PACDE)* (2008-2013) and focuses on strengthening systems, institutions and civic engagement to better manage and deliver public resources and services. In particular, it adopts the following strategy:

1. Expanding the political and normative agenda on anti-corruption to development plans by integrating anti-corruption in service delivery and other sectors (e.g., climate change and the extractive industry);
2. Strengthening state/institutional capacities to prevent and combat corruption;
3. Promoting civic engagement and social accountability through youth and women’s empowerment and the participation of civil society and the media;
4. Improving results-based management and institutional effectiveness for effective implementation of anti-corruption initiatives and monitoring their results.<sup>51</sup>

In relation to the UNCAC, the UNDP works closely with the UNODC in supporting countries to conduct the UNCAC gap analysis to identify gaps between the UNCAC provisions and existing anti-corruption legislative frameworks at the country level. This gap analysis can be seen as the first step in anti-corruption policy reform and in strengthening the implementation of an anti-corruption mechanism.<sup>52</sup> It also supported the development of a guidance note on UNCAC self-assessments. The UNCAC self-assessment is a part of the country review under the Review Mechanism.

Together with the United Nations Development Fund for Women (UNIFEM, now part of UN Women) the UNDP published in 2010 a primer on *Corruption, Accountability and Gender: Understanding the Connections*. It shows that corruption affects women disproportionately and in different ways than men. The primer also underlines that advancing gender equality and addressing corruption have complimentary effects, and both are necessary to ensure good governance.<sup>53</sup> In 2012 the UNDP and the Huairou Commission, which is a global coalition of grassroots women’s organizations, produced a study

48 Available from <http://www.sigmaxweb.org/publications/public-governance-assessment-reports.htm>

49 This section is based on information from the UNDP website [www.undp.org/content/undp/en/home/ourwork/democraticgovernance/focus\\_areas/focus\\_anti-corruption/](http://www.undp.org/content/undp/en/home/ourwork/democraticgovernance/focus_areas/focus_anti-corruption/)

50 See [www.undp.org/content/undp/en/home/ourwork/democraticgovernance/focus\\_areas/focus\\_anti-corruption/how\\_we\\_work.html#2](http://www.undp.org/content/undp/en/home/ourwork/democraticgovernance/focus_areas/focus_anti-corruption/how_we_work.html#2)

51 See UNDP, *Global Anti-Corruption Initiative (GAIN): 2014-2017*, available from [http://www.undp.org/content/dam/undp/library/Democratic%20Governance/Anti-corruption/globalanticorruption\\_final\\_web2.pdf](http://www.undp.org/content/dam/undp/library/Democratic%20Governance/Anti-corruption/globalanticorruption_final_web2.pdf)

52 See [http://www.undp.org/content/undp/en/home/ourwork/democraticgovernance/focus\\_areas/focus\\_anti-corruption/how\\_we\\_work.html](http://www.undp.org/content/undp/en/home/ourwork/democraticgovernance/focus_areas/focus_anti-corruption/how_we_work.html)

53 See <http://www.undp.org/content/dam/aplaws/publication/en/publications/womens-empowerment/corruption-accountability-and-gender-understanding-the-connection/Corruption-accountability-and-gender.pdf>

*Seeing Beyond the State: Grassroots Women's Perspectives on Corruption and Anti-Corruption.*<sup>54</sup>

### 1.2.4 The International Anti-Corruption Academy

The International Anti-Corruption Academy (IACA)<sup>55</sup> has been deemed an international organization since March 2011, with a constituency of 64 Parties including three intergovernmental organizations. IACA is the only global institution solely concerned with addressing the shortcomings in knowledge and practice in the field of anti-corruption.

Its mandate is to promote the prevention and combating of corruption through (1) anti-corruption education and professional training, (2) research into all aspects of corruption, (3) the provision of relevant forms of technical assistance, and (4) the fostering of international co-operation and networking.<sup>56</sup>

The Academy pursues a holistic approach, catering to an international audience from both the private and public sectors. Its approach integrates a range of disciplines, providing both the knowledge and the tools needed to help bridge the gap between theory and practice, with the goal of arriving at sustainable solutions.

Programmes and trainings form the core of IACA's activities. At present, they include:

- Masters degree in Anti-Corruption Studies (MACS) – the world's first Masters programme in anti-corruption, designed for working professionals;
- The International Anti-Corruption Summer Academy (IACSA) – an annual summer school offering contemporary insight into anti-corruption theory and practice;
- Short-term trainings and seminars addressing thematic aspects of corruption;
- Trainings and seminars organized in co-operation with other bodies; and,
- Tailor-made trainings specifically adapted to the needs of specific organizations, companies or groups of individuals.

The Academy provides opportunities for research and serves as an anti-corruption think tank which aims to provide tools and guidance on anti-corruption affairs for policy makers and practitioners. In addition, it offers a platform for dialogue and networking, and promotes the exchange of experiences and best practices, fostering co-operation across political borders.

IACA works with a number of partner organizations and provides input and expertise for anti-corruption trainings and events in the international arena.

### 1.2.5 Regional Anti-Corruption Initiative for South-Eastern Europe

Within the broader framework of the Stability Pact for South Eastern Europe set up in 1999, the Regional Anti-Corruption Initiative (RAI) was established in 2000, initially under the name 'Stability Pact Anti-corruption Initiative'. The objective of this framework for coordination is to address corruption-related issues in the nine member States of South-Eastern Europe (SEE).<sup>57</sup>

The initiative follows a multidisciplinary approach in five main areas: (i) adoption and implementation of international anti-corruption instruments as well as implementation of regional agreements; (ii) promotion of good governance and reliable public administration; (iii) strengthening of national legislation and promotion of the rule of law; (iv) promotion of transparency and integrity in business operations; and (v) promotion of an active civil society and raising public awareness. Concrete action follow overall programmatic objectives which have been sub-divided into specific programme objectives.

Since the launch of the initiative in 2000, the environment for anti-corruption co-operation in South-Eastern Europe has changed significantly. All countries of the region have, for instance, become members of GRECO and some also participate in the monitoring mechanism of the OECD. In addition, international anti-corruption instruments such as the UNCAC have been ratified by a number of SEE States. Moreover, anti-corruption plans have been developed in many SEE countries and specific institutional changes to implement anti-corruption efforts have been made. It is noteworthy that the websites of the respective States represent a considerable public outreach achievement.<sup>58</sup> The said websites contain valuable information about national anti-corruption efforts (strategy documents, assessment reports by

<sup>54</sup> Available from <http://www.undp.org/content/dam/undp/library/Democratic%20Governance/Anti-corruption/Grassroots%20women%20and%20anti-corruption.pdf>

<sup>55</sup> See [www.iaca.int](http://www.iaca.int)

<sup>56</sup> See IACA, *Agreement for the Establishment of the International Anti-Corruption Academy as an International Organization*, 2010, Article II (1), available from <http://www.iaca.int/about-us/agreement-and-external-resolutions>

<sup>57</sup> See <http://www.rai-see.org/>

<sup>58</sup> See, for instance, [www.anticorruption-albania.org/](http://www.anticorruption-albania.org/) (Albania), [www.anticorruption-croatia.org/](http://www.anticorruption-croatia.org/) (Croatia) or <http://www.anticorruption-serbia.org/> (Serbia).

international organizations, etc.) and projects; moreover, up-to-date anti-corruption news and articles covering the initiative's region are available on these websites which allows citizens to be informed of ongoing matters.

### 1.2.6 The Stolen Asset Recovery Initiative

The Stolen Asset Recovery Initiative (StAR)<sup>59</sup> is a partnership between the World Bank Group and the UNODC that supports international efforts to end safe havens for corrupt funds. StAR works with developing countries and financial centres to prevent the laundering of the proceeds of corruption and to facilitate more systematic and timely return of stolen assets.

The initiative, set up in 2007, was a response to the difficulties faced by States in recovering illicitly-gained assets that corrupt leaders have moved to other jurisdictions. The States from which assets were stolen, often did not have adequate laws, co-operation mechanisms or the technical expertise necessary to successfully locate, restrain, confiscate and recover stolen assets from a foreign jurisdiction. For asset recovery to be successful, a concerted effort was essential. This led to the establishment of the StAR Initiative. It is built on four key pillars:

- 1) *Empowerment*: StAR helps countries establish the legal framework, institutions and practices required to recover the proceeds of corruption. Through knowledge sharing, informational materials and hands-on training, StAR assists countries in developing specific skills such as asset tracing and international co-operation techniques. StAR also supports countries by facilitating contacts between requesting and requested countries;
- 2) *Partnerships*: StAR works to bring together governments, regulatory authorities, donor agencies, financial institutions and civil society organizations from both developing countries and financial centres, fostering collective responsibility and action for to deter, detect and recover stolen assets;
- 3) *Innovation*: StAR produces knowledge materials and technical tools to identify and promote the use of global best practices for recovering the proceeds of corruption;
- 4) *International standards*: StAR advocates the strengthening and effective implementation of Chapter V of the UNCAC and other international standards to detect, deter and recover the proceeds of corruption. Working with the FATE, the Conference

of States Parties to the UNCAC and its asset recovery working group and other multinational bodies, StAR fosters collective global action and encourages countries to implement agreed-upon standards.

The StAR Initiative has produced a number of tools, including a searchable database of corruption cases,<sup>60</sup> an *Asset Recovery Handbook* and other publications for practitioners.<sup>61</sup>

### 1.2.7 International Centre for Asset Recovery

The International Centre for Asset Recovery (ICAR) is a division of the Basel Institute on Governance which is an independent not-for-profit organization specialized in corruption prevention, public and corporate governance, anti-money laundering and the recovery of stolen assets. The Institute is based in Switzerland.

ICAR<sup>62</sup> focuses on strengthening the capacities of countries in recovering stolen assets. It specialises in assisting countries all over the world in conducting financial investigations and asset tracing, handling mutual legal assistance requests and developing international co-operation in the area of corruption and money laundering cases. It also delivers national training programmes on-site to enhance the skills and competences of investigators and prosecutors to analyse, investigate and prosecute complex corruption, financial crime and money laundering cases.

### 1.2.8 Open Government Partnership

The Open Government Partnership (OGP),<sup>63</sup> started in September 2011, is a multilateral initiative that aims to secure concrete commitments from governments to promote transparency, empower citizens, fight corruption, and harness new technologies to strengthen governance. From initial eight countries (Brazil, Indonesia, Mexico, Norway, the Philippines, South Africa, the United Kingdom and the United States), it has grown to 65 countries endorsing its aims. The participating countries also agree to deliver a country action plan developed with public consultation and commit to independent reporting on their progress.

<sup>60</sup> See <http://star.worldbank.org/corruption-cases/?db=All>

<sup>61</sup> See [http://star.worldbank.org/star/publications?keys=&sort\\_by=score&sort\\_order=DESC&items\\_per\\_page=10](http://star.worldbank.org/star/publications?keys=&sort_by=score&sort_order=DESC&items_per_page=10)

<sup>62</sup> See [www.baselgovernance.org/icar/](http://www.baselgovernance.org/icar/)

<sup>63</sup> The information on the Open Government Partnership is based on the material available on their website [www.opengovpartnership.org/](http://www.opengovpartnership.org/)

<sup>59</sup> This section is based on information from [www1.worldbank.org/finance/star\\_site/](http://www1.worldbank.org/finance/star_site/)

The OGP's vision is that governments become more transparent, more accountable, and more responsive to their own citizens, which should help improve the quality of governance and services that citizens receive. It seeks to do this through supporting a "genuine dialogue and collaboration between governments and civil society". It also aspires to bring difficult reform issues to the "highest levels of political discourse".

To see real change taking place, the OGP has set itself three main objectives to help governments deliver on their commitment towards open government reforms:<sup>64</sup>

- 1) Maintain high-level political leadership and commitment to OGP within participating countries;
- 2) Support domestic reformers with technical expertise and inspiration;
- 3) Foster more engagement in OGP by a diverse group of citizens and civil society organizations.

In addition, OGP's Independent Reporting Mechanism (IRM) seeks to ensure that countries are held accountable for making progress toward achieving their OGP commitments. The IRM allows all stakeholders to follow how governments are progressing on their development and implementation of OGP action plans and fulfilling open government principles. The aim of the reports is to stimulate dialogue and promote accountability between member governments and citizens. The first progress reports were produced for the eight founding members and posted for comments by the public on the OGP website in preparation for their October 2013 London Summit.

### 1.2.9 Financial Action Task Force

The Financial Action Task Force (FATF)<sup>65</sup> is an intergovernmental body that was established at the G-7 Summit in 1989 to respond to the international threat money laundering poses to financial institutions and the banking sector. The FATF has created international anti-money laundering standards which are recognized by the International Monetary Fund, the United Nations, OSCE, the World Bank and the finance ministers of more than 130 countries.

The FATF recommendations, developed initially in 1990 and revised in 2012, provide a comprehensive framework for States to build, maintain and improve efforts to fight money laundering and terrorist financing,

both at the national and international level. They are referred to as the *International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation: The FATF Recommendations*.

The FATF has 34 member jurisdictions, two regional organization members, two observer jurisdictions (Malaysia and Saudi Arabia) and 25 observer international organizations including the OSCE. In addition, eight associate members comprising FATF-style regional bodies (FSRBs) extend the FATF's work around the globe.

In addition to establishing international standards to combat money laundering and other financial crimes, the FATF and the FSRBs have created a mechanism to evaluate countries' compliance. The FATF publically names countries it considers to be at high risk for money laundering or non-cooperative with the FATF and has made remarkable progress in working with countries to strengthen their national anti-money laundering regimes in order to be removed from the FATF's public lists. These technical evaluation and listing processes have been instrumental to the success of the FATF's non-binding, 'soft law' approach.

The FATF regularly produces best practices papers and guidance and in 2011, with the political support of the G20, the FATF began to host meetings and develop materials on the *links between corruption and money laundering*. While avoiding duplication of the role of mandated anti-corruption bodies, the FATF has brought together anti-money laundering experts and anti-corruption experts to identify synergies between the two fields. Many of the findings of the FATF's dialogue with anti-corruption experts are contained in the FATF's October 2013 *Best Practices Paper on the Use of the FATF Recommendations to Combat Corruption*.<sup>66</sup>

### 1.2.10 United Nations 'soft law' instruments dealing – fully or partially – with corruption

#### A. International Code of Conduct for Public Officials

Pursuant to Economic and Social Council resolution 1996/8, adopted on the recommendation of the Commission on Crime Prevention and Criminal Justice at its fifth session, the General Assembly adopted the

<sup>64</sup> See [www.opengovpartnership.org/about/mission-and-goals](http://www.opengovpartnership.org/about/mission-and-goals)

<sup>65</sup> See [www.fatf-gafi.org](http://www.fatf-gafi.org)

<sup>66</sup> Available from [www.fatf-gafi.org/media/fatf/documents/recommendations/BPP-Use-of-FATF-Recs-Corruption.pdf](http://www.fatf-gafi.org/media/fatf/documents/recommendations/BPP-Use-of-FATF-Recs-Corruption.pdf)

International Code of Conduct for Public Officials<sup>67</sup> and recommended it to Member States as a tool to guide their efforts against corruption. The Assembly requested the Secretary-General to distribute the International Code of Conduct to all States and to include it in the manual on practical measures against corruption, to be revised and expanded pursuant to Council resolution 1995/14. The Assembly also requested the Secretary-General to consult with States and relevant entities in order to elaborate an implementation plan and submit it to the Commission at its sixth session. The Assembly further requested the Secretary-General to continue to collect information and legislative and regulatory texts from States and relevant intergovernmental organizations on the problem of corruption.

The International Code of Conduct for Public Officials was adopted as a tool to guide Member States in their efforts against corruption through a set of basic recommendations that national public officials should follow in the performance of their duties. The Code deals with the following aspects: (a) the general principles that should guide public officials in the performance of their duties (i.e. loyalty, integrity, efficiency, effectiveness, fairness and impartiality); (b) conflict of interest and disqualification; (c) disclosure of personal assets by public officials, as well as, if possible, by their spouses and/or dependants; (d) acceptance of gifts or other favours; (e) the handling of confidential information; and (f) the political activity of public officials, which, according to the Code, shall not be such as to impair public confidence in the impartial performance of the functions and duties of the public official.

## B. United Nations Declaration against Corruption and Bribery in International Commercial Transactions

In December 1996, the General Assembly adopted the United Nations Declaration against Corruption and Bribery in International Commercial Transactions.<sup>68</sup> It requested the Commission on Crime Prevention and Criminal Justice to examine, *inter alia*, ways, including through legally binding international instruments, without in any way precluding, impeding or delaying international, regional or national actions, to further the implementation of the resolution and the Declaration,

so as to promote the criminalization of corruption and bribery in international commercial transactions (paragraph 4 of the resolution); and to keep the issue of corruption and bribery in international commercial transactions under regular review.

The United Nations Declaration against Corruption and Bribery in International Commercial Transactions includes a set of measures that each country could implement at the national level, in accordance with its own constitution, fundamental legal principles, national laws and procedures, to fight against corruption and bribery in international commercial transactions. The Declaration addresses the issue of bribery of foreign public officials and contains different provisions aimed at combating the phenomenon, including the criminalization of such bribery, as well as the denial of tax deductibility of bribes paid by any private or public corporation or individual of a State to any public official or elected representative of another country.

In addition, Member States committed themselves to developing or maintaining accounting standards and practices that improve the transparency of international commercial transactions; to develop or to encourage the development of business codes, standards or best practices that prohibit corruption, bribery and related illicit practices in international commercial transactions; to examine establishing illicit enrichment by public officials or elected representatives as an offence; and to ensure that bank secrecy provisions do not impede or hinder criminal investigations or other legal proceedings relating to corruption, bribery or related illicit practices in international commercial transactions.

Finally, Member States committed themselves to cooperate and afford one another the greatest possible assistance in connection with criminal investigations and other legal proceedings brought in respect of corruption and bribery in international commercial transactions, including sharing of information and documents.

The Declaration has played a pioneering role for the enactment of laws and regulations against bribery in international transactions, paving the way, *inter alia*, for the conclusion of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.<sup>69</sup>

<sup>67</sup> See United Nations, General Assembly Resolution 51/59, *Action against corruption*, 12 December 1996, Annex. Available from <http://unpan1.un.org/intradoc/groups/public/documents/un/unpan010930.pdf>

<sup>68</sup> See United Nations, General Assembly Resolution 51/191, *United Nations Declaration against Corruption and Bribery in International Commercial Transactions*, 16 December 1996, Annex. Available from <http://www.un.org/documents/ga/res/51/a51r191.htm>

<sup>69</sup> Adopted on 17 December 1997 and in force since 15 February 1999.

### C. United Nations Declaration on Crime and Public Security

On the recommendation of the Commission at its fifth session, the General Assembly also adopted the United Nations Declaration on Crime and Public Security.<sup>70</sup> In accordance with this Declaration, Member States undertook, *inter alia*, to seek to protect the security and well-being of all their citizens, by taking effective national measures to combat serious transnational crime and promoting bilateral, regional, multilateral and global law enforcement co-operation and assistance to that effect. In addition, Member States agreed to combat and prohibit corruption and bribery by enforcing applicable domestic laws against such activity, and, for this purpose, consider developing concerted measures for international co-operation to curb corrupt practices, as well as developing technical expertise to prevent and control corruption (Article 10).

### D. The Bangalore Principles<sup>71</sup>

The Bangalore Principles of Judicial Conduct identify the six core values of the judiciary, and are intended to establish standards for ethical conduct of judges. They are designed to provide guidance to judges and to afford the judiciary a framework for regulating judicial conduct. These principles presuppose that judges are accountable for their conduct to appropriate institutions established to maintain judicial standards, which are themselves independent and impartial. The *Principles* were drafted in February 2001 in Bangalore, India, on the invitation of the United Nations Centre for International Crime Prevention (UNCICP), by a representative group of Chief Justices, in consultation with senior judges from over 75 countries. They were adopted in November 2002 at a roundtable meeting of Chief Justices representing all geographical regions, held in The Hague, at which Judges of the International Court of Justice also participated. In April 2003, the *Bangalore Principles* were presented to the UN Commission on Human Rights by the UN Special Rapporteur on the Independence of Judges and Lawyers. In a resolution that was unanimously adopted, the Commission brought these Principles to the attention of Member States, the relevant United Nations organs and intergovernmental and non-governmental organizations for their consideration. In 2006, ECOSOC endorsed the

*Bangalore Principles of Judicial Conduct*<sup>72</sup> as representing “a further development” and as “complementary to the *Basic Principles on the Independence of the Judiciary*”. In the same resolution, ECOSOC invited Member States, “consistent with their domestic legal systems, to encourage their judiciaries to take into consideration the Bangalore Principles of Judicial Conduct when reviewing or developing rules with respect to the professional and ethical conduct of members of the judiciary”.

<sup>70</sup> See United Nations, General Assembly Resolution 51/60, *United Nations Declaration on Crime and Public Security*, 12 December 1996, Annex. Available from <http://www.un.org/documents/ga/res/51/ares51-60.htm>

<sup>71</sup> The following text is based on UNODC, *the United Nations Convention against Corruption Implementation Guide and Evaluative Framework for Article 11*, p.6, 2015. Available from [http://www.unodc.org/documents/corruption/Publications/2014/Implementation\\_Guide\\_and\\_Evaluative\\_Framework\\_for\\_Article\\_11\\_-\\_English.pdf](http://www.unodc.org/documents/corruption/Publications/2014/Implementation_Guide_and_Evaluative_Framework_for_Article_11_-_English.pdf)

<sup>72</sup> See ECOSOC Resolution 2006/23, *Strengthening basic principles of judicial conduct*, 27 July 2006 (available from [http://www.unodc.org/pdf/corruption/corruption\\_judicial\\_res\\_e.pdf](http://www.unodc.org/pdf/corruption/corruption_judicial_res_e.pdf))

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## CHAPTER 2

# Anti-Corruption Strategies

### CONTENTS

2.1	International standards	32
2.2	Good governance to prevent corruption: a ‘national integrity system’	33
2.3	Developing an anti-corruption strategy	35
2.4	Measuring and monitoring the success of the anti-corruption strategy	37
2.5	Conditions for the success of anti-corruption policies	39
	2.5.1 Socio-political factors	39
	2.5.2 Overall governance framework	40
2.6	Conclusions	40
	Selected Bibliography	41
<i>Box 2.1</i>	<i>Serbia’s Anti-Corruption Strategy and Action Plan</i>	36
<i>Box 2.2</i>	<i>Romania’s National Anti-Corruption Strategy</i>	37
<i>Table 2.1</i>	<i>Rules and practices of individual pillars</i>	34
<i>Table 2.2</i>	<i>Role of different stakeholders in fighting corruption</i>	35

## CHAPTER 2

# Anti-Corruption Strategies

*Anti-corruption strategies and action plans have become common tools in combating corruption, especially in countries which experience a higher level of corruption. They are less common in countries with a generally lower level of corruption, where existing mechanisms and institutions are utilized for corruption prevention and suppression.*

*The purpose of a national anti-corruption strategy is to clearly set forward how the government intends to fight corruption by building a strong integrity system that runs throughout the public and private sectors of a State. The strategy is usually supported by an action plan which outlines specific implementation measures, allocates responsibilities and timelines and provides for a monitoring mechanism.<sup>1</sup>*

*A broad coalition of key partners need to be involved in planning any anti-corruption strategy and action plan, for them to be successful. The strategy should be based on carefully researched, quality and independent information about corruption-prone areas, and be reflective of the local context and available resources. Strong and sustained political will is required for its effective implementation.*

*Some States have had each ministry and public body shape and compile its own individual sub-strategy or action plan based on their specific needs, to ensure better effectiveness, relevance and ownership of the implementation process. A comprehensive and co-ordinated strategy might seem more likely to succeed than a narrowly focused one. However, sometimes this focused approach may be preferable, and there are no simple solutions or models. Every country has to choose an approach that suits its specific needs.*

*This Chapter will look at how building strong integrity systems can function as effective counters to corruption. It will also discuss the key components of an anti-corruption strategy and the importance of putting in*

*place a monitoring and evaluation system to assess the effectiveness of policies and the impact of measures taken.*

## 2.1. International standards

International and regional anti-corruption frameworks and the activities of international organizations and foreign donor agencies have stimulated governments globally, as well as in the OSCE region to develop and implement anti-corruption strategies. Although the United Nations Convention against Corruption (UNCAC) does not mention anti-corruption strategies explicitly, it states in Article 5 that “Each State Party shall [...] develop and implement or maintain effective, co-ordinated anti-corruption policies [...]”. Although countries may implement effective policies to prevent corruption without a ‘Strategy’, this implies a need, if not already existing, for a State to establish the overall context and framework to prevent corruption. Such an overall framework often includes the development and implementation of a comprehensive anti-corruption strategy and related action plans.<sup>2</sup> Further, it often requires States to review their existing institutional, legal and procedural provisions to see whether they need amendment in order to be able to explicitly support the implementation of an anti-corruption strategy.

The OSCE participating States expressed their political support for adopting a comprehensive and long-term anti-corruption strategy in the Maastricht Strategy Document for the Economic and Environmental Dimension as far back as in 2003 and also in a subsequent Ministerial Council Decision on Combating Corruption in 2004. They reiterated the importance of long-term and comprehensive strategic approaches and strong institutions for achieving good governance and combating corruption in their Dublin Ministerial Council Declaration on Good Governance of 2012.

<sup>1</sup> See OECD, *The Istanbul Anti-Corruption Action Plan: Progress and Challenges*, Anti-Corruption Network for Eastern Europe and Central Asia, 2008, p.19.

<sup>2</sup> See UNODC, *Technical Guide to the United Nations Convention against Corruption*, 2009, p.3.

## UNCAC

### Article 5. Preventive anti-corruption policies and practices

1. Each State Party shall, in accordance with the fundamental principles of its legal system, develop and implement or maintain effective, co-ordinated anti-corruption policies that promote the participation of society and reflect the principles of the rule of law, proper management of public affairs and public property, integrity, transparency and accountability.
2. Each State Party shall endeavour to establish and promote effective practices aimed at the prevention of corruption.
3. Each State Party shall endeavour to periodically evaluate

relevant legal instruments and administrative measures with a view to determining their adequacy to prevent and fight corruption. [...]

4. States Parties shall, as appropriate and in accordance with the fundamental principles of their legal system, collaborate with each other and with relevant international and regional organizations in promoting and developing the measures referred to in this article. That collaboration may include participation in international programmes and projects aimed at the prevention of corruption.

Source: [www.unodc.org/unodc/en/treaties/CAC/](http://www.unodc.org/unodc/en/treaties/CAC/)

Based on these mandates, the OSCE has promoted and supported activities in this regard for many years.

The Council of Europe has also been supporting work in this area. The Twenty Guiding Principles for the Fight against Corruption (1997) calls on States *inter alia* to take “effective measures for the prevention of corruption” (principle 1).<sup>3</sup> When the Group of States against Corruption (GRECO) carried out its First Evaluation Round (2000-2002) on the principles of the Resolution dealing with domestic institutional capacities to prevent, investigate, prosecute and adjudicate corruption offences (principles 3, 6 and 7), the situation in certain countries was such that GRECO recommended adopting strategies and actions plans to address the various changes needed as regards institutional aspects, inter-agency co-operation, working methods, the development of preventive approaches, etc. in a concerted and effective way.

Further concrete steps with regard to anti-corruption policies in the OSCE region were taken in 2003, when the Organisation for Economic Co-operation and Development (OECD) launched the Istanbul Anti-Corruption Action Plan (IAP) as a sub-regional peer review programme within the framework of the Anti-Corruption Network for Eastern Europe and Central Asia (ACN). All IAP countries have since developed fairly comprehensive anti-corruption strategies and plans; several countries have adopted and implemented second and third generation policy documents.<sup>4</sup>



Angel Gurría, Secretary-General of the OECD at the launch of the OECD Foreign Bribery Report. OECD Headquarters, Paris, 2 December 2014

## 2.2 Good governance to prevent corruption: a ‘national integrity system’

It is generally accepted that modern government requires integrity, accountability and the rule of law. Without it, no system can function in a way that promotes the overarching public interest.

Corruption, abuse of power, nepotism and cronyism can severely damage a system of government. Therefore, it is important to develop an overall legal, institutional and cultural framework including anti-corruption strategies that promote good governance and integrity, and prevent

<sup>3</sup> See Council of Europe, Committee of Ministers, *Resolution (97) 24 on the Twenty Guiding Principles for the Fight against Corruption*, 1997, available from [http://www.coe.int/t/dghl/monitoring/greco/documents/Resolution%2897%2924\\_EN.pdf](http://www.coe.int/t/dghl/monitoring/greco/documents/Resolution%2897%2924_EN.pdf)

<sup>4</sup> See OECD, *The Istanbul Anti-Corruption Action Plan: Progress and Challenges*, Anti-Corruption Network for Eastern Europe and Central Asia, 2008, p. 19; OECD, *Anti-Corruption Reforms in Eastern Europe and Central Asia. Progress and Challenges, 2009-2013*, 2013, p.27; OECD, *Anti-Corruption Reforms in Uzbekistan, Round 3 Monitoring of the Istanbul Anti-Corruption Action Plan*, 2015.

**Table 2.1** Rules and practices of individual pillars

PILLAR	CORE RULES AND PRACTICES
Executive	Conflict of interest rules
Legislature/Parliament	Fair elections
Parliamentary public accounts committee	Power to question senior officials
Auditor-General	Public reporting
Public service	Public service ethics
Judiciary	Independence
Media	Access to information
Civil society	Freedom of speech
Ombudsman	Records management
Anti-corruption/watchdog agencies	Enforceable and enforced laws
Private sector	Competition policy including public procurement rules
International community	Effective mutual legal/judicial assistance

Source: adapted from Pope, J., *Confronting Corruption: The Elements of a National Integrity System*, Transparency International, 2000, p. 37.

and discourage corrupt conduct.<sup>5</sup> Such a framework cannot be based only on measures to catch and punish corrupt individuals. It must have the broader aim of creating an environment that entrenches integrity as the standard of public office. Several organizations that work in the area of corruption prevention have developed such frameworks – including international organizations such as Transparency International (TI).

TI's approach advocates a multi-layered and holistic approach to combating corruption by building a National Integrity System. Such a system "is the sum total of the institutions and practices within a given country that addresses aspects of maintaining the honesty and integrity of government and private sector institutions."<sup>6</sup>

The concept of a national integrity system was advanced in the first edition of what is now *Confronting Corruption: the Elements of a National Integrity System*, published by TI.<sup>7</sup> The concept based on J. Pope's TI publication is summarized below.

Integrity in public service requires more than the absence of corruption. Indeed, integrity has been identified as a central element of good governance, "a condition for all other activities of government not only to be more legitimate and trusted, but also to be effective"<sup>8</sup>. The term 'integrity' refers to the application of generally accepted values and norms in daily practice. While individual integrity is about ethical conduct and relates to the qualities that enable a civil servant to fulfil an organization's mandate by acting in accordance with standards, rules and procedures, the concept of integrity also applies at the organizational level. The integrity of an institution can be understood as the effective establishment of procedures that facilitate, promote and ensure the good conduct of its management and employees. Organizational integrity thus relates to the rules, regulations, policies and procedures defined and implemented by public institutions in various fields of operations such as human resource management (recruitment and promotion), management schemes, service provision, procurement, monitoring and auditing, oversight and standards of transparency.

Promoting integrity, both at the organizational and the individual level, represents a key component in a comprehensive strategy to prevent and suppress corruption in the public sector. Public confidence and accountability in public administration are instrumental to the prevention of corruption. Developing concrete

5 Some recent approaches to tackling corruption – and in particular assessing corruption and corruption risks – recommend focusing not just on corruption in a narrow sense, but on poor conduct in a broader sense. See for example CoE/EU Project against Corruption in Albania Technical Paper, *Corruption Risk Assessment Methodology Guide*, 2010, p.4, which recommends focusing on "practices within an institution that compromise that institution's capacity to perform its public service function in an impartial and accountable manner." Available from [http://www.coe.int/t/dghl/cooperation/economiccrime/corruption/projects/Albania/Technical%20Papers/PACA\\_TP%20202011-Risk%20Assessment%20Methodology.pdf](http://www.coe.int/t/dghl/cooperation/economiccrime/corruption/projects/Albania/Technical%20Papers/PACA_TP%20202011-Risk%20Assessment%20Methodology.pdf)

6 See Pope, J., *Confronting Corruption: The Elements of a National Integrity System*, 2000, Transparency International. Available from <http://archive.transparency.org/publications/publications/sourcebook2000>

7 Ibid.

8 See OECD, *Towards a Sound Integrity Framework: Instruments, Processes, Structures and Conditions for Implementation*, 2009, Global Forum on Public Governance, GOV/PGC/GF(2009)1, p.6.

**Table 2.2** Role of different stakeholders in fighting corruption

STAKEHOLDERS	ANTI-CORRUPTION INSTRUMENT	MAIN GOAL
Society at large	Elections, public participation	Achieving integrity by evicting corrupt politicians
Parliament	Anti-corruption laws, oversight	Empowering anti-corruption enforcement
Judiciary	Adjudication, integrity in judiciary	Punishing the corrupt, corruption-free judiciary
Government	Anti-corruption reforms, adopting integrity regulations and policies	Integrity of the executive branch of government
Public Service	Codes of conduct, auto-regulatory instruments, professionalism, transparency	Encouraging good conduct, and addressing official misconduct
Business	Internal control systems including Codes of professional ethics, business-government dialogue	Corruption-free economy
NGO Sector	Watchdog activities, own anti-corruption projects, joint civil society-government anti-corruption activities (for example, training)	Preventing corruption
Media	Media coverage, publications of documents (for example, financial reports of political parties)	Exposing corruption, enhancing integrity standards

standards in areas such as recruitment or procurement will foster fair and honest practices and, at the same time, will reduce the risk of improper and dishonest behaviours.

The general goals of a National Integrity System – “maintaining the honesty and integrity of government and private sector institutions” are underpinned by a number of institutional pillars. There are variations of national integrity systems from State to State, but the typical pillars are:

- Executive
- Judiciary
- Legislature
- Auditor-General
- Ombudsman
- Watchdog agencies: public accounts committee, finance and taxation bodies, central bank, independent electoral commissions, anti-corruption agency, police
- Public service
- Civil society including the professions and the trade unions
- Private sector
- Media
- International agencies

When these pillars rest on a strong foundation of high public awareness and strong societal values, then these

will also be reflected in a strong governance system and lower levels of corruption.

Complementing each of the national integrity system institutional pillars are core rules and practices attached to each individual pillar. Their absence may be considered an indicator of weakness.

Establishing an effective National Integrity System requires regular policy and performance reviews to identify possible gaps and weaknesses that would need to be addressed to maintain high governance standards. To be effective, an anti-corruption strategy needs to consider all these different components in a holistic manner.

## 2.3 Developing an anti-corruption strategy

Developing an anti-corruption strategy is the responsibility of the government. The aim is to provide for the country a road map on the direction to take and the priorities to set, with the ultimate goal of reducing the level of corruption through policy legal and institutional change and practical measures.

Working out an appropriate anti-corruption strategy would benefit from the formation of a broad coalition or working group including representatives from different

## Box 2.1 Serbia's Anti-Corruption Strategy and Action Plan

In 2013, Serbia adopted a National Anti-corruption Strategy (NACS) and accompanying Action Plan for its implementation covering the period 2013-2018. All relevant ministries, institutions and the judiciary were invited to participate, and focus group meetings with an even wider range of stakeholders were held to receive their input. The process also ensured several public hearings during which civil society, academics and citizens were invited to critique and provide suggestions. The product of this inclusive drafting process is a focused strategy that sets goals for the following areas: political corruption, public finance, privatization, the judiciary, the police, urban planning and development, health, education and sport, the media, and the prevention of corruption.

The accompanying Action Plan defines what measures need to be implemented, the authority responsible for each measure, a clear timeline, and the estimated budgetary impact. The Anti-corruption Council, with the support of the Ministry of Justice, and the Anti-corruption Agency

monitor the implementation of the Strategy. The Council, together with the Ministry of Justice, meets quarterly with focal points from the relevant Ministries and institutions and provide reports and recommendations to the Government on the implementation of the NACS and Action Plan. If the Government fails to respond in a timely fashion to these recommendations, the Council may publish their recommendations. The Anti-corruption Agency will review annual reports submitted by responsible persons on the implementation of the strategy and action plan. If a responsible person fails to submit a report, the Agency can call him/her in for an explanation, issue a recommendation for his/her dismissal and initiate misdemeanour charges.

The NACS and Action Plan can be found on <http://www.mpravde.gov.rs/en/vest/3369/the-anti-corruption-strategy-and-the-action-plan.php>

Source: OSCE Mission to Serbia

ministries and governmental bodies, civil society, academics and the private sector to ensure that different concerns, experiences and contributions can be taken into account when formulating the strategy. Involving civil society can bring in information and other perspectives on the corruption situation as experienced or perceived by the public. At the same time, it helps inform the public of the goals and progress in the strategy development. Private sector representatives should also be involved as it is the major economic driver. Their involvement may advance the introduction of anti-bribery behaviour and self-regulatory practices such as codes of conduct and corporate ethics.

Attention should also be paid to including both men and women from the different stakeholder groups in the strategy development process as they may have different perspectives, knowledge and expertise to contribute. A participatory approach including all the key stakeholders will also ensure greater ownership of the strategy and the action plan(s) when it comes to the implementation phase.

Before embarking on the strategy drafting process, it is essential for the drafting group to analyse the incidence and nature of corruption, corruption risks and vulnerable areas in the public and the private sectors. The impact and achieved targets of earlier efforts also need to be assessed. To get a good understanding of which areas need attention, what the weaknesses are and to identify the successes, the drafting group should seek information from different sources: internal sources from different national authorities including regulators

and investigators, external surveys and contributions from civil society and the private sector, alongside independent research carried out by academia and others on corruption. Evidence-based background information will help set more accurate, targeted and context relevant objectives, targets and time frames for the anti-corruption strategy and the action plans. Regulatory impact assessment (RIA) can be employed to identify corruption-related problems, define solutions and determine which solution is preferable.<sup>9</sup>

It is also important for the drafting group to consider:

- which policy instruments and programmes could potentially affect the national integrity system and how they could best be designed and implemented so as to enhance integrity and eliminate corruption risks;
- what are the internal and external constraints to the organizations' effectiveness and efficiency, including co-ordination between government departments and among various other actors;
- what insights have national and international experiences provided with regard to the workability and success of different anti-corruption models and measures; what are the factors that have inhibited the strategy development process;
- how to develop a strategy with sustained and long-term corruption reduction effects.

<sup>9</sup> For guidance on RIA, see, for example, OECD, *Introductory Handbook for Undertaking Regulatory Impact Analysis (RIA)*, 2008. Available from <http://www.oecd.org/gov/regulatory-policy/44789472.pdf>

### Box 2.2 Romania's National Anti-Corruption Strategy

After extensive consultation and preparation, Romania adopted its new national anti-corruption strategy in 2012 for the period 2012-2015. Unlike the earlier strategies, this one focuses on implementation, measuring of impact and enforcement of rules. It strongly promotes institutional integrity and ethical conduct. The strategy is structured around four objectives:

- Preventing corruption in public institutions;
- Increasing the level of corruption education;
- Combating corruption through administrative and criminal matters; and,
- Approving sectoral plans and developing a system to monitor the strategy.

Each objective has a number of specific objectives and detailed measures and institutions responsible for their implementation. The objectives are also supported by individual action plans, which include indicators to help evaluate progress and achievements. The Ministry of

Justice is responsible for monitoring the strategy. It is supported in this task by an inter-institutional secretariat and five co-operation platforms (platform of independent authorities and anti-corruption institutions; central public administration; local public administration; business environment; and civil society).

The monitoring mechanisms used by government institutions are: self-assessments, questionnaire-based reviews, feedback mechanism related to integrity incidents, on-site visits by experts, and open data. An integrated IT system helps the institutions in the transmission, processing and analysis of the assessment reports.

The National Anti-corruption Strategy (2012-2015) can be found on <http://sna.just.ro>

Source: adapted from TI Anti-Corruption Helpdesk document, *Examples of National Anti-corruption Strategies*, 2013. Available from [www.transparency.org/files/content/corruptionqas/Good\\_practices\\_in\\_anti-corruption\\_strategy.pdf](http://www.transparency.org/files/content/corruptionqas/Good_practices_in_anti-corruption_strategy.pdf)

When the country is party to international anti-corruption frameworks, its strategy should also be reflective of these commitments.

The anti-corruption strategy needs to be adopted by the parliament, president, or head of government in accordance with national requirements. To galvanize the necessary support for the suggested reforms throughout the administration, it is also essential to gain the commitment for their implementation at the highest political level.

As soon as the anti-corruption strategy is ready, its content and envisaged implementation and the bodies responsible for its execution should be widely publicised. This will ensure transparency and help mobilize popular support, besides creating public expectation that those involved in the reform process will have to live up to their commitments. The public can be informed of the strategy and its implementation progress through the media, government websites and targeted public information events as well as by civil society organizations.

Boxes 2.1 and 2.2 provide examples of anti-corruption strategies and action plans that may be seen as good examples in terms of structure and the envisaged implementation and monitoring mechanism.<sup>10</sup>

## 2.4 Measuring and monitoring the success of the anti-corruption strategy<sup>11</sup>

To understand how effective anti-corruption measures (including the anti-corruption strategy) are in combating corruption, it is important to establish a regular *national monitoring, review and revision mechanism* to measure the impact and change, and to make adjustments to policies and institutional arrangements based on the findings. Such mechanisms should be set up in connection with developing the anti-corruption strategy and programme. This would require the government to think of what type of national review mechanism it wants to introduce, which areas should be reviewed, what performance indicators should be used, which agencies should be responsible for the review(s), what resources are available or required, who should participate in the review, should external stakeholders also be included, how frequently should the review(s) be held and how should the results be reported. Currently, national monitoring and evaluation mechanisms are rather rare across the OSCE region, although some positive developments are taking place.

Many countries have either used or are using *international (peer) review mechanisms to monitor the implementation of anti-corruption policies*. In the case of some countries

<sup>10</sup> For more on structuring anti-corruption strategies and further examples of national strategies, see, for instance, materials of the expert seminar "Anti-corruption Policy and Integrity Training", Vilnius, Lithuania, 23-25 March 2011, co-organized by the OECD and –the OSCE. Available from <http://www.oecd.org/corruption/acn/47912383.pdf>

<sup>11</sup> Section 2.4 is based on the OSCE *Strategic Approaches to Corruption Prevention in the OSCE Region*, Review Report on the Implementation of OSCE Commitments (EEFGAL/20/12), 5 September 2012, pp. 30-31.

in Central and Eastern Europe, technical co-operation activities implemented by the Council of Europe have provided direct involvement of the international community in, and support to the definition and effective implementation of strategies and actions plans: in the context of multilateral diagnoses carried out in the period 1996-1999 through multilateral programmes (Octopus I and II) and later on, in the context of sub-regional programmes. Examples include the Stability Pact for South-Eastern Europe which comprised an anti-corruption component, or on-going activity on the basis of country-specific assistance projects in support of national strategies and action plans (for instance in Albania, Azerbaijan, Georgia, Moldova, Serbia, the former Yugoslav Republic of Macedonia, Ukraine).

The OECD Istanbul Anti-Corruption Action Plan (IAP) also foresees regular peer reviews of anti-corruption reform efforts. Notably, the IAP looks closely at the development and implementation of policies, strategies and plans.<sup>12</sup> In the context of the wider EU anti-corruption policy, a mechanism for the periodic assessment of EU States' efforts in the fight against corruption, composed of national experts, was established up in June 2011.<sup>13</sup> The implementation of the UNCAC is monitored by the Implementation Review Group (IRG) that was set up in 2009.<sup>14</sup> As part of the UNCAC review mechanism, countries use a self-assessment checklist<sup>15</sup> as the basic data collection tool for conducting UNCAC gap analyses, followed by a direct dialogue between reviewing States Parties and the State Party under review.

To assist countries in planning for and undertaking the self-assessment exercise, the United Nations Development Programme (UNDP) in partnership with the UNODC, has developed a detailed *Guidance Note – UNCAC Self-Assessments: Going Beyond the Minimum*, which can be found on the UNDP website.<sup>16</sup> In summary, it proposes that the UNCAC Self-Assessment consist of two preliminary steps and six successive steps.

The preliminary steps are:

1. Designation of a Lead Agency
2. Establishment of a Steering Committee

<sup>12</sup> For an overview of progress in this area see Section "Anti-corruption strategies and action plans" in OECD, *Anti-corruption Reforms in Eastern Europe and Central Asia: Progress and Challenges 2009-2013*, Fighting Corruption in Eastern Europe and Central Asia, 2013, pp. 26-33.

<sup>13</sup> See European Union Commission Decision, *Establishing an EU Anti-corruption reporting mechanism for periodic assessment ('EU Anti-corruption Report')*, (C(2011) 3673 final), available from [http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/pdf/com\\_decision\\_2011\\_3673\\_final\\_en.pdf](http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/pdf/com_decision_2011_3673_final_en.pdf)

<sup>14</sup> UNODC, Resolution 3/1 of the Conference of the States Parties to the United Nations Convention against Corruption, §18.

<sup>15</sup> See [www.unodc.org/unodc/en/treaties/CAC/self-assessment.html](http://www.unodc.org/unodc/en/treaties/CAC/self-assessment.html)

<sup>16</sup> See [www.undp.org/content/undp/en/home/librarypage/democratic-governance/anti-corruption/guidance-note---uncac-self-assessments-going-beyond-the-minimum.html](http://www.undp.org/content/undp/en/home/librarypage/democratic-governance/anti-corruption/guidance-note---uncac-self-assessments-going-beyond-the-minimum.html)

Phases:

1. Initial stakeholder workshop to launch and plan the process
  - a. Data collection:
  - b. Document gathering
2. Stakeholder consultations
3. Analysis and drafting of the reports
4. Validation workshop and finalization of the reports
5. Publication and dissemination of the reports
6. Follow-up

For countries to make best use of international review and monitoring processes, experience has shown that a wide range of national stakeholders need to be involved. This is to secure broad national involvement and raise awareness about the country's efforts to implement international standards and fight corruption. When carried out thoroughly and with strong in-country commitment, an international review process such as the ones related to the IAP or the UNCAC can become a nationally owned process whereby national governmental and non-governmental actors are committed to the exercise and its outcomes. By applying a participatory approach and widely publicizing results of review processes, whether national or international, such monitoring mechanisms will also encourage inter-institutional dialogue and co-operation. Information gathered through review mechanisms can provide a clear overview of technical assistance needs. The UNCAC Self-Assessment puts particular emphasis on this aspect and therefore produces useful information for governments that wish to draw on international technical assistance providers. Finally, international review processes such as the ones under the UNCAC or the IAP also provide an opportunity for countries to share knowledge and expertise with other countries on implementing international standards.

However, the existence of and participation in such international review processes should not and cannot replace the need for a national monitoring and evaluation process. Nationally-developed anti-corruption policies and strategies must include a specific and time-bound implementation plan (Action Plan), the achievement of which is monitored and regularly reported. The findings from such monitoring mechanisms can feed into international review mechanisms. Whilst international monitoring mechanisms evaluate against a broad set of external standards, national evaluation processes reflect policies that also target national priorities. Finally, while international mechanisms are likely to be more oriented towards formal compliance with standards (such as legal and institutional frameworks), national evaluation processes may be better placed to also assess practical implementation and impact. *Inter alia*, this will allow the



High-level delegation from Tajikistan in front of the OECD Headquarters on the occasion of the review of the implementation of the Istanbul Anti-Corruption Action Plan, Paris, 16 April 2014

institutions responsible for monitoring to identify the specific causes of delays and implementation problems and to develop specific measures to address them. The importance of also developing national monitoring and evaluation processes is indeed highlighted in numerous studies (e.g., by GRECO, SIGMA, TI and the Hertie School of Governance) that note that actual implementation and enforcement of anti-corruption policies at the national level is still lagging behind.

## 2.5 Conditions for the success of anti-corruption policies

A range of organizations such as the UNDP, OECD, EU and TI have identified a number of factors that make anti-corruption efforts more likely to succeed. Key amongst these are the following.

### 2.5.1 Socio-political factors

#### Political will and commitment

The key precondition for any successful anti-corruption effort, be it a national strategy or an anti-corruption

institution, is political will and commitment.<sup>17</sup> Yet, it is important to distinguish between externally triggered political will and internally generated political will - the latter is clearly more sustainable than the former. Thus, it is advisable that any externally triggered initiatives should seek a long-term local anchor and engage with local partners that can carry forward the necessary political will beyond the expiry date of external pressure points. Civil society generally plays an important role in maintaining this political will from within a society.

#### Public trust and transparency

The citizenry's trust in the government's anti-corruption efforts is also of utmost importance and to a great degree, a result of the sincerity of the political leadership's will and commitment to fight corruption. In order to enhance public confidence, it is essential to regularly inform citizens about the strategic goals of the anti-corruption policies and the launched programmes. At the same time, they must also be informed of the functions as well as the performance of the anti-corruption bodies and other institutions tasked with implementing anti-corruption functions. Maintaining an informed public-private dialogue on corruption-

<sup>17</sup> See OECD, *The Istanbul Anti-Corruption Action Plan: Progress and Challenges*, Anti-Corruption Network for Eastern Europe and Central Asia, 2008, pp. 16-17.

related issues has proven to be a key success element of anti-corruption efforts.<sup>18</sup> As a positive example in this regard, reference can be made to the United Kingdom's Serious Fraud Office and Romania's anti-corruption agencies<sup>19</sup> which publish their reports on-line. Yet, transparency alone is insufficient in this regard: the inclusion of non-state actors is also of great importance.

### Active involvement of key stakeholders and awareness raising amongst citizens

It is recommended to incentivise key stakeholders to take part and push forth anti-corruption projects while showing them the positive impacts of such initiatives. Raising awareness of the benefits of reforms for those directly concerned by them (government officials and non-state actors) has to become a constitutive element of anti-corruption strategies so as to ensure their interest in the matter and pave the way for an informed citizenry capable of engaging in a fruitful public participation.<sup>20</sup>

### 2.5.2 Overall governance framework

Anti-corruption policies and institutions will not produce the desired effects regarding corruption prevention if they alone are to safeguard integrity in a country. There needs to be a broader governance framework that favours the fight against corruption in the public and the private sector as well as public sector integrity. Northern European countries (Denmark, Finland, Norway and Sweden notably) are generally cited as good practice examples when it comes to illustrating the importance of a good overall governance framework in order to effectively prevent corruption.

Transparency and accountability of public services and the public sector in general are key components of a good governance framework. Not only do these contribute to preventing corruption but, as importantly, they contribute to a broader increase in the effectiveness and fairness of public services and the public sector in general.

Similarly, the respect for the rule of law is a crucial prerequisite not only for the effective fight against corruption but generally for the effective functioning of a State. The impediment for anti-corruption measures posed by a deficient rule of law system is, for instance,

pointed to in several 2011 SIGMA assessment reports<sup>21</sup> which find that despite an overall improvement of the rule of law across the region, considerable deficiencies exist in some countries. The latest 2013 SIGMA reports show, however, that some countries have made progress in the implementation of rule of law reforms. For example, in Serbia, fighting corruption through improved legislation remains one of the policy priorities.<sup>22</sup>

## 2.6 Conclusions

Combating corruption is a complex cross-cutting task that needs to be addressed through a comprehensive and long term strategic approach that includes both preventive and suppressive measures. For a strategy to become successful, it needs strong political commitment. It also needs to have national ownership by all key stakeholders, be based on knowledge and evidence of the local conditions and specific requirements, and be of strategic priority. It is essential to develop a strong co-ordination mechanism to oversee the strategy development and implementation process. Once the strategy is in place, it needs to be monitored regularly and evaluated by a locally created and owned process. International review processes should only complement the national ones and not substitute them. The findings from national performance evaluation mechanisms can feed into international monitoring mechanisms. Whilst international monitoring mechanisms will evaluate against a broad set of standards, national evaluation processes can be targeted towards national priorities.

18 See OECD, *Specialised Anti-Corruption Institutions: Review of Models: Second Edition*, 2013, p. 33.

19 There are three different anti-corruption agencies in Romania. For more details see [www.transparency.org/whatwedo/nisarticle/romania\\_2012](http://www.transparency.org/whatwedo/nisarticle/romania_2012).

20 See OECD and OSCE, *Proceedings of the Expert Seminar "Anti-Corruption Policy and Integrity Training"*, 2011, available from <http://www.oecd.org/corruption/acn/47912383.pdf>

21 Available from [www.sigmaweb.org/publications/sigmaassessmentreports.htm](http://www.sigmaweb.org/publications/sigmaassessmentreports.htm)

22 See for example SIGMA Assessment Report on Serbia (2013) and European Commission's Joint Report on Serbia's Progress (JOIN(2013)), available from [http://ec.europa.eu/enlargement/pdf/key\\_documents/2013/sr\\_spring\\_report\\_2013\\_en.pdf](http://ec.europa.eu/enlargement/pdf/key_documents/2013/sr_spring_report_2013_en.pdf)

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## CHAPTER 3

# Anti-Corruption Bodies

### CONTENTS

3.1	International instruments	44
3.2	Legal basis	47
	<b>3.2.1 Mandated functions</b>	47
	<b>3.2.2 Institutional settings</b>	47
3.3	Conditions for effective anti-corruption institutions	50
3.4	Enabling the specialized body to conduct effective investigations	51
3.5	Measuring performance	52
3.6	Conclusions	52
	<b>Selected Bibliography</b>	<b>53</b>
<i>Box 3.1</i>	<i>Jakarta Principles for Anti-Corruption Agencies</i>	46
<i>Box 3.2</i>	<i>Hong Kong's Independent Commission against Corruption</i>	48
<i>Box 3.3</i>	<i>What can a specialized anti-corruption body do: a guide</i>	49

## CHAPTER 3

# Anti-Corruption Bodies

*Since the early 1990s, recognition of the fact that corruption poses a real threat to economic development, social prosperity, well governed public institutions, public trust and political stability has been increasing steadily. Countries have adopted a number of global and regional conventions, guiding principles, recommendations and declarations on combating corruption. Many of them recognize the need to anchor the task of prevention and suppression of corruption in specialized bodies.*

*This Chapter will examine international commitments and standards related to bodies dealing with corruption prevention, detection and law enforcement, the different approaches and models of various States, and the challenges they may face in building effective anti-corruption bodies. It will also seek to suggest some solutions and provide examples of good practice, mainly from within the OSCE region.*

## 3.1 International instruments

The Council of Europe (CoE) has played a leading role in advancing the concept of an anti-corruption entity through its *Twenty Guiding Principles for the Fight against Corruption* (1997) which includes two principles pertaining to anti-corruption bodies (principles 3 and 7)<sup>1</sup> and shortly thereafter, producing a *Criminal Law Convention on Corruption* (1999) reflective of many of the Guiding Principles and including a provision on specialized anti-corruption entities (Article 20)<sup>2</sup>. These initiatives were followed globally by the adoption of the *United Nations Convention against Corruption* (UNCAC) in 2003. Both Conventions oblige signatory countries to put in place an institutional specialization in the area of corruption. More specifically, the UNCAC requires countries to ensure the existence of:

- a body or bodies in charge of corruption prevention (Article 6); and
- a body or bodies or persons specialized in combating corruption through law enforcement (Article 36).

Those two articles, in combination, raise a number of questions that each State will have to address as to the type of institution(s) or institutional elements to establish for corruption prevention on the one hand and for detection, investigation and prosecution on the other. Specific questions include: whether to establish a dedicated body or bodies or just ensure specialization within existing ones; the legislative context needed to ensure adequate authority to work across sectors; co-ordination mechanisms for policy implementation; measures to ensure operational independence, transparency and accountability; and arrangements with regard to appropriate staffing, employment security, budget and reporting; and so on.<sup>3</sup>

<sup>1</sup> See Council of Europe, *Resolution (97) 24 on the Twenty Guiding Principles for the Fight against Corruption* (1997), available from [http://www.coe.int/t/dghl/monitoring/greco/documents/Resolution%2897%2924\\_EN.pdf](http://www.coe.int/t/dghl/monitoring/greco/documents/Resolution%2897%2924_EN.pdf)

<sup>2</sup> See Council of Europe, *Criminal Law Convention on Corruption*, CETS No.: 173 (1999).

<sup>3</sup> See UNODC, *Technical Guide to the United Nations Convention against Corruption*, 2009, p. 8, available from [www.unodc.org/documents/corruption/Technical\\_Guide\\_UNCAC.pdf](http://www.unodc.org/documents/corruption/Technical_Guide_UNCAC.pdf)



Flags of the Sixth Session of the Conference of the States Parties to the UNCAC, St. Petersburg, Russia, 2-6 November 2015

## Council of Europe

### Twenty guiding principles for the fight against corruption

#### *Principle 3*

Ensure that those in charge of the prevention, investigation, prosecution and adjudication of corruption offences enjoy the independence and autonomy appropriate to their functions, are free from improper influence and have effective means for gathering evidence, protecting the persons who help the authorities in combating corruption and preserving the confidentiality of investigations.

#### *Principle 7*

Promote the specialization of persons or bodies in charge of fighting corruption and to provide them with appropriate means and training to perform their tasks.

Source: [http://www.coe.int/t/dghl/monitoring/greco/documents/Resolution%2897%2924\\_EN.pdf](http://www.coe.int/t/dghl/monitoring/greco/documents/Resolution%2897%2924_EN.pdf)

## Criminal Law Convention on Corruption

#### *Article 20. Specialized authorities*

Each Party shall adopt such measures as may be necessary to ensure that persons or entities are specialized in the fight against corruption. They shall have the necessary independence in accordance with the fundamental principles of the legal system of the Party, in order for them

to be able to carry out their functions effectively and free from any undue pressure. The Party shall ensure that the staff of such entities has adequate training and financial resources for their tasks.

Source: <http://conventions.coe.int/Treaty/en/Treaties/Html/173.htm>

## UNCAC

#### *Article 6. Preventive anti-corruption body or bodies*

1. Each State Party shall, in accordance with the fundamental principles of its legal system, ensure the existence of a body or bodies, as appropriate, that prevent corruption by such means as:
  - a. Implementing the policies referred to in Article 5 of this Convention and, where appropriate, overseeing and coordinating the implementation of those policies;
  - b. Increasing and disseminating knowledge about the prevention of corruption.
2. Each State Party shall grant the body or bodies referred to in paragraph 1 of this article the necessary independence, in accordance with the fundamental principles of its legal system, to enable the body or bodies to carry out its or their functions effectively and free from any undue influence. The necessary material resources and specialized staff, as well as the training that such staff may require to carry out their functions, should be provided.

3. Each State Party shall inform the Secretary-General of the United Nations of the name and address of the authority or authorities that may assist other States Parties in developing and implementing specific measures for the prevention of corruption.

#### *Article 36. Specialized authorities*

Each State Party shall, in accordance with the fundamental principles of its legal system, ensure the existence of a body or bodies or persons specialized in combating corruption through law enforcement. Such body or bodies or persons shall be granted the necessary independence, in accordance with the fundamental principles of the legal system of the State Party, to be able to carry out their functions effectively and without any undue influence. Such persons or staff of such body or bodies should have the appropriate training and resources to carry out their tasks.

Source: [www.unodc.org/unodc/en/treaties/CAC/](http://www.unodc.org/unodc/en/treaties/CAC/)

In November 2013, the International Association of Anti-Corruption Authorities recognized the “Jakarta Principles” on effective and independent anti-corruption agencies in its Panama Declaration.<sup>4</sup> The Conference of States Parties (COSP) to the UNCAC also emphasized the importance of ensuring the independence of anti-corruption bodies and referred to the same principles in its resolution on the prevention of corruption.<sup>5</sup> The

“Jakarta Principles” were adopted in November 2012 by heads and former heads of anti-corruption agencies, as well as anti-corruption experts from around the world, at a conference hosted by the Indonesian Corruption Eradication Commission.<sup>6</sup> The *Jakarta Statement on Principles for Anti-Corruption Agencies* sets out 16 principles to define the meaning of independence with the aim of strengthening anti-corruption bodies around the world (see Box 3.1).

<sup>4</sup> See Conference of States Parties to the UN Convention against Corruption, *Panama Declaration*, 2013, CAC/COSP/2013/CRP.9, available from <http://www.unodc.org/documents/treaties/UNCAC/COSP/session5/V1388018e.pdf>

<sup>5</sup> See Conference of States Parties to the UN Convention against Corruption, *Resolution 5/4 Follow-up to the Marrakech Declaration on the prevention of Corruption*, 2013, available from <http://www.unodc.org/documents/treaties/UNCAC/COSP/session5/V1401171e.pdf>

<sup>6</sup> See UNODC, *Jakarta Statement on Principles for Anti-Corruption Agencies*, 2012, available from [http://www.unodc.org/documents/corruption/WG-Prevention/Art\\_6\\_Preventive\\_anti-corruption\\_bodies/JAKARTA\\_STATEMENT\\_en.pdf](http://www.unodc.org/documents/corruption/WG-Prevention/Art_6_Preventive_anti-corruption_bodies/JAKARTA_STATEMENT_en.pdf)

### Box 3.1 Jakarta Principles for Anti-Corruption Agencies

The participants [in the Jakarta Conference]:

1. **Recommend** the following principles to ensure the independence and effectiveness of anti-corruption agencies (ACAs):

- **MANDATE:** ACAs shall have clear mandates to tackle corruption through prevention, education, awareness raising, investigation and prosecution, either through one agency or multiple coordinated agencies;
  - **COLLABORATION:** ACAs shall not operate in isolation. They shall foster good working relations with state agencies, civil society, the private sector and other stakeholders, including international cooperation;
  - **PERMANENCE:** ACAs shall, in accordance with the basic legal principles of their countries, be established by proper and stable legal framework, such as the Constitution or a special law to ensure continuity of the ACA;
  - **APPOINTMENT:** ACA heads shall be appointed through a process that ensures his or her apolitical stance, impartiality, neutrality, integrity and competence;
  - **CONTINUITY:** In the event of suspension, dismissal, resignation, retirement or end of tenure, all powers of the ACA head shall be delegated by law to an appropriate official in the ACA within a reasonable period of time until the appointment of the new ACA head;
  - **REMOVAL:** ACA heads shall have security of tenure and shall be removed only through a legally established procedure equivalent to the procedure for the removal of a key independent authority specially protected by law (such as the Chief Justice);
  - **ETHICAL CONDUCT:** ACAs shall adopt codes of conduct requiring the highest standards of ethical conduct from their staff and a strong compliance regime;
  - **IMMUNITY:** ACA heads and employees shall have immunity from civil and criminal proceedings for acts committed within the performance of their mandate. ACA heads and employees shall be protected from malicious civil and criminal proceedings.
  - **REMUNERATION:** ACA employees shall be remunerated at a level that would allow for the employment of sufficient number of qualified staff;
  - **AUTHORITY OVER HUMAN RESOURCES:** ACAs shall have the power to recruit and dismiss their own staff according to internal clear and transparent procedures;
  - **ADEQUATE AND RELIABLE RESOURCES:** ACAs shall have sufficient financial resources to carry out their tasks, taking into account the country's budgetary resources, population size and land area. ACAs shall be entitled to timely, planned, reliable and adequate resources for the gradual capacity development and improvement of the ACA's operations and fulfilment of the ACA's mandate;
  - **FINANCIAL AUTONOMY:** ACAs shall receive a budgetary allocation over which ACAs have full management and control without prejudice to the appropriate accounting standards and auditing requirements;
  - **INTERNAL ACCOUNTABILITY:** ACAs shall develop and establish clear rules and standard operating procedures, including monitoring and disciplinary mechanisms, to minimize any misconduct and abuse of power by ACAs;
  - **EXTERNAL ACCOUNTABILITY:** ACAs shall strictly adhere to the rule of law and be accountable to mechanisms established to prevent any abuse of power;
  - **PUBLIC REPORTING:** ACAs shall formally report at least annually on their activities to the public.
  - **PUBLIC COMMUNICATION AND ENGAGEMENT:** ACAs shall communicate and engage with the public regularly in order to ensure public confidence in its independence, fairness and effectiveness.
2. **Encourage** ACAs to promote the above principles within their respective agencies, countries and regional networks of ACAs;
3. **Encourage** ACAs to promote these principles to assist members of the executive and the legislature, criminal justice practitioners and the public in general, to better understand and support ACAs in carrying out their functions;
4. **Call upon** ACAs to appeal to their respective Governments and other stakeholders to promote the above principles in international fora on anti-corruption.
5. **Express** appreciation and gratitude to the Corruption Eradication Commission of Indonesia for hosting the International Conference "Principles for Anti-Corruption Agencies" with support from the United Nations Development Programme and the United Nations Office on Drugs and Crime to reflect and agree on principles for ACAs.

Source: adapted from [www.unodc.org/documents/corruption/WG-Prevention/Art\\_6\\_Preventive\\_anti-corruption\\_bodies/JAKARTA\\_STATEMENT\\_en.pdf](http://www.unodc.org/documents/corruption/WG-Prevention/Art_6_Preventive_anti-corruption_bodies/JAKARTA_STATEMENT_en.pdf)

A further consideration is whether the body with investigative powers should also have prosecution capability, or whether the prosecuting authority should be housed in a separate body from those carrying

out investigations. Each country has to decide what institutional arrangements would most suit their needs. There is no single, ready answer that will apply to every State. Whatever the set-up, those undertaking investigation

and prosecution should have the necessary independence from the executive to be able to carry out their functions effectively and without any undue influence.

Indeed, a range of different institutional arrangements can serve the same purposes, and different types of anti-corruption structures exist across the OSCE region. These range from institutions with preventive functions; to specialized law enforcement bodies, separate from or integrated into existing prosecutorial or police structures; to multi-purpose agencies in charge of prevention, investigation, co-ordination and public outreach. One of the first and still best known specialised multi-purpose bodies is Hong Kong's Independent Commission against Corruption (ICAC) (see more details in Box 3.2). A number of other countries, including some Baltic and Central European States,<sup>7</sup> have set up similar multipurpose bodies specialized in the fight against corruption. Other such bodies are integrated into existing structures as is frequently the case in Western and Northern Europe, where the tasks generally assigned to anti-corruption agencies are performed by a multitude of existing institutions and structures, such as the police and prosecutorial services or civil service commissions. The following sections will discuss these models in further detail.

The OSCE has also acknowledged the importance of preventing and combating corruption and has actively supported programmes aimed at strengthening governance of public institutions and the development of effective anti-corruption bodies in its participating States since 2004.

## 3.2 Legal basis

### 3.2.1 Mandated functions

There are a multitude of tasks related to the fight against corruption, and therefore anti-corruption institutions have a broad range of activities in their portfolio. These may consist of anti-corruption policy development and co-ordination; performing research and analysis; engaging in public outreach activities including awareness raising; monitoring and co-ordinating the implementation of anti-corruption strategies and action plans and assessing their impact; as well as investigation and prosecution of corruption cases (see Box 3.3 for a more detailed task description).

To undertake these functions, the body or bodies require authority assigned to it/them and some critical features formally established in the law. The United Nations Office on Drugs and Crime (UNODC) *Technical Guide to the UNCAC* defines some of the elements that such a legislative framework could include:

- provision of statutory authority to develop policies and practices outlined in the Convention;
- ability to publish guidance manuals, developing codes of conduct and making legislative recommendations;
- where investigative powers are conferred, ability to commence an inquiry on its own initiative, and subpoena powers to obtain documentation, information, testimonies and other evidence;
- ensuring the exchange of information with appropriate bodies involved in anti-corruption work;
- ensuring the appropriate independence to fulfil its functions, and that the staff are protected from civil action when carrying out their duties in good faith;
- providing for appropriate levels of accountability and reporting, and ensuring appropriate leadership and level of resources.<sup>8</sup>

### 3.2.2 Institutional settings

It is generally acknowledged that there are three types of specialized anti-corruption institutions:

- *Multipurpose model*
- *Law enforcement model*
- *Preventive bodies*<sup>9</sup>

The boundaries between these different models are not hard and fast; for example, activities such as verification of asset declarations or processing complaints of alleged conflicts of interest may be seen as preventive activities, although they often border on or directly involve investigative activities.

#### **Multipurpose: Anti-corruption institutions with both preventive functions and law enforcement powers**

Some States have set up 'multipurpose' anti-corruption institutions dealing with prevention, public education and support, and investigation of corruption (similar to the Hong Kong model presented above); prosecution is a separate function in most cases. When opting for such a model, it is important that anti-corruption efforts are

<sup>7</sup> The Corruption Prevention and Combating Bureau (KNAB) in Latvia, the Special Investigation Service of the Republic of Lithuania and the Central Anti-Corruption Bureau in Poland.

<sup>8</sup> For a more detailed account of the elements, please see the UNODC, *Technical Guide to the UNCAC*, 2009, p. 9.

<sup>9</sup> See OECD, *Specialised Anti-Corruption Institutions: Review of Models: Second Edition*, 2013.

### Box 3.2 Hong Kong's Independent Commission against Corruption

The Hong Kong Independent Commission against Corruption (ICAC) ([www.icac.org.hk](http://www.icac.org.hk)) was established in 1974 and it is one of the most well known anti-corruption agencies. It is also just about the most intensively resourced, with about 1,200 staff. The Commission has an explicit three-pronged approach to countering corruption:

- i. Pursue the corrupt through effective detection and investigation: enforcing anti-corruption laws vigilantly and professionally, thereby making corruption a high risk crime;
- ii. Eliminate opportunities for corruption by introducing corruption-resilient practices;
- iii. Educate the public on the 'evils' of corruption and foster their support in fighting corruption.

It is a multi-purpose agency mandated to investigate, prevent and educate. It is endowed with investigative powers such as arrest, search, seizure, access to financial information and the confiscation of assets of any person holding an office of remuneration under the Government. It is also tasked to prevent bribery and corrupt and illegal conduct of elections. Organizationally, it comprises of the office of the Commissioner and three departments:

Operations, Corruption Prevention and Community Relations.

ICAC is independent of the public service, other law enforcement agencies and prosecutorial services. It is accountable for its work to four independent advisory committees including community leaders and citizens appointed by the Chief Executive of the Hong Kong Special Administrative Region.

For the ICAC model to work, it is important that the institution is operationally independent, well-resourced, and the judicial system around the institution is sufficiently independent and efficient. In some States, the model has failed, precisely due to lack of independence, lack of resources and lack of co-operation from other institutions. It is, therefore, important that each State assesses its own needs and environment, and arrives at specific rather than 'off the shelf' solutions that may not fit the local context.

*Source: OECD, Specialised Anti-Corruption Institutions: Review of Models: Second Edition, 2013, and OSCE Strategic Approaches to Corruption Prevention in the OSCE Region, Review Report on the Implementation of OSCE Commitments, 2012.*

#### Structure of Hong Kong's Independent Commission Against Corruption



Source: [www.icac.org.hk/en/about\\_icac/os/index.html](http://www.icac.org.hk/en/about_icac/os/index.html)

### Box 3.3 What can a specialized anti-corruption body do: a guide

Countering corruption is a complex task that involves various disciplines and functions. Thus, when considering establishing or strengthening anti-corruption bodies, States should bear in mind that some or all of the following anti-corruption competencies will be called upon:

1. *Policy development, research, monitoring and co-ordination*: This includes researching trends and levels of corruption, and assessing the effectiveness of anti-corruption measures. Policy development and co-ordination include the elaboration of anti-corruption strategies and action plans, and monitoring/co-ordination of implementation measures. Another important function is serving as a focal point for international co-operation.
2. *Prevention of corruption in public sector*: This focuses on promoting integrity and transparency in public institutions; it includes elaboration and implementation of special measures concerning public service rules and restrictions, guidance and enforcement. More specifically, these functions may include the prevention of conflict of interest; asset declaration by public officials, including their verification and public access to declarations. Finally, preventive functions will seek to promote transparency and accountability of public sector, including promotion of public access to information. Competence may also include effective control of political party financing.
3. *Education and awareness-raising*: This includes developing and implementing educational programmes for the public, academic institutions and civil servants;

organizing public awareness campaigns; and working with the media, NGOs, businesses and the public at large.

4. *Investigation and prosecution*: These functions aim to ensure a legal framework for the effective prosecution of corruption, including dissuasive sanctions for all forms of corruption. In addition, they aim to ensure effective enforcement of anti-corruption legislation through all the stages of criminal proceedings, including identification, investigation, prosecution and adjudication of corruption offences. In doing so, it is also important to clearly define the limit between criminal and disciplinary/administrative proceedings. This competence should also include overseeing interagency co-operation and exchange of information on specific cases and spontaneous transmission of information (among law enforcement bodies and with auditors, tax and customs authorities, the banking sector and the Financial Intelligence Unit (FIU), public procurement officials, state security, and others). These functions include acting as a focal point for mutual legal assistance and extradition requests. They may, very often, encompass an intelligence capability, including the keeping of dedicated databases. Maintaining, analysing and reporting law enforcement statistics on corruption-related offences is another important function that will fall within this heading in many States.

Source: OECD, *Specialised Anti-Corruption Institutions: Review of Models, Second Edition*, Anti-Corruption Network for Eastern Europe and Central Asia, 2013.

not limited to this institution but that efforts are made to involve other public authorities to ensure the most effective implementation and enforcement of anti-corruption policies.

#### Specialized departments or institutions with police or prosecutorial functions

In some OSCE participating States, specialized units with law enforcement powers are institutionally integrated into existing police or prosecutorial hierarchies. Some of these perform preventive, research and co-ordination tasks that go beyond the mere law enforcement aspects of anti-corruption. Others may be entrusted with a narrower mandate of detecting and investigating corruption within the law enforcement bodies. There are also examples (Azerbaijan, Croatia, Romania) of new, “stand alone” institutions with law enforcement powers, investigating and prosecuting corruption.

#### Institutions in charge of prevention and co-ordination

This anti-corruption policy and prevention institution model is the most heterogeneous as it comprises a

great variety of structures with differing degrees of independence and organizational settings. The OECD breaks down this model into three categories:<sup>10</sup>

- *Anti-corruption inter-institutional co-ordinating councils*: Such councils are usually collegial bodies bringing together representatives from different government agencies and ministries and often also civil society to guide the anti-corruption reform efforts, in particular through a leading role in developing and overseeing implementation of the national anti-corruption strategy and action plan.
- *Dedicated corruption prevention bodies* are explicitly created for undertaking corruption prevention activities that may include co-ordination of anti-corruption strategies, corruption research, corruption risk assessment and guidance to public institutions on corruption prevention, public awareness raising and anti-corruption education and training, management and control of conflict of interest, asset declarations, political party financing,

<sup>10</sup> Ibid., pp. 40-42.



L-R Vuk Zagic, Representative of the Republic of Serbia to the OSCE, Radomir Ilic, State Secretary, Serbian Ministry of Justice, and Drago Kos, Chair of the OECD Working Group on Bribery at the OSCE Economic and Environmental Dimension Implementation Meeting, Vienna, 19 October 2015

lobbying, assessment of laws or draft bills for corruption risks.

- *Public institutions, which contribute to the prevention of corruption as part of their responsibilities* such as state audit, public procurement, taxation, public service commissions, ethics commissions, integrity offices, central election commissions, and business ombudsmen.

### 3.3 Conditions for effective anti-corruption institutions

Status, remit and institutional set-up of an anti-corruption body or bodies can and should vary from one country to another to reflect the local political, economic and social context. Institutional design should take into account the existence and role of other bodies in preventing or fighting corruption. The key institutional prerequisites identified are the following:

- **Independence and impartiality**

The institutional setting as well as the organizational structure of an anti-corruption body must permit independent and impartial work and must protect the staff of the institution from potential reprisals or fear of reprisals. In most countries, prosecutorial bodies, police bodies and institutions of the executive are generally part of an institutional set-up that places them under

the hierarchical authority of the government, a specific minister, the head of government or state, or makes them answerable to the parliament. However, what is important is operational autonomy, allowing the body to work without undue influence or interference from other authorities.

- **Accountability and integrity**

Whilst it is important to grant anti-corruption institutions operational independence as noted earlier, they nonetheless ought to be accountable for their actions; adequate internal and external oversight of their performance is important to guarantee integrity and good performance, as well as to protect them from suspicions of impropriety which may be used against them by opponents of the anti-corruption drive. Accountability mechanisms in most countries foresee that anti-corruption bodies among others are to prepare regular public activity reports.

- **Financial and human resources**

The importance of adequate financial and material resources cannot be overstated for to ensure the efficiency and effectiveness of anti-corruption institutions. The funds available for anti-corruption efforts have to be commensurate with the size of the institution and the overall performance objectives. The availability of sufficient and appropriate human resources and their stability is another key prerequisite for the performance of an anti-corruption body.

### • Recruitment, appointment and training of management and staff members

Finally, recruitment as well as appointment procedures for staff of anti-corruption agencies need to be regulated and handled transparently so as to not diminish public trust. Regular staff training is also of fundamental importance, not only due to the complexity of crimes that agencies may have to investigate but also due to the range of expertise needed to implement preventive measures.

The European Partners Against Corruption (EPAC) and the European contact-point network against corruption (EACN) have developed a set of *Standards for an Anti-Corruption Authority* with the aim of promoting transparency and independence of operations. The 10 Guiding Standards relate to the rule of law; independence; accountability; integrity and impartiality; accessibility; transparency and confidentiality; resources; recruitment, career and training; co-operation; and holistic approach to preventing and fighting corruption. These guidelines are in the nature of recommendations and are not legally binding. They are also in line with international conventions and legal instruments.<sup>11</sup>

## 3.4 Enabling the specialized body to conduct effective investigations

For those bodies/agencies with investigative powers, there are several prerequisites to an effective corruption investigation:<sup>12</sup>

- *Independent*: Corruption investigations can be politically sensitive and embarrassing to the government or generally to some powerful interests. The investigation can only be effective if it is truly independent or, at the very minimum, free from undue interference. Ensuring adequate independence can show whether there is real political will to fight corruption in the country in question.
- *Adequate investigative powers*: Because corruption is usually a secretive crime without a direct victim,

which occurs in a multiplicity of activities including business, public procurement, political financing, privatizations, it is difficult to investigate and adequate investigative powers are needed. As an example, the Hong Kong ICAC enjoys wide investigative power, such as the power to check bank accounts, requiring suspects to declare their assets, requiring witnesses to answer questions under oath, restraining properties suspected to be derived from corruption, and holding the suspects' travel documents to prevent them from fleeing the jurisdiction. With such wide powers, there must be checks and balances in place to prevent abuse, if credibility and public support is to be maintained. The Council of Europe's Group of States against Corruption (GRECO) has recommended to many countries evaluated in the first evaluation round, to improve the availability of special investigative techniques for offences related to corruption (public and private sector bribery, trading in influence, etc.): interception of communications and electronic surveillance, but also controlled delivery (of illegal payments) and – in more extreme cases – undercover operations. Use of these tools must be in accordance with the rule of law and democratic principles (legal basis, proportionality, approval by the judicial authority, etc.). The same goes for access to information held by financial institutions and other business and professions, as well as state agencies.

- *Adequate means and resources*: Investigating and prosecuting corruption can be very time-consuming and resource intensive, particularly when dealing with cross-jurisdictional corruption cases. The GRECO has often recommended improving the legal, financial, human and other means available to those dealing with corruption cases. In some instances, it was also clear that the low wages did not allow for retaining or recruiting adequate staff and that it could have adverse effects on the level of integrity within state agencies themselves.
- *Confidentiality*: It is important to protect the confidentiality of corruption investigations and prosecutions in order for them to be effective and to reduce the opportunities for interference and to respect the presumption of innocence.
- *International co-operation and mutual legal assistance*: Many complex corruption cases are transnational; it is, therefore, important that international assistance is available for, *inter alia*, following money trails, search and seizure, locating

<sup>11</sup> See European Partners Against Corruption/European contact-point network against corruption (EPAC/EACN), *Anti-Corruption Authority Standards*, 2011, and *Police Oversight Principles*, 2011, available from <http://www.epac.at/downloads/recommendations>

<sup>12</sup> See speech by KWOK Man-wai, T. SBS, IDS, Visiting Professor of the PRC National Prosecutors College and Former Head of Operations, ICAC, Hong Kong, *Activities of the Hong Kong Independent Commission Against Corruption (ICAC): Its Investigative Technique*, LAWASIA Tokyo Conference, 2003, Tokyo, Japan. Available from [http://www.kwok-manwai.com/Speeches/UNAFEI-Lawasia\\_conference\\_speech.html](http://www.kwok-manwai.com/Speeches/UNAFEI-Lawasia_conference_speech.html)

witnesses and suspects, surveillance, exchange of intelligence.

- *Professionalism*: It is key that investigators are properly and constantly trained and remain highly professional in their investigations. It is important that they have knowledge of and experience in financial investigation, analysis and forensics.

### 3.5 Measuring performance

Assessing the effectiveness of anti-corruption institutions is a complex task. Their performance should be measured against a carefully designed set of quantitative indicators (for example, statistical data on criminal proceedings, survey data) and qualitative indicators (such as expert assessments) deriving from the functions that the entity carries out. Statistical data (e.g., number of complaints received, investigations and prosecutions opened and completed, convictions achieved, administrative orders, guidelines and advice issued, laws and regulations drafted or reviewed) are objective indicators that provide valuable information. However, a note of caution in relation to such data: taken alone, it may show little about the quality of justice outcomes or governance or the actual impact of their work in terms of education, awareness raising and for example to determine whether law enforcement is generating important case results. Therefore, quantitative and qualitative indicators, including statistical data, should be complemented by regular national monitoring evaluations. They in turn may be supplemented by evaluations carried out by international bodies, such as the GRECO, the OECD Working Group on Bribery and the OECD Anti-Corruption Network for Eastern Europe and Central Asia.<sup>13</sup>

An interesting report regarding the *monitoring and evaluation of anti-corruption agencies* was published in 2011 by the anti-corruption resource centre U4.<sup>14</sup> It notably stresses the importance of improving evaluations (composition of the assessment team, methodological issues, budgetary and financial aspects) and to conduct impact assessments, and furthermore outlines essential aspects with regard to performance indicators.

### 3.6 Conclusions

To effectively prevent, investigate, prosecute and adjudicate corruption, countries need to have the appropriate legislation, institutional, and human and financial resources in place, and enforce them in practice. International instruments such as the UNCAC require States to create or ensure coordinated policies to prevent corruption, along with adequate specialization to ensure effective investigation and prosecution of corruption – whether through a specialized body or within existing law enforcement institutions. Before deciding on what type of institution(s) to establish, countries should carefully analyse their national context.

There are three main model types of anti-corruption institutions that can serve as guidance: multipurpose agencies in charge of prevention, investigation, coordination and public outreach; specialized anti-corruption law enforcement bodies within existing prosecutorial and police structures; and bodies in charge of prevention and coordination. They all have their strong points and drawbacks. However it is important to ensure that both prevention and law enforcement, i.e. investigation and prosecution, are handled by capable, well-resourced and operationally independent entities to ensure an effective response to corruption. For them to function effectively, certain important prerequisites are, sufficient political will and resources; independence and adequate authority to carry out the mandated functions; impartiality, integrity and professionalism of its staff; and transparency and accountability of its operations.<sup>15</sup> Once the institution has been put in place, its performance should be regularly monitored through an established performance measurement system including feedback from civil society.

<sup>13</sup> This part is adapted from OECD, Anti-Corruption Network for Eastern Europe and Central Asia, *Specialised Anti-corruption Institutions Review of Models*, 2006, p.8.

<sup>14</sup> See Johnson, J., Hechler, H., De Sousa, L., Mathisen, H., *How to monitor and evaluate anti-corruption agencies: Guidelines for agencies, donors, and evaluators*, 2011, U4 Anti-Corruption Resource Centre, Issue 2011:8.

<sup>15</sup> For more information on anti-corruption bodies, see also UNODC's webpage <http://www.unodc.org/unodc/en/corruption/WG-Prevention/preventive-anti-corruption-bodies.html> and the website of Anti-Corruption Authorities (ACAs) Initiative [www.acauthorities.org](http://www.acauthorities.org).

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## CHAPTER 4

# Integrity in Public Sector Management

### CONTENTS

4.1	International instruments and regional initiatives	56
4.2	Cross-cutting issues pertaining to public sector integrity	58
4.3	Guiding principles for public servants and officials	58
4.4	Prerequisites for integrity in public administration	59
4.5	Recruitment and promotion of personnel	60
4.6	Risk assessment and management of personnel	61
4.7	Access to information	62
	Selected Bibliography	64
	<i>Diagram 4.1 Integrity management instruments</i>	59

## CHAPTER 4

# Integrity in Public Sector Management

*Chapter 2 underlined the fundamental point that anti-corruption efforts should be based not only on punitive measures but also on a comprehensive strategy to underpin and maintain integrity in public life. This Chapter builds on that concept by outlining areas of intervention necessary to build public sector<sup>1</sup> integrity – thereby ensuring trust in government, good management of public resources, and prevention of corruption. It highlights the roles of guiding principles of public service and senior leadership in communicating integrity and professionalism. It addresses the question of risk assessment of government sectors and functions to establish their vulnerability to corruption and what steps can be taken to mitigate these risks. Attention is also paid to the role of staff recruitment and appointment in developing a public service that serves the public interest.*



An image which highlights the many issues involved in the prevention of corruption and building integrity

## 4.1 International instruments and regional initiatives

In the last two decades, issues related to the integrity of the public sector have increasingly come under the scanner.

Chapter II of the United Nations Convention against Corruption (UNCAC) contains several provisions on different aspects of public sector integrity. Article 7 (4) touches upon prevention of conflict of interest, a matter that is also addressed in Article 8. Article 8 also contains provisions on (i) codes of conduct for public officials (no distinction is made between elected or non-elected public officials) and (ii) asset declarations; the subject of asset declarations is also addressed in Article 52 (5) in the context of asset recovery. Articles 9, 10, 11 and 13 deal with public procurement and management of public finances; public reporting; integrity of the judiciary; and participation of civil society in the prevention of, and fight against, corruption.

<sup>1</sup> 'Public sector' definition may differ by country and organization. Usually, this term refers to national, regional and local governments; institutional units controlled by government units; and their employees. It comprises the three branches of government: executive, legislative and judicial.

The OECD was among the first organizations to conduct extensive research into and identify the prerequisites for, and essential means to achieve, public sector integrity.<sup>2</sup> It has further helped to develop standards for codes of conduct and ethics, conflict of interest regulation, and asset declaration regimes.

The Council of Europe addressed the integrity of public administration dealing with the transparency of the decision-making process in particular, which is emphasized in the Twenty Guiding Principles for the Fight against Corruption. Moreover, the Committee of Ministers of the Council of Europe issued a comprehensive recommendation on codes of conduct for public officials in 2000, comprising *inter alia* provisions on management of conflicts of interest and asset declarations, and the issue of dealing with gifts received in the course of duty.<sup>3</sup> The Committee of Ministers also approved numerous recommendations to

<sup>2</sup> See, for instance, OECD, *Towards a Sound Integrity Framework: Instruments, Processes, Structures and Conditions for Implementation*, GOV/PGC/GF (2009)1, Background paper, Global Forum on Public Governance. Available from [http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?doclanguage=en&cote=GOV/PGC/GF\(2009\)1](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?doclanguage=en&cote=GOV/PGC/GF(2009)1)

<sup>3</sup> See Council of Europe, *Recommendation No. R (2000) 10 of the Committee of Ministers to Member states on codes of conduct for public officials*, 2000. Available from [https://www.coe.int/t/dghl/monitoring/greco/documents/Rec\(2000\)10\\_EN.pdf](https://www.coe.int/t/dghl/monitoring/greco/documents/Rec(2000)10_EN.pdf)

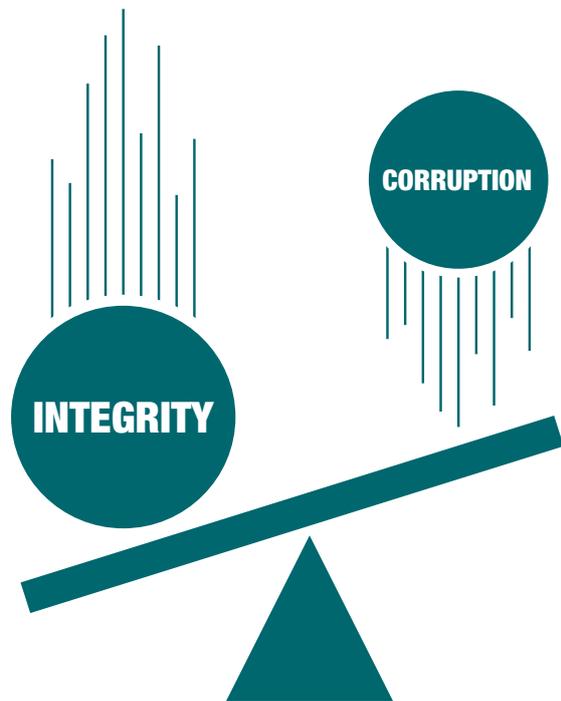
promote the integrity and efficiency of judiciaries and law enforcement bodies.

The various legal instruments and standards of the Council of Europe are subject to monitoring by the Group of States Against Corruption (GRECO), which has been involved in analysing public sector integrity provisions (Second Evaluation Round, 2003-2005), assessing the transparency of political party financing (Third Evaluation Round, 2007-2011) and corruption prevention in respect of members of parliament, judges and prosecutors (Fourth Evaluation Round, as from 2012).

As part of its good governance work, the OSCE has also addressed integrity matters related to the political and the judicial landscapes. The OSCE has in fact taken a leading role in analysing and assessing election-related topics such as political financing, given its long-standing and somewhat unique role as an electoral observer.

The Core Group of Experts on Political Parties,<sup>4</sup> established in 2011, has further raised the OSCE's profile in this subject matter. Moreover, the OSCE's Office for Democratic Institutions and Human Rights (ODIHR) has been active on the issue of public sector integrity and has drafted, for instance, recommendations on judicial independence in Eastern Europe, the South Caucasus and Central Asia in co-operation with the Minerva Research Group of the Max Planck Institute

<sup>4</sup> See [www.osce.org/odihr/83683](http://www.osce.org/odihr/83683)



in Heidelberg.<sup>5</sup> ODIHR has also published *Background Study: Professional and Ethical Standards for Parliamentarians*.<sup>6</sup>

Global and regional efforts to enhance public sector integrity have also received a boost with the endorsement of initiatives such as the Open Government Partnership launched in 2011.<sup>7</sup>

<sup>5</sup> See OSCE/ODIHR, *Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia*, 2010. Available from <http://www.osce.org/odihr/KyivRec?download=true>

<sup>6</sup> See OSCE/ODIHR, *Background Study: Professional and Ethical Standards for Parliamentarians*, 2013. Available from <http://www.osce.org/odihr/98924>

<sup>7</sup> More details about this initiative are to be found in the *Open Government Partnership: Four Year Strategy 2015-2018* (2014) in Section IV dealing with Transparency, Accountability and Public Participation.

## UNCAC on codes of conduct for public officials

### Article 7. Public sector

7 (4) Each State Party shall, in accordance with the fundamental principles of its domestic law, endeavour to adopt, maintain and strengthen systems that promote transparency and prevent conflicts of interest.

### Article 8. Codes of conduct for public officials

1. In order to fight corruption, each State Party shall promote, inter alia, integrity, honesty and responsibility among its public officials, in accordance with the fundamental principles of its legal system.
2. In particular, each State Party shall endeavour to apply, within its own institutional and legal system, codes or standards of conduct for the correct, honourable and proper performance of public functions.
3. [...]
4. Each State Party shall also consider, in accordance with the fundamental principles of its domestic law,

establishing measures and systems to facilitate the reporting by public officials of acts of corruption to appropriate authorities, when such acts come to their notice in the performance of their functions.

5. Each State Party shall endeavour, where appropriate and in accordance with the fundamental principles of its domestic law, to establish measures and systems requiring public officials to make declarations to appropriate authorities regarding, inter alia, their outside activities, employment, investments, assets and substantial gifts or benefits from which a conflict of interest may result with respect to their functions as public officials.
6. Each State Party shall consider taking, in accordance with the fundamental principles of its domestic law, disciplinary or other measures against public officials who violate the codes or standards established in accordance with this article.

Source: [www.unodc.org/unodc/en/treaties/CAC/](http://www.unodc.org/unodc/en/treaties/CAC/)

## OSCE on public sector integrity

The Foreign Ministers of the OSCE participating States have also recognized the importance of public sector integrity in their Ministerial Council Declaration on Good Governance (Dublin, 2012):

“[...] We view a public sector based on integrity, openness, transparency, accountability and rule of law as being a major factor of sustainable economic growth, and recognize that such a public sector constitutes an important element for fostering citizens’ trust in public institutions and government. Thus, we underline the importance of providing education and training on ethical behavior for public officials, establishing and enforcing relevant codes of conduct and conflict-of-interest legislation, and adopting and implementing comprehensive

income- and asset-disclosure systems for relevant officials. In particular, we recognize that both the development of and adherence to codes of conduct for public institutions are critical to reinforcing good governance, public-sector integrity and the rule of law, and to providing rigorous standards of ethics and conduct for public officials.

We welcome the support the OSCE and its field operations have already provided in this regard and call on them to continue providing their valuable assistance to participating States upon their request, also in sharing among themselves, through the OSCE platform for dialogue, national experiences gained and good practices. [...]”

(full text can be downloaded from <http://www.osce.org/cio/97968>)

Non-governmental organizations, such as Transparency International (TI), have also been active in promoting public sector integrity. Remaining weaknesses in public sector integrity at the national level have been illustrated, for example, by the TI assessment of anti-corruption policies and institutions in 25 European States (*Money, Politics, Power: Corruption risks in Europe*, 2012), conducted with the financial support of the European Commission.<sup>8</sup>

## 4.2 Cross-cutting issues pertaining to public sector integrity

Integrity among public officials and institutions is the backbone of a democratic society. Public sector integrity constitutes a critical element for fostering citizens’ trust in public institutions and government and is also of utmost importance in the context of corruption prevention. Whilst at first sight public integrity measures primarily target the behaviour of individuals working in and/or representing the public sector, their ultimate goal is to help establish an effective public service fully responsive to the needs of citizens.

The many elements of public sector integrity targeting the behaviour of individuals (such as codes of conduct and other behavioural standards, conflict of interest regulations, asset declaration regimes, recruitment and appointment procedures) are interlinked, and actual integrity is based on their fruitful interplay. To ensure integrity in the public sector, enforceable regulations and laws on the one hand, and administrative procedures and institutional integrity mechanisms on the other,

need to be in place, taking into consideration possible integrity risks.

Provisions regarding public sector integrity apply to all public officials. Codes of conduct are a key tool to fostering integrity in the public service. Additional targeted measures may be taken for specific actors and institutions that are particularly exposed to corruption risks. Specific transparency measures can also be applied to elected public officials and to political parties (especially with regard to political financing) as well as to senior ranking public officials or members of the executive. Similarly, special measures may apply to certain public institutions that are either at the heart of the enforcement of integrity and anti-corruption standards, such as the judiciary and law enforcement agencies and anti-corruption agencies, or to public institutions that are particularly prone to corruption, such as those involved in public procurement or customs administration, and offices for business licences. Transparent and merit-based recruitment and appointment procedures are also crucial.

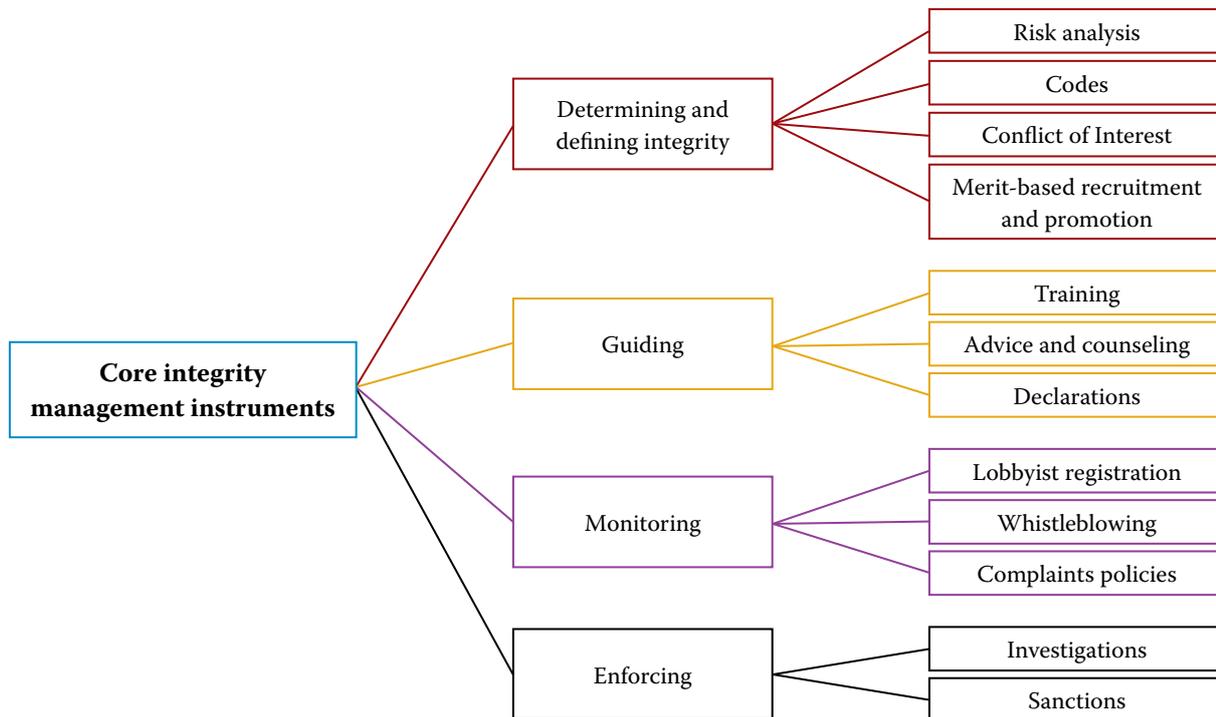
## 4.3 Guiding principles for public servants and officials

The United Nations General Assembly (GA) and the Economic and Social Council (ECOSOC) have adopted a number of resolutions and decisions promoting the integrity, transparency, accountability, responsiveness, efficiency and effectiveness in the public administration, including a multi-stakeholder approach, citizen engagement, e-government, etc.<sup>9</sup>

<sup>8</sup> Please see [www.transparency.org/enis/report](http://www.transparency.org/enis/report)

<sup>9</sup> For more details see <https://publicadministration.un.org/en/About-Us/Mandates>

Diagram 4.1 Integrity management instruments



Source: the figure is slightly adapted but mainly based on the OECD, *Integrity in Government: Towards Output and Outcome Measurement*, 2009, Figure 5, p.17.

The Organisation for Economic Co-operation and Development's (OECD) set of 12 principles for managing ethics in the public service, adopted by its Council in 1998, represents another good example. They identify the functions of guidance, management or control against which integrity management systems can be checked.<sup>10</sup> The principles cover the four main functions of integrity management systems: determining and defining integrity, guiding towards integrity, monitoring integrity, and enforcing integrity. Fully described in *Trust in Government: Ethics Measures in OECD Countries*,<sup>11</sup> the principles serve as an instrument for policy makers to help them to review the functionality of the elements of their integrity management systems (instruments, processes and actors). The OECD conducts *Integrity Framework Reviews* and provides comparative cross-country data to assist the countries in the implementation of the principles.

At a national level, a useful example of formulating a public statement as to what is expected from the public administration is the First Report of the United

Kingdom's Committee for Standards in Public Life<sup>12</sup> (the 'Nolan Report', after its Chairman, Lord Nolan). It established *The Seven Principles of Public Life*, also known as the 'Nolan Principles' (see Box 5.3 in Chapter 5); these are now included in, for instance, the Code for the ministers of the United Kingdom Government.

## 4.4 Prerequisites for integrity in public administration

To develop a public administration reflective of integrity standards such as the 'Nolan Principles', a number of essential prerequisites need to be in place. The *senior leadership* should communicate the importance of integrity, professionalism and dedication to delivering the best of service to the public in an impartial, effective and lawful manner.

<sup>10</sup> See OECD, *Recommendation of the Council on Improving Ethical Conduct in the Public Service Including Principles for Managing Ethics in the Public Service*, 1998. Available from <http://acts.oecd.org/Instruments/ShowInstrumentView.aspx?InstrumentID=129&InstrumentPID=125&Lang=en&Book=>

<sup>11</sup> See OECD, *Trust in Government: Ethics Measures in OECD Countries*, 2000. Available from <http://www.oecd.org/corruption/ethics/48994450.pdf>

<sup>12</sup> UK Parliament, Committee on Standards in Public Life, *Guidance: The 7 principles of public life*, 1995. Available from <https://www.gov.uk/government/publications/the-7-principles-of-public-life>

In developing integrity principles and values, it is important that public institutions take into consideration not only the legal but also the historical, cultural and traditional values prevailing in the society.

The *guidelines for public institutions* need to be based on international standards, good governance principles, and commonly understood values and principles. These values should be politically neutral and applicable beyond any change of government. Codes of conduct and other documents related to behaviour and expected standards among government agencies and those individuals or organizations which work with government agencies should be widely disseminated. *Training* for and *guidance* to public sector employees on how to use the code of conduct to make ethical decisions is also important, as are positive incentives for compliance. Furthermore, the code of conduct should be non-partisan in nature and contain standards that any employee, whatever his or her political beliefs, can support. Lastly, efficient and relevant *accountability mechanisms* need to be put in place to ensure compliance with, and maintenance of, high governance standards.

The complexity of the task of entrenching integrity in public administration is well illustrated in the integrity management Diagram 4.1 on the previous page.

## 4.5 Recruitment and promotion of personnel

Recruitment, selection and promotion of personnel have a critical role in public sector integrity. Honest, motivated and skilled individuals must be identified, engaged and retained to create a public administration in which integrity and professionalism are the norm and the expectation. This is also acknowledged by the UNCAC in Article 7 on the public sector.

No institution can be expected to perform with professionalism in the absence of qualified and motivated personnel. Therefore, a State should consider whether a centralized office or other body, such as a public services commission, should be established to handle or provide guidance on recruitment, employment and promotion procedures in the public sector. Such a body might also take responsibility for issuing guidance and possible oversight for recruitment procedures at the local level. To ensure the integrity of the public administration, the objectivity of the selection procedures and the integrity of applicants for public sector posts must be



the highest priority; cronyism and nepotism must be safeguarded against.

Thus, ministries, departments, or public bodies should put in place:

- Detailed job descriptions for all posts, with stated requirements and qualifications;
- Open advertising of posts and agreed recruitment procedures;
- Entrance exams/interviews which are fair and equitable;
- Proper training and career development;
- Remuneration and benefits commensurate with staff posts;
- Annual evaluation of pay scales taking into account cost-of-living increases and pay for comparable posts in the private sector;
- Other financial/in kind benefits that are available and practicable (e.g., vacation and sick leave);
- Annual performance appraisals to determine effectiveness and promotion.

Each ministry or other public entity should maintain accurate personnel records for all recruitment, promotion and other staffing issues.

This approach should be equally applied to senior management in public institutions. In addition, senior officials must be made responsible for the compliance of their staff with training requirements and with anti-corruption rules. Performance indicators should reflect this.

### Vulnerable/Sensitive Posts and Vetting

In putting the above principles into practice, it may be necessary to adopt extra checks and safeguards in

## UNCAC on personnel policies

### Article 7. Public sector

1. Each State Party shall, where appropriate and in accordance with the fundamental principles of its legal system, endeavour to adopt, maintain and strengthen systems for the recruitment, hiring, retention, promotion and retirement of civil servants and, where appropriate, other non-elected public officials:

- That are based on principles of efficiency, transparency and objective criteria such as merit, equity and aptitude;
- That include adequate procedures for the selection and training of individuals for public positions considered especially vulnerable to corruption and the rotation,

where appropriate, of such individuals to other positions;

- That promote adequate remuneration and equitable pay scales, taking into account the level of economic development of the State Party;
- That promote education and training programmes to enable them to meet the requirements for the correct, honourable and proper performance of public functions and that provide them with specialized and appropriate training to enhance their awareness of the risks of corruption inherent in the performance of their functions. Such programmes may make reference to codes or standards of conduct in applicable areas. [...]

Source: [www.unodc.org/unodc/en/treaties/CAC/](http://www.unodc.org/unodc/en/treaties/CAC/)

relation to sensitive or vulnerable posts and positions. Such positions as well as functions should be identified and documented, and contingency plans should be in place ahead of time. The individuals affected are likely to be those:

- Inspecting, regulating or monitoring the standards of premises, businesses, equipment or products.
- Issuing qualifications or licences to individuals to indicate their proficiency or enable them to undertake certain types of activities.
- Receiving payments.
- Allocating public fund grants.
- Providing assistance or care to the vulnerable or disabled.

The United Nations Office on Drugs and Crime (UNODC) has addressed this in the *UNCAC Technical Guide*<sup>13</sup> and provides useful guidance:

“Parties will recognise that certain posts or activities may be more susceptible to corruption. These will require a higher level of assurance against misuse and it is important to identify the organisational vulnerabilities and procedures that need to be addressed (sometimes termed “corruption-proofing”). The institution [...] possibly in conjunction with the body or bodies identified in Article 6 (anti-corruption body), should consider conducting an audit to:

- Determine which public positions or activities are particularly vulnerable to corruption;
- Analyse vulnerable sectors; and

- Prepare a report addressing the assessments and specific risks within vulnerable sectors, with consequential proposals to deal with them.

Recommendations or proactive measures may include: pre-appointment screening of successful candidates (ensuring that the potential appointee has already demonstrated high standards of conduct); specific terms and conditions of service for successful candidates; procedural controls, such as benchmarking performance, or the rotation of staff, as means of limiting inducements to and effects of corruption arising from protracted incumbency. Management should also introduce specific support and oversight procedures for public officials in positions that are especially vulnerable to corruption, including regular appraisals, confidential reporting, registration and declaration of interests, assets, hospitality and gifts, as well as efficient procedures to regularly monitor the accuracy of the declarations. [...]

For many jurisdictions, vetting ranges from the most straightforward of checks to a stringent evaluation of personal history and an assessment of ‘risk’, with a spectrum of other standards of ‘clearance’ in between.

## 4.6 Risk assessment and management of personnel

Most of the measures that are taken in creating an ethical public administration require the assessment and management of risk: corruption cannot be prevented and addressed effectively unless the nature of the corruption risk is ascertained. Public bodies therefore

<sup>13</sup> See UNODC, *Technical Guide to the United Convention against Corruption*, 2009, discussion of Article 7, p.15, available from [www.unodc.org/documents/corruption/Technical\\_Guide\\_UNCAC.pdf](http://www.unodc.org/documents/corruption/Technical_Guide_UNCAC.pdf) Similar

need to undertake a risk assessment in the public sector to determine which sector (for example, education or healthcare), institution (such as a ministry) and positions are particularly vulnerable to corruption, and should identify factors that may be causing, contributing or facilitating corruption.

Such an assessment of a public sector institution may focus on its organization, management, procedures, decision-making process, specific practices and personnel issues. It should be complemented by an assessment of the actual incidence of corruption in the institution, which would help to determine the factors that cause such corruption. Corruption risk factors can be further identified by an analysis and screening of aspects including:

- Organizational role and structure;
- Budget;
- Procedures and decision-making processes;
- Transparency;
- Accountability mechanisms;
- Access to information;
- Record keeping;
- Human resources management;
- Ethics and integrity framework;
- Complaints mechanisms;
- Disciplinary procedures and sanctions;
- Training;
- Vulnerable areas;
- Anti-corruption policies.

Once risk factors have been identified, measures must be taken to address them through anti-corruption strategies, plans and tools.

Risk management tools used by compliance/control units, human resources/training departments and line management include:

- Recruitment, contracting and procurement strategies;
- Codes of conduct and conflict of interest rules including dialogues across grades and ranks, to build a culture of integrity;
- Information technology management rules and procedures;
- Audit procedures;
- Data gathering on corruption information;
- Whistleblowing and complaints policies;
- Enforcement procedures and action.

In personnel management, each entity should consider implementing a number of proactive employment

related measures in addition to the aforementioned recruitment/selection/vetting procedures, such as:

- Procedural controls. For example, benchmarking performance expected of vulnerable posts, or the rotation of staff.
- Oversight procedures for employees in positions that are especially vulnerable to corruption. For example, using a system of multiple-level review and approval for certain decisions rather than having a single individual with sole authority over decision making. This is particularly important for procurement contracts valued above pre-determined amounts; for hiring/recruitment decisions for sensitive/vulnerable positions such as security and procurement officers, employees of licensing, regulatory, or enforcement bodies, public safety, and for positions above pre-determined salary levels.

Public officials and contractors should have their individual awareness of 'corruption risk' raised through guiding activities such as:

- Courses on professional ethics and conduct (not only upon recruitment but also as part of in-service training and especially for the posts most exposed to risks of corruption).
- Information on rights and duties, and on the risks of corruption or malpractice attached to the performance of their functions should be provided.
- Counseling and advice on practical job related questions and on how to avoid compromising one's values and corruption related situations.
- Training on their role and responsibilities in information security management.
- Regular information on the organization's internal reporting policy, its internal and external reporting channels, its complaints mechanisms and how they work.

## 4.7 Access to information

Given the importance of providing transparency in public administration, States should ensure that the public has access to information. The introduction of a freedom of information law is a key step in this direction. Such a law should be predicated on the premise that the public has a general right of access to government records and on the principle of maximum disclosure. While certain limitations will apply, these exceptions to the general right should be as narrowly drawn as possible and comply with the proportionality and public interest

## UNCAC on public reporting and participation of society

### **Article 10. Public reporting**

Taking into account the need to combat corruption, each State Party shall, in accordance with the fundamental principles of its domestic law, take such measures as may be necessary to enhance transparency in its public administration, including with regard to its organization, functioning and decision-making processes, where appropriate. Such measures may include, inter alia:

- (a) Adopting procedures or regulations allowing members of the general public to obtain, where appropriate, information on the organization, functioning and decision-making processes of its public administration and, with due regard for the protection of privacy and personal data, on decisions and legal acts that concern members of the public;
- (b) Simplifying administrative procedures, where appropriate, in order to facilitate public access to the competent decision-making authorities; and

- (c) Publishing information, which may include periodic reports on the risks of corruption in its public administration.

### **Article 13. Participation of society**

- 1. (b) Ensuring that the public has effective access to information;
- 1. (d) Respecting, promoting and protecting the freedom to seek, receive, publish and disseminate information concerning corruption. The freedom may be subject to certain restrictions, but these shall only be such as are provided for by law and are necessary:
  - (i) For respect of the rights or reputations of others;
  - (ii) For the protection of national security or *ordre public* or of public health or morals.

Source: [www.unodc.org/unodc/en/treaties/CAC/](http://www.unodc.org/unodc/en/treaties/CAC/)

tests. To elaborate, any restriction should be a necessary measure, should not go further than required to protect a legitimate interest (e.g., defence, national security, international relations, commercial confidentiality and individual privacy) and should apply only if there is a specific and substantial risk of harm to such interest that outweighs the public interest in disclosure.

The UNCAC has, in Articles 10 and 13, clearly stated that citizens should be given the means and the material to understand the workings of public administrations, and should therefore have access to information on the decisions made by public officials. Additionally, institutions of the State should publish regular reports on their work, including details of corruption risks and how those are addressed.

Citizens must be in a position to ascertain and verify what the administration is doing on their behalf; this should have the effect of enhancing their trust in public institutions.

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## CHAPTER 5

# Codes of Conduct

### CONTENTS

5.1	International requirements	66
5.2	Scope and nature of codes	67
5.3	Contents of codes/standards	68
5.4	Codes in operation	70
5.5	Sanctions	71
5.6	Oversight	72
	<b>Selected Bibliography</b>	<b>72</b>
<i>Box 5.1</i>	<i>OECD Principles for Managing Ethics in the Public Service</i>	67
<i>Box 5.2</i>	<i>Poland's Code of Ethics</i>	67
<i>Box 5.3</i>	<i>The Seven Core Principles developed by the UK Independent Committee on Standards in Public Life</i>	69
<i>Box 5.4</i>	<i>Standards of behaviour and Codes of conduct according to the Technical Guide to the UNCAC</i>	69
<i>Box 5.5</i>	<i>The Council of Europe Model Code</i>	70
<i>Box 5.6</i>	<i>Australia: specific legislation on ethical conduct in public management</i>	71
<i>Box 5.7</i>	<i>The United States Office of Government Ethics</i>	72

## CHAPTER 5

# Codes of Conduct

*Standards of conduct serve to establish expectations and requirements of professional conduct of public officials. They set out fundamental behavioural standards and ethical principles to be respected by the concerned persons and help ensure an ethical public administration. The need for standards to guide the behaviour of civil servants in central government has long been understood. While the way in which standards are best formulated will vary across different administrative and legal cultures, codes of conduct have become increasingly recognized as an international good practice for establishing standards for all categories of public office holders, whether elected or appointed, or working in central or local government.*

*This Chapter sets out the main developments of relevance to the OSCE participating States in international and regional standards relating to codes of conduct. It then sets out the main areas to be considered when developing codes of conduct for public officials, namely formulation of content, effective implementation criteria, sanctions when in breach of the code and oversight arrangements.*

### 5.1 International requirements

At the international level, the United Nations Convention against Corruption (UNCAC) states that each State Party should “endeavour to apply, within its own institutional and legal systems, codes or standards of conduct for the correct, honourable and proper performance of public functions.”<sup>1</sup> The United Nations approved an International Code of Conduct for Public Officials as a recommendation to Member States in 1996.<sup>2</sup> With its 20 guiding principles for the fight against corruption, approved in 1997, the Council of Europe’s (CoE) resolved “to ensure that the rules relating to the rights and duties of public officials take into account the

requirements of the fight against corruption and provide for appropriate and effective disciplinary measures; promote further specification of the behaviour expected from public officials by appropriate means, such as codes of conduct.”<sup>3</sup> This was later elaborated in the landmark 2000 recommendation of the CoE Committee of Ministers on codes of conduct for public officials, which includes a more developed Model Code of Conduct for Public Officials.<sup>4</sup>

The CoE’s Group of States Against Corruption (GRECO) monitored the extent to which adequate rules of conduct were in place in its member States in its second evaluation round, as well as in the current fourth round (for parliamentarians and judges).<sup>5</sup> The second round evaluation approach embraced a broad concept of ‘public official’ as comprising of the staff of all public sector services – that is, all staff who engage in an activity within the administration in a permanent or temporary capacity, whether or not exercising actual prerogatives of state authority, and whether elected or appointed. Other international conventions, such as the UNCAC, go into the same direction and interpret the term public official as wide as possible (Article 2 (a) of the UNCAC). GRECO further aimed to verify *inter alia* whether: all public officials, and not only statutory staff coming under the civil service regulations (‘civil servants’), are subject to proper provisions for preventing, reporting and punishing improper conduct; and that there are appropriate rules in place on basic requirements of conduct requirements (such as impartiality, neutrality and professionalism) as well as on specific issues such as managing conflicts of interest, regulating secondary occupations and post-service employment opportunities (so-called ‘revolving doors’), and responding ethically to gifts or improper offers.

1 See UNCAC, Article 8 (2).

2 See General Assembly Resolution 51/59 of 12 December 1996. Further information on it can be found in the introduction of the UNCAC *Travaux Préparatoires*, available from [http://www.unodc.org/documents/treaties/UNCAC/Publications/Travaux/Travaux\\_Preparatoires\\_-\\_UNCAC\\_E.pdf](http://www.unodc.org/documents/treaties/UNCAC/Publications/Travaux/Travaux_Preparatoires_-_UNCAC_E.pdf)

3 See Council of Europe Resolution (97) 24 *On the Twenty Guiding Principles for the Fights against Corruption*, available from [www.coe.int/t/dghl/monitoring/greco/documents/Resolution\(97\)24\\_EN.pdf](http://www.coe.int/t/dghl/monitoring/greco/documents/Resolution(97)24_EN.pdf)

4 See Council of Europe, *Recommendation No. R (2000) 10 of the Committee of Ministers to Member states on codes of conduct for public officials*, available from [www.coe.int/t/dghl/monitoring/greco/documents/Rec\(2000\)10\\_EN.pdf](http://www.coe.int/t/dghl/monitoring/greco/documents/Rec(2000)10_EN.pdf)

5 See individual country reports and general discussion in the *Sixth General Activity Report of GRECO*, 2005, available from [www.coe.int/t/dghl/monitoring/greco/documents/2006/Greco\(2006\)1\\_EN.pdf](http://www.coe.int/t/dghl/monitoring/greco/documents/2006/Greco(2006)1_EN.pdf)

### Box 5.1 OECD Principles for Managing Ethics in the Public Service

1. Ethical standards for public service should be clear.
2. Ethical standards should be reflected in the legal framework.
3. Ethical guidance should be available to public servants.
4. Public servants should know their rights and obligations when exposing wrongdoing.
5. Political commitment to ethics should reinforce the ethical conduct of public servants.
6. The decision-making process should be transparent and open to scrutiny.
7. There should be clear guidelines for interaction between the public and private sectors.
8. Managers should demonstrate and promote ethical conduct.
9. Management policies, procedures and practices should promote ethical conduct.
10. Public service conditions and management of human resources should promote ethical conduct.
11. Adequate accountability mechanisms should be in place within the public service.
12. Appropriate procedures and sanctions should exist to deal with misconduct.

Source: OECD, *Recommendation of the Council on Improving Ethical Conduct in the Public Service Including Principles for Managing Ethics in the Public Service*, 1998, available from <http://acts.oecd.org/Instruments/ShowInstrumentView.aspx?InstrumentID=129&InstrumentPID=125&Lang=en&Book=>

### Box 5.2 Poland's Code of Ethics

Since 2002, Poland has a Code of Ethics for the Civil Service. It is composed of five articles which refer to four principles: reliability, professionalism (competence), neutrality and political impartiality. While the Act on Civil Service contains provisions imposing a certain number of rules of conduct, and related sanctions, the Code is not legally enforceable. The Polish authorities underline nevertheless that any flagrant infringement of the Code,

being a violation of the provisions of the Act at the same time, may not only lead to a negative opinion regarding the civil servant, but also to the application of disciplinary penalties. There are also specific codes of ethics for Internal Auditors and Customs Service.<sup>7</sup> In addition, Poland has introduced a set of ethical standards in respect of Members of Parliament, judges and prosecutors (including adoption of a collection of ethical principles for prosecutors).<sup>8</sup>

Codes of conduct should be based on fundamental principles. In 1998, the OECD published broad principles for ethical conduct within public administrations, *Principles for Managing Ethics in the Public Service* (see Box 5.1). These principles should guide the formulation of codes and the main areas they cover.

## 5.2 Scope and nature of codes

The way in which standards of conduct are codified may vary in several respects. Some OSCE participating States have opted for “minimal legislative intervention and an essentially voluntary code of conduct”<sup>6</sup> (as in the United Kingdom), whereas some other OSCE participating States with a Civil Law system and an administrative law tradition are more likely to have incorporated behavioural rules into existing administrative laws or other legislation (France, Germany, Spain, to give only some examples). There are also significant differences between these sub-groups – Germany, for example, also has a Federal Code of Conduct that is more in the



Multimedia guide on the code of conduct for local officials produced by the OSCE Mission to Serbia

nature of guidance and is distinct from behavioural rules codified in administrative law.

In addition, the following key points may be made concerning the scope and nature of codes:

<sup>6</sup> See Hine D., *Codes of Conduct for Public Officials in Europe: Common Label, Divergent Purposes*, *International Public Management Journal*, 2005, 8 (2), pp. 153-174.

<sup>7</sup> See GRECO, *Second Evaluation Round: Evaluation Report on Poland*, 2004, available from [www.coe.int/t/dghl/monitoring/greco/evaluations/round2/GrecoEval2\(2003\)6\\_Poland\\_EN.pdf](http://www.coe.int/t/dghl/monitoring/greco/evaluations/round2/GrecoEval2(2003)6_Poland_EN.pdf)

<sup>8</sup> See GRECO, *Fourth Evaluation Round: Corruption prevention in respect of members of parliament, judges and prosecutors: Evaluation Report, Poland*, 2012, available from [http://www.coe.int/t/dghl/monitoring/greco/evaluations/round4/GrecoEval4\(2012\)4\\_Poland\\_EN.pdf](http://www.coe.int/t/dghl/monitoring/greco/evaluations/round4/GrecoEval4(2012)4_Poland_EN.pdf)

First, it is preferable, for ease of understanding, that a code is drafted in language that is understandable to the layman, rather than the legal language of a statute. It should also be relatively easy to update codes when need be, which argues against the use of a statute.

Second, while the positive element of a code as a model for conduct should generally be the main one, at times it will be necessary to enforce codes. Even if a code is not binding or sanctionable in a legal sense, it may be made so practically by including it as a part of an official's terms and conditions of service. Disciplinary action (e.g., through proportionate and dissuasive sanctions) should be possible in cases of violations of a code; clearly, how this is regulated will vary depending on the country context (see also Section 5.5 on sanctions).

Third, codes should be tailored specifically for the categories of officials to whom they are to apply. The rules/standard for Ministers will not be exactly the same as those for civil servants, judges, Members of Parliament or political advisers. Also, different sectors of government (for example those handling large contracts or dealing with highly sensitive information) may have special requirements and therefore need codes tailored to their circumstances. However, there are certain basic points that should be unchangeable across a country's codes, and this is where the fundamental points on corruption prevention should appear. One possibility is to incorporate these fundamental points in a central code or law that has a more permanent status than the local codes.

## 5.3 Content of codes/standards

In addition to the general points relating to the content of codes made above, the following specific areas may or should be covered:

- Conflicts of interest, including provisions on employment after leaving public service, declaration of offers/gifts and specifically reaction to improper offers. Conflict of interest provisions would generally cover the management of potential financial and non-financial conflicts of interest, restrictions on external business or other activities.
- Disclosure of assets
- Restrictions on political activity
- Handling of confidential information
- Abuse of office and/or/including corruption

- Codes may establish the moral obligation of officials to report evidence of unlawful activity (see e.g., CoE Model Code 12.5). Where they do, it is essential that proper channels for reporting and protections for those doing so are in place (see, for example, UNCAC Article 8 (4), CoE Model Code 12.6).

In the United Kingdom, the Independent Committee on Standards in Public Life has developed seven core values for public officials, these being selflessness, integrity, objectivity, accountability, openness, honesty and leadership. These were recently reviewed and combined, in the 2010 United Kingdom Civil Service Code, into just four core principles, namely integrity, honesty, objectivity and impartiality, though both the original and the revised set of values remain highly relevant when seen in light of the guidelines in the *Technical Guide to the United Nations Convention against Corruption*.

The codes of other OSCE countries also reflect similar values, including those of Canada (Values and Ethics Code for the Public Sector, 2005), Denmark (Good Conduct in the Public Sector), Greece (Code of Civil Servants, 1999), Italy (Code of Conduct for Government Employees, 2001), Norway (Ethics Guidelines for the State Service, 2005), Poland (Code of Ethics for the Civil Service 2002), Spain (Code of Good Governance, 2005) and the United States (Standards of Ethical Conduct for Employees of the Executive Branch, 2002). Yet, not all of these codes have legal force as such, but become enforceable as they are linked to labour contracts. Thus, they could be viewed as expressing the "will of the profession" (Denmark, Norway).<sup>9</sup>

Two possible components of codes (provisions on misuse of position and on migration to the private sector) are discussed below, to elaborate the types of provision that are needed and how these are reflected in international standards.

### Example 1: Misuse of position

While the core purpose of codes of conduct is naturally to establish positive standards of conduct and highlight values and principles, they may also reiterate or elaborate certain prohibitions. Article 21 of the Council of Europe Model Code makes a general provision forbidding a public official from offering or giving any advantage in any way connected with his or her position, unless lawfully authorized to do so; and from seeking to influence for private purposes any person or

<sup>9</sup> See OECD, *Asset Declarations for Public Officials: A Tool to Prevent Corruption*, 2011, p. 35.

### Box 5.3 The Seven Core Principles developed by the UK Independent Committee on Standards in Public Life

**SELFLESSNESS.** Holders of public office should act solely in terms of the public interest. They should not do so in order to gain financial or other material benefits for themselves, their family, or their friends.

**INTEGRITY.** Holders of public office should not place themselves under any financial or other obligation to outside individuals or organizations that might seek to influence them in the performance of their official duties.

**OBJECTIVITY.** In carrying out public business, including making public appointments, awarding contracts, or recommending individuals for rewards and benefits, holders of public office should make choices on merit.

**ACCOUNTABILITY.** Holders of public office are accountable for their decisions and actions to the public and must submit themselves to whatever scrutiny is appropriate to their office.

**OPENNESS.** Holders of public office should be as open as possible about all the decisions and actions that they take. They should give reasons for their decisions and restrict

information only when the wider public interest clearly demands.

**HONESTY.** Holders of public office have a duty to declare any private interests relating to their public duties and to take steps to resolve any conflicts arising in a way that protects the public interest.

**LEADERSHIP.** Holders of public office should promote and support these principles by leadership and example.

These principles apply to anyone who works as a public office-holder. This includes all those who are elected or appointed to public office, nationally and locally, and all people appointed to work in the civil service, local government, the police, courts and probation services, and in the health, education, social and care services. The principles also have application to all those in other sectors delivering public services.

*Source:* [www.public-standards.gov.uk/about-us/what-we-do/the-seven-principles/](http://www.public-standards.gov.uk/about-us/what-we-do/the-seven-principles/)

### Box 5.4 Standards of behaviour and Codes of conduct according to the Technical Guide to the UNCAC

- (i) Serving the public interest;
- (ii) Serving with competence, efficiency, respect for the law, objectivity, transparency, confidentiality and impartiality, and striving for excellence;
- (iii) Acting at all times in such a way as to uphold the public trust;

- (iv) Demonstrating respect, fairness and courtesy in their dealing with both citizens and fellow public officials.

*Source:* UNODC, *Technical Guide to the United Nations Convention against Corruption*, 2009, p. 21.

body by using his or her official position. It is useful to have a catch-all provision like this to cover potentially corrupt acts that are so minor or ill-defined that they do not merit the attention of the criminal law.

#### Example 2: Migration to the private sector (pantouflage/'revolving doors')

New approaches in public sector management such as public/private partnerships, contracting out, privatization, and civil service reform, along with the increased use of lobbyists, have changed the relationship between the public service and the private sector. There is a risk that officials may favour an organization in the hope that they will, one day, work for it. In some countries, the improper migration of public officials from the public to the private sector carries criminal sanctions. Apart from that, several countries have systems that require authorization prior to a public official's engagement by a private sector agency.

GRECO paid special attention to this phenomenon to guard against the decisions of officials being influenced by the hope of obtaining a job in an enterprise they deal with or have control over, or to prevent their releasing inside information to their new, or proposed, private sector employer improperly and in a manner which would distort competition. GRECO has made recommendations to a number of countries that they adopt appropriate provisions and set up a suitable system of control. This issue was discussed in detail in GRECO's 8th General Activity Report (2007).<sup>10</sup> GRECO concluded there was no ideal model that could be recommended but set out possibilities for consideration and identified the most common goals of a system to address the movement of public officials from public service to the private sector to be to:

<sup>10</sup> See <https://wcd.coe.int/ViewDoc.jsp?id=1258347&Site=COE>

## Box 5.5 The Council of Europe Model Code

### Article 26. Leaving the public service

1. The public official should not take improper advantage of his or her public office to obtain the opportunity of employment outside the public service.
2. The public official should not allow the prospect of other employment to create for him or her an actual, potential or apparent conflict of interest. He or she should immediately disclose to his or her supervisor any concrete offer of employment that could create a conflict of interest. He or she should also disclose to his or her superior his or her acceptance of any offer of employment.
3. In accordance with the law, for an appropriate period of time, the former public official should not act for any person or body in respect of any matter on which he or she acted for, or advised, the public service and which would result in a particular benefit to that person or body.
4. The former public official should not use or disclose confidential information acquired by him or her as a public official unless lawfully authorised to do so.
5. The public official should comply with any lawful rules that apply to him or her regarding the acceptance of appointments on leaving the public service.

1. ensure that specific information gained while in public service is not misused,
2. ensure that the exercise of authority by a public official is not influenced by considerations of personal gain, including by the hope or expectation of future employment; and,
3. ensure that the access and contacts of current as well as former public officials are not used for the unwarranted benefits of the officials or of others.

## 5.4 Codes in operation

Public sector codes tend to be drafted at the top, by senior public officials or managers, and then passed down to more junior staff. It is rare for staff at all levels to be actively involved in the preparation of a code. As a result, such codes often fail to reflect the situations and aspirations of the public service as a whole. Public employees will have a greater stake in the code if they are asked to participate in its formulation. While this may be difficult with fundamental codes which are enshrined in law, it should be possible to engage staff when codes are first prepared or revised. It is also possible to have self-generated codes of conduct at the local level that conform to the basic code but address practical problems of the unit or sector, and are devised with the participation of all employees.

It is also important that the code includes at least some acknowledgement of long-term goals, rather than be simply a long list of prohibited actions. This will provide the code with a positive tone rather than with the forbidding appearance of a criminal statute.

Once a code is finalized, many regard the process to have ended. However, to be effective, codes should be



*publicized* throughout an organization and to all those with whom it has dealings, including the general public, so that everyone is aware of its contents. Employees should receive *regular training* that allows officials to apply the code to their work and discuss ethical dilemmas drawn from real life. There should also be regular staff surveys to check if the code is known and understood, and any problem areas ought to be addressed by the management of the body concerned, and the code clarified or amended if need be. Another good practice is to hand over copies of a code and to have the recipients express their readiness to stand by the rules by, for example, signing an acknowledgement when taking an oath.

The interpretation of the code is also important. It should protect staff who comply with its standards. For this reason, an effective code will usually have a *designated person* to provide advice and guidance for staff who have difficulty in determining what position they should take on a given question.

### Box 5.6 Australia: specific legislation on ethical conduct in public management

The State of Queensland in Australia has enacted specific legislation for ethical conduct in public management. Under the 1994 Public Sector Ethics Act, department chiefs are required to develop conduct codes and to make them accessible to staff and to the public, to institute training and to describe the implementation of the code in the department's annual report.<sup>11</sup>

The Act proceeded from an explicit demand by employees and managers for greater certainty about what was expected of them in the workplace. This demand was driven by everyday concerns about fairness, equity, responsiveness, and integrity and by community expectations that official wrong-doing would be effectively countered by the system itself.

The Act, as passed, declares the principles which are to be the basis of the "Ethics Obligations" of the agency-specific codes of conduct which individual public sector agencies are required to develop in consultation with staff and the public.

The framework values are:

- Respect for the law and the parliamentary system of government
- Respect for persons
- Integrity
- Diligence
- Economy and efficiency in the use of public resources

The Act sets out the last three of these obligations in the following terms:

*Integrity:* In recognition that public office involves a public trust, a public official should seek: (a) to maintain and enhance public confidence in the integrity of public

administration; and (b) to advance the common good of the community the official serves. Having regard to [that obligation], a public official –

- a) should not improperly use his or her official powers or position, or allow them to be improperly used; and
- b) should ensure that any conflict that may arise between the official's personal interests and official duties is resolved in favour of the public interest; and
- c) should disclose fraud, corruption, and maladministration of which the official becomes aware.

*Diligence:* In performing his or her official duties, the official should exercise proper diligence, care and attention, and should seek to achieve high standards of public administration.

*Economy and Efficiency:* In performing his or her official duties, a public official should ensure that public resources are not wasted, abused, or used improperly or extravagantly.

*Chief Executives' Obligations:* The Ethics Act requires Chief Executives of public sector agencies to ensure that the Act is implemented in their agency, that training in ethics is undertaken, and that the agency's "administrative practices and procedures are consistent with the Act and with the agency's Code of Conduct." Failure to do so could result in sanctions under the Chief Executive's contract of employment, or (potentially) in a private legal action for compensation resulting from breach of statutory duty. Such an action might arise when the interests of a citizen or client of the agency suffered damage from the foreseeable and preventable unethical conduct of an employee; for example, in a contract negotiation or tendering process involving the Chief Executive's agency.

Last but not least, subordinates take their lead from the conduct of their superiors. It is, therefore, essential that top officials within a department should not only foster an understanding of the values that their code seeks to capture, but also exemplify the conduct recommended by the code.

## 5.5 Sanctions

Codes of conduct can be rendered *legally effective through legislative texts* or by means of individual commitments - in other words, by making public sector employment conditional upon acceptance of the code, as the Organisation for Economic Co-operation and

Development (OECD) suggests.<sup>12</sup> Also, clear provisions regarding potential *sanctions* for non-compliance with the codes and the effective and impartial enforcement of these sanctions is an essential prerequisite for their effectiveness. In most Civil Law countries, disciplinary sanctions are foreseen in administrative laws, and penal sanctions are included in the respective Penal Code, as is the case for example in France<sup>13</sup> or Germany.<sup>14</sup> In addition, it is increasingly recognized that *positive incentives* can go a long way in promoting compliance with the codes. Notably, making promotion contingent upon a good integrity track record is increasingly recommended, though practice somewhat lags behind and is still largely at the discretion of individual managers. A generic code of conduct can be enhanced

<sup>11</sup> See Queensland, Public Sector Ethics 1994 (current as at 7 November 2014), available from [www.legislation.qld.gov.au/LEGISLTN/CURRENT/P/PublicSecEthA94.pdf](http://www.legislation.qld.gov.au/LEGISLTN/CURRENT/P/PublicSecEthA94.pdf)

<sup>12</sup> See OECD, *Asset Declarations for Public Officials: A Tool to Prevent Corruption* (2011), p. 35.

<sup>13</sup> See French Penal Code (*Code pénal*), Articles 432.1-435.5.

<sup>14</sup> See German Penal Code (*Strafgesetzbuch*), § 331.

### Box 5.7 The United States Office of Government Ethics<sup>15</sup>

The United States created the Office of Government Ethics (OGE) in 1978. The OGE provides policy leadership and direction for the executive branch of government's ethics programme. This system is decentralized with each department or agency having responsibility for the management of its own ethics programme.

The OGE has issued a uniform set of Standards of Ethical Conduct for Employees of the Executive Branch that applies to all officers and employees of executive branch agencies and departments. These regulations contain

a statement of general principles that should guide the conduct of federal employees. The rules are enforced through the government's normal disciplinary process.

The OGE has also implemented uniform systems of financial disclosure. These systems are enforced throughout all agencies and are subject to periodic review by the OGE. It regularly reviews agency ethics programmes, makes recommendations and conducts training workshops for ethics officials both in Washington, and in cities throughout the United States.

in its effectiveness when additional institution-specific codes exist, as for example in Latvia. Finally, it has been found that it is critical for public officers to be able to identify with the code of conduct, in order for them to be able to accept it and implement it effectively.

Somewhat different procedures apply to the conduct of elected officials, who are in principle answerable to the electorate. Some countries have Parliamentary Committees or Commissioners to oversee compliance with the Codes of Conduct that apply to Members of Parliament.

## 5.6 Oversight

In some countries, oversight of the implementation of codes of conduct is delegated to dedicated bodies that are either part of a ministry (generally the ministry for public administration) or an independent body affiliated to the government. In most Civil Law countries, the implementation of the behavioural rules is ensured in each of the concerned public authorities (ministries, etc.) through internal structures in charge of disciplinary matters (as long as no penal infraction has occurred). It is also desirable to provide a counselling service for public servants who face difficult conflict of interest questions and who need to be able to talk through the matter with a trusted professional on whose advice they can safely rely.

<sup>15</sup> For further information about the US Office of Government Ethics see [www.oge.gov/](http://www.oge.gov/)

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## CHAPTER 6

# Conflict of Interest

### CONTENTS

6.1	What is a ‘conflict of interest’?	74
6.2	How to identify a conflict of interest	75
6.3	Situations involving conflicts of interest and their regulation	76
6.3.1	Nepotism and cronyism	76
6.3.2	Conflicts involving legislators and other high-ranking officials	79
6.3.3	Conflict of interest and post-public sector employment	79
6.4	Measures to address conflict of interest and declaration of assets	82
6.4.1	Overview of legal approaches	82
6.4.2	Declaration of interests, assets and gifts	83
6.4.3	Overview mechanisms for filed declarations	84
6.4.4	Disciplinary and criminal sanctions	84
6.5	Conclusions	85
	Selected Bibliography	86
<i>Box 6.1</i>	<i>The Council of Europe Model Code of Conduct: definition of conflict of interest situations</i>	75
<i>Box 6.2</i>	<i>Thailand: conflict of interest addressed in the Constitution</i>	79
<i>Box 6.3</i>	<i>Canada has introduced specific public ethics positions</i>	80
<i>Box 6.4</i>	<i>Croatia: public official Conflict of Interest Prevention Act 2011 on asset declaration</i>	83

## CHAPTER 6

# Conflict of Interest

*Serving the public interest is the fundamental mission of a government and its public institutions. Citizens are entitled to expect that public officials will perform their duties with integrity, and in a fair and unbiased way. Public officials who maintain private interests during their time in office can, if these interests are not effectively managed, present a threat to this fundamental right. Such conflicts of interest have the potential to weaken the trust of citizens in public institutions.*<sup>1</sup>

*Over recent decades, greater mobility of personnel between the public and private sectors and increased co-operation between these two sectors in the provision of public services have widened the 'grey areas' where the private interests of public servants can unduly influence (or be perceived to influence) the way in which they perform their official functions.*<sup>2</sup>

*In and of itself, a conflict of interest does not amount to corruption. However, conflicts between the private interests of a public official and those of his/her public duties may result in corrupt activity if the conflict is not properly managed. A prohibition on a public official having any private interests is, of course, unworkable and may well be unfair. The aim of the solutions set out below is to maintain integrity by reducing the potential for abuse and ensuring that if there is indeed a conflict of interest, it is declared and dealt with using preventive and if appropriate, punitive measures.*<sup>3</sup>

<sup>1</sup> See OECD, *Managing Conflict of Interest in the Public Service*, OECD Guidelines and Country Experiences, 2003. Available from <http://www.oecd.org/gov/ethics/48994419.pdf>

<sup>2</sup> See Polaine, M., *Guide to the UN Convention Against Corruption (UNCAC)*, 2015, London Centre of International Law Practice, Anti-corruption Forum. Available from <http://www.lcilp.org/wp-content/uploads/2015/02/Guide-to-the-UN-Convention-Against-Corruption-Martin-Polaine.pdf>

<sup>3</sup> Ibid.

## 6.1 What is a 'conflict of interest'?

The Guidelines for Managing Conflict of Interest in the Public Service<sup>4</sup> of the Organisation for Economic Co-operation and Development (OECD) defines it as follows:

*"A conflict between the public duty and private interests of public officials, in which the public officials have private-capacity interests which could improperly influence the performance of their official duties and responsibilities."*

This interest can be of any nature, be it pecuniary, non-pecuniary, personal or family-related. Such conflicts cannot always be excluded and avoided, but they have the potential to lead to wrongdoing by a public official. It is therefore essential to provide the pertinent legal framework to properly regulate and manage conflicts of interest, so as to reduce the risk of them leading to wrongdoings.

Specifically, legal frameworks need to establish the following:

- Appropriate duties of public officials to be aware of and avoid conflicts of interest where possible; this links also to prohibitions on the holding of certain positions simultaneously or of having certain external private interests.
- Duties of officials to declare conflicts of interest that arise, to the relevant superior or authority and/or publicly.
- Duties of officials to resolve conflicts by disposing of the private interest in question, or withdrawing from the official process threatened by the conflict (recusal).

<sup>4</sup> See OECD, *Managing Conflict of Interest in the Public Service*, OECD Guidelines and Country Experiences, 2003, p. 15.

### Box 6.1 The Council of Europe Model Code of Conduct: definition of conflict of interest situations

#### Article 13. Conflict of Interest

1. Conflict of interest arises from a situation in which the public official has a private interest, which is such as to influence, or appear to influence, the impartial and objective performance of his or her official duties.
2. The public official's private interest includes any advantage to himself or herself, to his or her family, close relatives, friends and persons or organizations with whom he or she has or has had business or political relations. It includes also any liability, whether financial or civil, relating thereto.

(the article lays down further general obligations of public officials relating to conflicts of interest)

3. Since the public official is usually the only person who knows whether he or she is in that situation, the public official has a personal responsibility to:
  - be alert to any actual or potential conflict of interest;
  - take steps to avoid such conflict;
  - disclose to his or her supervisor any such conflict as soon as he or she becomes aware of it;

- comply with any final decision to withdraw from the situation or to divest himself or herself of the advantage causing the conflict.
- 4. Whenever required to do so, the public official should declare whether or not he or she has a conflict of interest.
- 5. Any conflict of interest declared by a candidate to the public service or to a new post in the public service should be resolved before appointment.

In addition, **Article 14. Declaration of Interests**, recommends a system of regular declaration of interests, specifically that:

The public official who occupies a position in which his or her personal or private interests are likely to be affected by his or her official duties should, as lawfully required, declare upon appointment, at regular intervals thereafter and whenever any changes occur the nature and extent of those interests.

Source: [https://www.coe.int/t/dghl/monitoring/greco/documents/Rec\(2000\)10\\_EN.pdf](https://www.coe.int/t/dghl/monitoring/greco/documents/Rec(2000)10_EN.pdf)

- Where it is deemed necessary, duties to declare private interests on a regular basis (asset declarations).

- *Have I contributed personally in any way to the matter being decided or acted upon?*
- *Have I received any benefit or hospitality from someone who stands to gain or lose from my organization's decision or action?*
- *Am I a member of any association, club or professional body, or do I have particular ties and affiliations with bodies, business or individuals who stand to gain or lose from my organization's consideration of the matter?*
- *If I do participate in the assessment or decision-making, would I be worried if my colleagues and the public became aware of my association or connection with this body?*
- *Could there be any personal benefits for me in the future that could cast doubt on my objectivity?*
- *Am I confident of my ability to act impartially and in the public interest?*

## 6.2 How to identify a conflict of interest

Conflicts of interest situations cannot be avoided. It is inevitable that from time to time, personal interests may come into conflict with work decisions or actions. For these to be identified from the outset and to be properly managed is important.

Many, if not most, conflicts of interest are likely to be obvious and require no explanation. Obvious examples include where public officials, their friends or associates own companies which compete for contracts where the official participates in the bid evaluation or, are otherwise subject to regulation in which the official exercises powers or influence.

Sometimes, however, a conflict may not be immediately apparent and will require a reasoned analysis. A checklist such as the following can help individual public servants identify situations where a conflict of interest is likely to arise:

- *Does a relative, a friend or an associate or do I stand to gain or lose financially or reputation-wise from my organization's decision or action in this matter?*

When there may be a conflict of interest, one should place the potential conflict on the record and seek the guidance of a superior or an ethics adviser, if one is available.

Clearly, some conflicts will be so minor so as not to warrant anything more than the situation being recorded and made known to others who are participating in the decision-making process. For example, an official might hold such a small number of shares in a company that their value would not be affected significantly by the outcome of the particular matter under review. In such a case, stakeholders may feel comfortable with

the official's continued participation in the decision-making process. If they do not, the person should excuse themselves from further involvement.

The following checklist can be used to assess whether a disclosed conflict of interest might require other public officials to ask the potentially conflicted person in question to stand aside:

- *Has all the relevant information been made available to ensure a proper assessment?*
- *What is the nature of the relationship or association that could give rise to the conflict?*
- *Is legal advice needed?*
- *Is the matter one of great public interest? Is it controversial?*
- *Could the individual's involvement in this matter cast doubt on his or her integrity?*
- *Could the individual's involvement cast doubt on the organization's integrity?*
- *How would this individual's participation in the decision in question look to a member of the public or to one of the organization's potential contractors or suppliers?*
- *What is the best way to ensure impartiality and fairness and to protect the public interest?*

In order to ensure that conflict situations are readily identified and managed, agencies, departments and other bodies should:

- Keep full and accurate records of decision-making processes;
- Ensure openness by making accurate information about the organization's processes, decisions and actions public knowledge;
- Where there is a risk of a perception of conflict of interest, ensure that the final decision of all participants can be substantiated.

## 6.3 Situations involving conflicts of interest and their regulation

### 6.3.1 Nepotism and cronyism

One possible consequence of a failure to prevent or manage conflicts of interest is **nepotism**. Although the expression is sometimes used more widely, it strictly applies to a situation in which a person uses his or her public power to obtain a favour or advantage (such as a job) for a member of his or her family.

Nepotism in the public sector may damage the public interest. It means that the most suitable candidate fails to get a post or a promotion, and the population as a whole suffers as a consequence. It can even mean that a less competitive bid wins a government contract at the cost of taxpayers' money.

Nepotism can cause conflicts in loyalties within any organization, particularly when one relative is placed in direct supervision over another. These situations should be avoided. A typical legal prohibition would prevent a father, mother, brother, sister, uncle, aunt, husband, wife, son, daughter, son-in-law, daughter-in-law, niece, or nephew being given a position as either supervisor or subordinate to any such relative.

A less frequent question, perhaps, is that which arises when sons and daughters of judges appear as counsel in court before their parents. In some court systems, this has caused no complications. In others, it has aroused fierce controversy and given rise to serious allegations of collusion and corruption. Best practice dictates that such a position should, therefore, be avoided.

Broadly speaking, nepotism primarily involves one or more of the following:

- advocating or participating in, or causing the employment, appointment, reappointment, classification, reclassification, evaluation, promotion, transfer, or discipline of a close family member or domestic partner in a public position, or in an agency over which he or she exercises jurisdiction or control;
- participating in the determination of a close family member's or domestic partner's compensation;
- delegating any tasks related to employment, appointment, reappointment, classification, reclassification, evaluation, promotion, transfer, or discipline of a close family member or domestic partner to a subordinate; and
- supervising, directly or indirectly, a close family member or domestic partner, or delegating such supervision to a subordinate.<sup>5</sup>

The prohibition against nepotism should not be a total ban on employment of relatives. Indeed, blanket bans on employing relatives of existing staff can be held to be in breach of human rights guarantees against discrimination. This situation is distinct from one relative employing another relative to a position where they will retain supervisory powers over that family member. Rather, measures to eradicate nepotism are

<sup>5</sup> See King County Board of Ethics, *Nepotism as a Conflict*, Advisory Opinion 95-11-1133, State of Washington, USA. Available from <http://www.kingcounty.gov/employees/ethics/opinion/listing/family/1133.aspx>



Discussions at the Regional seminar on corruption prevention, focusing on asset declarations and conflict of interest regulations, which was organized by the OSCE/OCEEA, in co-operation with the UNODC and the OECD ACN, with the support the Government of Georgia, in Batumi, Georgia, on 16-17 December 2014

aimed at, for example, preventing public servants from using (or abusing) their public position to obtain public jobs for family members. The objective is not to prevent family members from working together, but to prevent the possibility that a public servant may show favouritism towards a fellow family member when exercising discretionary authority on behalf of the public to hire qualified public employees.

Public interest requires that only the best candidate for a job serve the State. There will be occasions when a relative is unquestionably the most qualified person for a particular post, and there must be a balancing of interests. For this reason, rules related to nepotism should not be an insurmountable barrier which could well lead to the invariable disqualification of well-qualified candidates.

**Cronyism** is a broader term than nepotism, and covers instances where preference is given to friends, regardless of their suitability. It is most likely to occur in the context of appointments, but it can arise in any instance when discretionary powers are to be exercised. However, whereas it is possible to define nepotism in terms of blood relatives or relations by marriage or partners, an effective legal definition of cronyism is much more difficult.

At times, the matter can be dealt with quite simply: if someone is applying for a position and a member of the interviewing panel knows the person very well, they can, and should, excuse themselves from sitting on the panel. However, at what point does a person become a “crony”, to the extent that a decision in his or her favour would be categorized as cronyism? To determine where the line should be drawn, the panel member can pose the question: What would the other candidates think if they knew about the relationship? Would they think it rendered the process unfair? If in doubt, the matter should be discussed and determined by the other panel members. What is necessary, of course, is for there to be complete transparency about the nature of the relationship, and that it be placed on the record.

On occasions it may not be that simple: if a candidate is known to a member of a panel as a person with discretion and sound judgment, there can be greater confidence in his or her appointment. It can come down to the question of trust. The primary concern is that decisions are made that are fair, reasonable and defensible, both in the eyes of the other applicants and in the eyes of the wider public.

By law, some appointments are required to be made by a particular officeholder. Should that official

feel compromised by his or her relationship with a prospective candidate, it should be possible for the officeholder to, in effect, stand aside in the selection process. The person can also ask for formal independent advice from another official of equal or senior rank as to who should be appointed, and act on that.

However, ultimately, the emphasis is on being able to answer the charge of a decision having been made on the basis of friendship, regardless of suitability.

### Avoiding nepotism and cronyism in the making of appointments

Basic principles for avoiding nepotism and cronyism with both the public and private sector should comprise the following:<sup>6</sup>

- *Clearly stated and well-understood human resource policies and procedures and codes of conduct.* These should also deal with actual, potential and perceived conflicts of interests, including nepotism and cronyism.
- *Impartiality in all recruitment and selection processes.* This is essential for public sector employers to meet their public duty by acting ethically and in the public interest. To avoid perceptions of bias or corruption, a potential applicant should have no direct link in any part of a recruitment process to an official involved in the recruitment process. All decisions and the reasons for those decisions during a selection process should be documented. In societies where there are particular pressures from extended family, it is advisable for those involved in the decision-making processes to certify formally that none of the applicants is a relative or is known to them, or else to excuse themselves from the process entirely.
- *Competition should be fostered.* Advertisements should be framed to both adequately reflect the requirements of the job and to maximize the potential field of candidates. Generally, advertisements should be placed to attract the widest potential field possible. Selection criteria should also be reviewed before recruitment action is taken to ensure they adequately reflect the requirements of the position and attract the widest field of applicants. Only in exceptional circumstances should truly competitive measures be bypassed. When these circumstances occur, the decision-maker must be able to demonstrate clear and unambiguous reasons for making direct appointments.

<sup>6</sup> Points adapted from materials of the New South Wales Independent Commission Against Corruption (NSW ICAC), Sydney, Australia, available from [www.icac.nsw.gov.au](http://www.icac.nsw.gov.au); see, for instance, ICAC, *Recruitment and selection. Navigating the best course of action*, 2002, p.6. Available from <http://www.u4.no/recommended-reading/recruitment-and-selection-navigating-the-best-course-of-action>

### Box 6.2 Thailand: conflict of interest addressed in the Constitution

An example of that approach is Thailand's 2007 Constitution. It contains express provisions requiring ministers (including the Prime Minister), legislators and government officials to avoid placing themselves in a conflict of interest situation in key areas of life. An example is that part of the Constitution addressing members of the House of Representatives (lower house) and senators.

#### Section 265:

A member of the House of Representatives and a senator shall not:

- 1) hold any position or assume any duty in any Government agency, State agency or State enterprise, or hold a position of member of a local assembly, local administrator or local government official;
- 2) receive, interfere with or intervene in any concession from the State, a Government agency, a State agency or a State enterprise, or become a party to a contract of a monopolistic nature with the State, a Government agency, a State agency or a State enterprise, or become a partner or a shareholder in a partnership or a company receiving such concession or becoming a party to the contract of that nature, whether directly or indirectly;
- 3) receive any special money or benefit from any Government agency, State agency or State enterprise apart from that given by the Government agency, the State agency or the State enterprise to other persons in the ordinary course of business.

#### Section 266:

A member of the House of Representatives and a senator shall not, through the status or position of member of the House of Representatives or senator, interfere with or intervene in the following matters for personal benefits or for the benefits of others or of a political party, whether directly or indirectly:

- 1) the performance of official service or the performance of regular duties of Government officials, officials or employees of a Government agency, a State agency, a State enterprise or an undertaking, of which the majority of shares are owned by the State, or a local Government organisation;
- 2) the recruitment, appointment, reshuffle, transfer, promotion and elevation of a salary scale of a Government official holding a permanent position or receiving a permanent salary and not being a political official, or an official or employee of a Government agency, a State agency, a State enterprise, an undertaking of which the majority of shares are owned by the State, or a local Government organisation; or
- 3) any action causing a removal from office of a Government official holding a permanent position or receiving a permanent salary and not being a political official, or an official or employee of a Government agency, a State agency, a State enterprise, an undertaking of which the majority of shares are owned by the State, or a local Government organisation.

Source: [http://english.constitutionalcourt.or.th/index.php?option=com\\_docman&Itemid=4&lang=en](http://english.constitutionalcourt.or.th/index.php?option=com_docman&Itemid=4&lang=en)

- *Openness should be maximized.* The risk of corruption is minimized when there are policies and procedures that promote openness in dealing with conflicts of interests.
- *An appeal procedure should be available.* Unsuccessful, but qualified applicants, who feel that proper procedures have not been followed, should be able to appeal to an appropriate authority for an independent review of the process and its outcome.

MPs to earn income from employment or business, but require them to declare it. The key issue here is how to balance the need to avoid conflicts of interest or corruption, and the need to recognize that elected officials cannot be prohibited from all private activities due to the essentially temporary nature of their office.

States with a written constitution can explicitly address conflict of interest in the constitution itself. That may then be supplemented by more specific national law and other regulatory provisions where appropriate.

### 6.3.2 Conflicts involving legislators and other high-ranking officials

Conflicts of interest involving higher-ranking officials may pose a particular threat to the integrity of public life. For instance, a conflict of interest might occur if a Member of Parliament (MP) owns a company in the construction sector, and in his or her role as a legislator, the MP is required to vote on a new law regulating safety in construction. For this reason, some States forbid MPs from being involved in commercial activity, or from earning income from commercial activity. Others permit

### 6.3.3 Conflict of interest and post-public sector employment

What happens when a public servant leaves the public service and enters the private sector? This question has become increasingly important when addressing conflict of interest issues. This is a consequence of several factors. Efficiency reforms have led to the 'downsizing' and contracting out of certain public sector functions to the private sector. Consequently, in many

### Box 6.3 Canada has Introduced specific public ethics positions

In Canada, a number of provinces as well as the federal Government have introduced specific positions to provide guidance to parliamentarians and senior public officials on ethical issues. While these positions have various titles such as “Ethics Commissioner” or “Conflict of Interest Commissioner”, all recognize that, in the area of ethics, there are two major risks when relying wholly on a legal system:

1. Public office holders can easily forget what truly ethical conduct actually is.
2. Rules are often extremely detailed about matters that should be self-evident. When this happens, it can do more to erode public confidence than it does to enhance it. Canada's federal Government has taken an approach that assumes that public office holders want to take ethical actions and to earn a high level of respect among citizens. For this reason, it has chosen not to rigidly codify ethical behaviour through an exhaustive list of forbidden behaviour.

The Office of the Conflict of Interest and Ethics Commissioner of Canada<sup>7</sup> deals with potential conflicts of interest and other ethical issues for those most likely to be able to influence critical decisions in the federal Government, including those officials responsible for

handling ‘blind trusts.’ Blind trusts are established to enable a decision-maker’s investments to be held separately (and secretly) by independent trustees so as to avoid any conflict of interest. The decision-maker is wholly unaware of where his or her investments have been made and so is unable to be influenced in any way by them.

The Ethics Counsellor’s Office covers all members of the federal cabinet, including the Prime Minister. This includes cabinet members’ spouses and dependent children, members of Government ministers’ political staff and senior officials in the federal public service. The Office handles the monitoring of the assets, incomes and liabilities of those it oversees.

When it comes to suspected breaches of the criminal law, the Ethics Counsellor does not replace the role of the police, prosecutors and judges. Rather, the Counsellor deals with those situations which could appear unethical to citizens without being illegal. Their Office works closely with those covered by Canada’s Conflict of Interest Code and provide advice on questions about how a given asset or interest should be treated. It is also asked by the Prime Minister to investigate and comment on specific issues when they arise.

countries, the differences that traditionally separated public sector careers from those in the private sector are less distinct. As a consequence, there has been a growing tendency in many countries for public officials not to regard public sector employment as a long-term career, but to consider moving between the public and private sectors in the course of their working lives. The type of employment which may be cause for concern is one which has a close or sensitive link with the person’s former position as a public official.

There are, perhaps, four main types of misconduct that may result from conflicts of interest relating to post-public sector employment:

- Public officials who modify their conduct while in office to improve prospects for future employment. Such conduct can involve favouring private interests over public duty; individual public officials ‘going soft’ on their official responsibilities to further personal career interests; an individual only taking partial action on a certain issue out of concern for the interests of prospective private sector employers; or outright bribery, where a public official solicits employment in return for rendering certain favours.
- Former public officials who improperly use

confidential government information acquired during the course of official functions for personal benefit, or to benefit another person or organization.

- Former public officials who seek to influence public officials. This involves former public officials pressuring ex-colleagues or subordinates to act partially by seeking to influence their work or by securing favours.
- Re-employment or re-engagement of retired or redundant public officials. This may involve: (a) senior public servants receiving generous severance compensation and re-entering the public service in non-executive positions while keeping their severance payments; (b) public officials leaving public employment only to be re-engaged as consultants or contractors at higher rates of pay to perform essentially the same work; (c) public officials who decide to go into business and to bid for work from their former employer after arranging their own severance packages.

To ensure that public administrators are not tempted to exploit their government connections after leaving the public service, measures regarding post-public sector employment may be appropriate.

<sup>7</sup> For further information see <http://ciec-ccie.gc.ca/Default.aspx?pid=1&lang=en>

In addition to provisions of codes of conduct (see Chapter 5), this leaves three approaches to consider:

- Each government agency can develop specific policies for employment after an official has left the public sector. These policies should take into consideration the degree of risk to the government involved in a public official gaining employment in the private sector and the likely impact of these policies on public employees' future careers; for example, highly qualified professionals with limited fields in which to work.
- Employment contracts can have specific restrictions written into them.
- Enacting legislation; this is a route that some States have taken, but any legislation should be careful to minimize restrictions and not to impose them on people unnecessarily.

Such measures should be designed taking into account a country's specifics - for example, a country where significant numbers of senior civil service employees are commonly replaced after elections may need stricter provisions than a country where such positions are more stable.

In the United States, like in many other countries, particular attention is paid to the heads of executive agencies. They are presidential appointees whose appointments are governed by Title 18, Section 207 of the United States Code,<sup>8</sup> in which they are referred to as “*very senior personnel*”. The system is multi-tiered: there are limited restrictions to which every government employee is subject, which progressively are more onerous as staff gain in seniority.

Under this regulation, very senior personnel must comply with several restrictions:

- A lifetime ban (which covers all executive employees) on representing any organization on a matter on which they directly worked as an executive employee;
- A two-year ban in cases on which they may not have directly worked, but for which they had direct responsibility;
- A one-year ban on representing any organization to any current representative of the executive branch of government;
- A one-year ban on representing a foreign entity “before any department or agency of the United States” and on aiding or advising a foreign entity.

<sup>8</sup> See the United States Code, 2012 Edition, Title 18 “*Crimes and Criminal Procedure*”; Part 1 “*Crimes*”; Chapter 11 “*Bribery, Graft, and Conflict of Interest*”; Section 207 “*Restrictions on former officers, employees, and elected officials of the executive and legislative branches*”.

As a preventive action, potential appointees to a senior Executive position have to provide a draft asset declaration which is reviewed by the White House, the employing agency and the United States Office of Government Ethics. Based on the provided information, an ‘ethics agreement’ is drawn up spelling out what steps the candidate has to take before taking up the position to ensure that there is no conflict of interest (e.g., divestiture of assets). The Office of Government Ethics ensures that the ethics agreement is implemented within 90 days of appointment.<sup>9</sup> It also advises executive employees on how to comply with the Code and different restrictions.

In both Canada and the United Kingdom, the employment of former Government ministers is governed by executive instrument, not statute. In the United Kingdom, Section Seven of the Ministerial Code (Ministers’ Private Interests) guides post-separation employment:<sup>10</sup> On leaving office, Ministers are prohibited from lobbying Government for two years. They should also seek and abide by the advice from the independent Advisory Committee on Business Appointments about any appointments they wish to take up within two years of leaving office. In Canada, there is a two-year ban unless the Prime Minister makes an exception; meanwhile, in the United Kingdom former ministers are merely restricted if, after seeking advice from the Advisory Committee, it is recommended that they delay their employment in the private sector.

Best practice suggests that:

- Post-public sector employment be addressed in any ministerial code;
- A standing advisory body should assist ministers in complying with any guidelines that might address their later employment. This feature is common to legislative and executive ethics instruments internationally and not just for dealing with post-public sector employment issues.<sup>11</sup>

It should be noted that restrictions on post-separation employment must be in proportion to the risks posed. To give one example of what can be seen as a proportionate restriction, Croatia’s Public Official Conflict of Interest Prevention Act 2011 (see Box 6.4) provides that for a

<sup>9</sup> See United Nations Conference of the States Parties to UNCAC, *Conflict of interest, reporting acts of corruption and asset declarations, particularly in the context of articles 7-9 of the Convention*, CAC/COSP/WG.4/2012/3, p.9, available from [www.unodc.org/unodc/en/corruption/WG-Prevention/conflict-of-interest.html](http://www.unodc.org/unodc/en/corruption/WG-Prevention/conflict-of-interest.html)

<sup>10</sup> See UK, Cabinet Office, Ministerial Code, 2010, Section 7.25, available from [http://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/61402/ministerial-code-may-2010.pdf](http://www.gov.uk/government/uploads/system/uploads/attachment_data/file/61402/ministerial-code-may-2010.pdf)

<sup>11</sup> See Australian Department of the Parliamentary Library, *Post-Separation Employment of Ministers*, Research Note. 40 (2002), available from <https://www.aph.gov.au/binaries/library/pubs/rn/2001-02/02rn40.pdf>

period of one year after they leave office, officials are not allowed to accept any appointment or election by, nor may they enter into any employment contract with a legal entity which were, during their term of office, involved in any business transaction with the body in which such officials discharged their office, or in which, at the time of such appointment, election or employment, all the circumstances of the case in question suggest that it intends to enter into a business transaction with that body.

## 6.4 Measures to address conflict of interest and declaration of assets

### 6.4.1 Overview of legal approaches<sup>12</sup>

The aim of any conflict of interest policy or legislation is above all to ensure that decisions taken by public actors and institutions are taken in the public interest rather than based on private concerns. Also, a comprehensive conflict of interest and declaration of assets policy will help to ensure public integrity and accountability as well as reduce corruption risks.

The establishment of measures and systems for asset and income declarations for public officials is supported by international instruments such as the United Nations Convention against Corruption (UNCAC) and the OECD Guidelines for Managing Conflict of Interest in the Public Sector. Conflict of interest regulation and asset declaration regimes are closely interlinked. This is for instance illustrated by Article 8 (5) of the UNCAC stating that “Each State Party shall endeavour [...] to establish measures and systems requiring public officials to make declarations to appropriate authorities regarding, inter alia, their outside activities, employment, investments, assets and substantial gifts or benefits from which a conflict of interest may result with respect to their functions as public officials.”<sup>13</sup>

Throughout the OSCE region, differing legal approaches to **conflict of interest** regulation and the declaration of assets can be found. Some OSCE participating States have been legislating on conflict of interest of public officials, while others have opted to manage conflicts of interest through personal commitments. As to the

first group, the French legislator has integrated conflict of interest provisions in different existing laws, such as the Penal Code, the law on public officials, the law on corruption prevention, or the Electoral Code. In the Russian Federation, a multi-layered approach is used where anti-corruption standards for public officials operate on four levels in a vertically integrated system: Federal Anti-corruption Act on general obligations and restrictions; Presidential Decree on general principles for official conduct of civil servants; Model Code of Ethics and Official Conduct for Officials of State and Municipal Agencies; and individual departmental codes of ethics and official conduct.<sup>14</sup> Canada, on the other hand, has passed a stand-alone conflict of interest law for public officials (Law on conflicts of interest, 2006) besides pertinent provisions in national and institutional codes of conduct. The United Kingdom and the United States have chosen to regulate conflicts of interest based on codes of conduct, and these are applicable specifically for elected public officials and members of the Executive. Public sector employment contracts in these two countries also address conflict of interest.

Similar legislative trends can be observed with regard to **asset declarations**. Some countries have integrated asset declaration provision in more general legislation, such as civil service and administrative procedure laws. This is the case in Belarus (regular filing of declaration form set out by the text of the law) as well as in Germany or Sweden (duty to notify one’s superior about outside employment and private interest without necessarily having recourse to regular declaration forms). Other countries have included the asset declaration obligation in codes of conducts, as is the case in Norway and Denmark. Another approach, which is to include asset declaration obligations in anti-corruption laws, can be found in such States as Azerbaijan, Estonia, Kazakhstan, Latvia, Lithuania, Montenegro, Serbia and Tajikistan. Other countries have enacted stand-alone asset declaration laws which can apply to all officials or to certain categories of officials only (for example Albania). The OECD recommends enacting specialized asset declaration regimes for different types of public officials (elected officials, high-ranking executive officials, civil servants, etc.), so as to adapt the texts according to the officials’ respective responsibilities and powers.<sup>15</sup> Such targeted rules have for instance, been established for parliaments, as is the case in the United Kingdom, Germany and Spain. Also, some countries have developed asset declaration regimes especially for cabinet members (United Kingdom).

<sup>12</sup> This section draws on materials from the OSCE, *Strategic Approaches to Corruption Prevention in the OSCE Region, Review Report on the Implementation of OSCE Commitments*, 2012, EEF.GAL/20/12, pp. 42-44.

<sup>13</sup> In addition the UNCAC Article 7 (4) states that “each State Party shall, in accordance with the fundamental principles of its domestic law, endeavour to adopt, maintain and strengthen systems that promote transparency and prevent conflicts of interest.”

<sup>14</sup> See United Nations Conference of the States Parties to UNCAC, *Conflict of interest, reporting acts of corruption and asset declarations, particularly in the context of articles 7-9 of the Convention*, CAC/COSP/WG.4/2012/3, p. 6.

<sup>15</sup> See OECD, *Asset Declarations for Public Officials: A Tool to Prevent Corruption*, 2011, OECD Publishing, p. 13.

### Box 6.4 Croatia: public official Conflict of Interest Prevention Act 2011 on asset declaration

The Act establishes the following framework:

- Within 30 days after assuming office and 30 days after office, each official is required to provide the Commission with his/her asset declaration containing the details of his/her own assets and the assets of his/her spouse and minor child(ren).
- Re-elected officials are also required to submit their asset declarations.
- Executive officers are required to submit their asset declarations within 30 days after their appointment and every four years. In addition, if, during the exercise of their public duties, any significant change has occurred in their assets, officials are required to report it to the Commission upon the end of the year in which such change actually occurred.
- Each asset declaration must also contain the official's statement whereby he/she grants the Commission access to data on all accounts opened with domestic and foreign banks and financial institutions, which are otherwise protected by banking secrecy.
- In addition to declaring their assets, officials are required to use their asset declaration forms to provide details as to how they acquired such assets and as to the sources of funds used for purchasing any movable or real property reported in their declarations.
- Shares held above a determined amount must be transferred to a trustee, and the Commission notified. Additionally, once he/she assumes her/his office, each official is required to arrange his/her activities under previously concluded business transactions in order to eliminate any potential, or to prevent any foreseeable, conflict of interest.

The declaration requirements of officials' assets include information as to:

- Inherited assets and acquired assets;
- Information on all real estate acquired in transactions, pursuant to judicial decisions and other real estate acquired from other persons;

- Information on valuable movable property such as vehicles, vessels, works of art, jewellery with individual worth in excess of HRK 30,000 (equivalent to approx. EUR 4000), with the exception of household objects and clothing;
- Interests and shares in companies;
- Savings deposits if they exceed the annual net income of the official;
- Debts, sureties given and other liabilities;
- Salary, self-employment income, income from assets and property rights, insurance capital income, as well as other types of income and receipts which are not considered as income and receipts for which no income tax is charged.

All information regarding the assets of officials (inherited and acquired), their spouses and children under the age of 18 are public and are posted by the Commission on its webpage. However, the personal data of officials, spouses and children is not published.

Importantly, the Croatian law also covers gifts and provides that:

- Officials may only keep gifts symbolic/notional value (equivalent to approx. EUR 65).
- Officials must never accept any cash, regardless of its amount, other securities, or precious metals.
- Customary presents exchanged among family members, relatives and friends, as well as national and international recognitions, medals and awards are not deemed gifts.
- Gifts that are not retained by officials, although they are entitled to do so, such as those exceeding notional value but received as a part of protocol, are deemed property of the State.

Source: The Republic of Croatia, *The Act on the Prevention of Conflict of Interest, 2011*, available from [http://publicofficialsfinancialdisclosure.worldbank.org/sites/fdl/files/assets/law-library-files/Croatia\\_Law%20on%20prevention%20of%20Conflict%20of%20Interest\\_2011\\_en.pdf](http://publicofficialsfinancialdisclosure.worldbank.org/sites/fdl/files/assets/law-library-files/Croatia_Law%20on%20prevention%20of%20Conflict%20of%20Interest_2011_en.pdf)

### 6.4.2 Declaration of interests, assets and gifts<sup>16</sup>

Generally speaking, comprehensive **conflict of interest regulations extend to the declaration of interests and assets as well as gifts.**

Usually asset declarations require information about (i) income, (ii) assets (for example property, investments, shareholdings), (iii) gifts, (iv) pecuniary and non-pecuniary interests (such as directorships), (v) spouses,

relatives and other pertinent persons. In some countries, declarations also include information on expenses when they exceed a certain amount.

The scale of public disclosure of asset declarations generally depends on the nature of the declaration. Where the declarations are of limited scope in terms of information and concerned individuals, *full public disclosure* is more likely. On the contrary, in States where numerous data are to be detailed in the asset declaration, *limited public disclosure* tends to be the norm, i.e. only some of the information submitted in the declarations is subject to disclosure. Apart from helping to identify a possible conflict of interest, asset declarations also serve as a corruption prevention tool as they can help in

<sup>16</sup> This section is drawn, inter alia, on Polaine, M., *Guide to the UN Convention Against Corruption (UNCAC)*, 2015, London Centre of International Law Practice, Anti-corruption Forum. Available from <http://www.icilp.org/wp-content/uploads/2015/02/Guide-to-the-UN-Convention-Against-Corruption-Martin-Polaine.pdf>

identifying illicit enrichment of public officials. When deciding to what extent the public should have access to declarations, ensuring more transparency should be the dominant criterion.

It is important that a public official knows from the outset what is required in relation to identifying and declaring conflict of interest situations. Accordingly, the process should begin with an official submitting initial declaration/disclosure, along with steps being taken to give detailed guidance to the official to assist him/her in complying with the obligation. Declaration requirement should then continue whilst the official is in post and at the conclusion of the person's term.

Declarations should also include gifts. An explicit prohibition should also be introduced preventing the acceptance of gifts above a reasonable threshold value; regulations should also provide for circumstances where refusal is impossible or would cause offence, for example that the gift is transferred to the State, sold, etc.

When designing an asset and income disclosure system, the following questions should be asked and answered in each State:

- What is the purpose of the disclosure system?
- Who should disclose? In the case of career public servants, at what level of seniority should the requirement to submit to a declaration process? Should the test be seniority and/or occupying a sensitive/vulnerable post?
- How broadly should disclosure requirements apply to members of an official's family?
- What should be disclosed by whom?
- To whom should disclosure be made?
- How will the information be verified and what will the sanctions be for wrong or non-disclosure?
- What access should the media and members of the public have to these declarations?

Further, declaration requirements will only be effective if supported by a number of other measures, including the existence of the necessary framework of oversight and sanctions to ensure compliance – the subjects of sections 6.4.3-6.4.4.

### 6.4.3 Overview mechanisms for filed declarations

In the OSCE participating States, oversight institutions vary in form and shape with both internal and external institutional structures to control asset declaration and

conflict of interest regimes, depending mostly on the legal structure and tradition of the countries. As for the **internal overview mechanisms**, some countries require their public officials to declare their public and remunerated activities outside their professional position to their superior (this is the case in Germany, Sweden, Switzerland, and also in Norway). In addition, legislative bodies tend to use internal arrangements to supervise the asset declarations of Members of Parliament or parliamentary employees (Germany, Ireland, Spain, and the United Kingdom).

Use is also made of **external overview mechanisms**. In some OSCE participating States, a specialized anti-corruption body is in charge of supervising officials' declarations (Albania, Montenegro, Romania, Serbia, and Slovenia) as in these countries, asset declaration is primarily seen as a tool for corruption prevention. In some other OSCE participating States, the tax authorities are entrusted with the task of controlling and processing asset declaration of public officials (Belarus and Kazakhstan). There is also the possibility of civil service bodies (Georgia and the Kyrgyz Republic) or parliamentary bodies (Estonia) overseeing asset declaration regimes. In other countries, the supreme audit bodies are in charge of supervising asset declarations (Bulgaria). Finally, some OSCE participating States have assigned this responsibility to judicial bodies (Denmark and Portugal) or to bodies staffed primarily with judicial personnel (France)<sup>17</sup> or ethics commissions (Armenia).

### 6.4.4 Disciplinary and criminal sanctions

Finally, as with most measures described in this Chapter, sanctions can be employed to comply with asset declaration regimes. In most cases, sanctions are of an administrative or disciplinary nature. The range of legal sanctions to be applied to elected public officials is somewhat more limited which makes the transparency requirement of asset declarations of elected officials all the more relevant.

Criminal sanctions may be considered in case of severe cases of non-compliance with declaration requirements – for example large-scale hiding of assets. The particular environment of a State will determine whether those other aspects of declaration, such as the gift

<sup>17</sup> In the context of external overview mechanisms, it is important to outline two elements: (i) in countries where asset declarations are managed centrally, the institutions in charge should enjoy protection against political or other undue interference; (ii) in countries where asset declaration regimes are relatively recent, it can be an advantage to set up an independent oversight body which can then gather expertise to share with other public institutions.

giving provisions, are addressed through disciplinary procedures or the criminal courts.

In determining sanctions, thought should be given to the real purpose of the declaration requirement. For most States, the need for declaration serves not just to produce a public register of public officials' interests, but to instil public confidence in the workings of government, both at the central and local levels and to identify the corrupt or potentially corrupt.

An example of a possible range of sanctions is that contained in the Croatian Act referred to in Box 6.4. Therein, available penalties include:

- Reprimand;
- The withholding of part of the net salary;
- Publication of the Commission's decision;
- A proposal to dismiss an appointed official from public office; and,
- Calling on an elected official to resign from public office.

Though some States may have introduced a declaration requirement, little or no examination/monitoring of the declarations takes place. It is often better that a limited number of public officials in key positions are required to make thorough financial interest declarations and to properly scrutinise those declarations, than for a blanket requirement extended to all public officials in circumstances where it is common knowledge that the declarations themselves will be too numerous for any effective analysis to take place.

## 6.5 Conclusions

Conflict of interest regulation should attempt - within reason - to prevent conflict of interest situations arising for public officials through prohibitions on certain activities. However, all officials are likely to be confronted with conflicts at some point, and the main purpose of regulation is therefore to address such situations through an appropriate combination of proactive awareness on the part of officials together with obligations to declare conflicts and resolve them. Increasingly, systems of regular declarations of interests and assets are also regarded as an important means for preventing and detecting conflicts of interest. The key aims should be to appropriately tailor regulations to different categories of officials, maximize transparency (although the less senior or powerful officials are, the more this may be counterbalanced by privacy rights) and to provide officials with the guidance, training and assistance they need to comply.

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## CHAPTER 7

# Public Financial Management

### CONTENTS

7.1	Regional initiatives and international instruments	88
7.2	Legal basis	89
7.2.1	Legal approaches	89
7.2.2	Content and scope	89
7.3	Implementation and enforcement	91
7.4	Integrity in revenue collection	91
7.4.1	Suggested components for reform of revenue-collecting frameworks and entities	93
7.4.2	Prohibition against tax deductibility for bribes	94
7.5	Conclusions	94
	Selected Bibliography	95
<i>Box 7.1</i>	<i>Building integrity in customs administration</i>	92
<i>Table 7.1</i>	<i>The PFM High-Level Performance Indicator Set - overview</i>	90

## CHAPTER 7

# Public Financial Management

*The proper management of financial resources is a core element when it comes to corruption prevention in the public sector. Many past and present public sector programmes and reforms target the management of public expenditure, financial accountability and budget transparency. The last decade has seen an increased interest in this issue, from many regional organizations, international donors and financial institutions, in the context of corruption prevention.*

*This Chapter will discuss international instruments as well as prevention, implementation and enforcement measures put in place at the national level by the OSCE participating States to ensure proper public financial management void of any misuse, embezzlement or corruption. The importance of effective and transparent revenue collection systems for the functioning of the administration of the State and maintenance of the public trust in how the government is managing these common resources will also be discussed.*

## 7.1 Regional initiatives and international instruments

Since the early 2000s, the Millennium Development Goals movement followed by the aid effectiveness agenda led to increased international interest and initiatives on public financial management. Founded in 2001, the Public Expenditure and Financial Accountability (PEFA) Programme, for example, is a multi-donor partnership between seven national and international donors and international financial institutions,<sup>1</sup> that aims at “assess[ing] the condition of country public expenditure, procurement and financial accountability systems, and develop[ing] a practical

sequence for reform and capacity-building actions.”<sup>2</sup> The Organisation for Economic Co-operation and Development (OECD), too, has been active in the field of budgeting and public expenditure as well as public finances; country reviews of budgeting systems have, amongst others, been undertaken in more than 30 countries, including non-OECD member states such as Russia (2008), Moldova (2010), or Montenegro (2012).<sup>3</sup> Support for Improvement in Governance and Management (SIGMA) – a joint European Union (EU) and OECD initiative - has also been concerned with public expenditure management in a number of (potential) EU accession countries, focussing on treasury and budget as well as on resource allocation.<sup>4</sup> Moreover, a range of bilateral programmes aimed at improving public financial management have been set up.

The OSCE, too, has pursued programmes aimed at improving public financial management, for example in promoting good economic governance, sound financial budgeting and management, and local government reform. In its Dublin Ministerial Council Declaration on Good Governance (2012), the OSCE participating States held that “the effective management of public resources by strong and well-functioning institutions, a professional and effective civil service, as well as sound budgetary and public procurement processes are major components of good governance.” They also recognized “the importance of [...] providing a solid financial basis for public administration systems [...]”

As to international instruments, the call for a transparent and accountable management of public finances is an integral part of Council of Europe and United Nations instruments. The Council of Europe Resolution of 1997 on the Twenty Guiding Principles for the Fight against

<sup>1</sup> European Commission, French Ministry of Foreign Affairs, Norwegian Ministry of Foreign Affairs, Swiss State Secretariat for Economic Affairs, the UK Department for International Development, International Monetary Fund, and World Bank.

<sup>2</sup> See [www.pefa.org/en/content/resources](http://www.pefa.org/en/content/resources)

<sup>3</sup> The overview of all country reviews of budgeting systems can be found at [www.oecd.org/gov/budgetingandpublicexpenditures/seniorbudgetofficialcountryreviewsofbudgetingsystems.htm](http://www.oecd.org/gov/budgetingandpublicexpenditures/seniorbudgetofficialcountryreviewsofbudgetingsystems.htm)

<sup>4</sup> See <http://www.sigmaweb.org/activityareas/#PEM>

Corruption emphasizes such principles as transparency, audit and accountability as important prerequisites for the prevention and detection of corruption. The guiding principles 9, 11 and 12 have special relevance in this context:

*Principle 9 to ensure that the organisation, functioning and decision-making processes of public administrations take into account the need to combat corruption, in particular by ensuring as much transparency as is consistent with the need to achieve effectiveness;*

*Principle 11 to ensure that appropriate auditing procedures apply to the activities of public administration and the public sector;*

*Principle 12 to endorse the role that audit procedures can play in preventing and detecting corruption outside public administrations.*

The UNCAC also stresses good governance and corruption prevention. Article 9 (2) says that each State Party is to take appropriate measures “to promote transparency and accountability in the management of public finances” through measures relating to procedures for the adoption of the national budget; timely reporting on public revenue and expenditure; a system of accounting and auditing standards and related oversight; and effective and efficient systems of risk management and internal control.

## 7.2 Legal basis

### 7.2.1 Legal approaches

Constitutional provisions provide for parliamentary participation in budgetary matters and can be found in many OSCE participating States. Further procedural and institutional matters – the degree of implication of parliamentary committees in budget preparation or the oversight by internal or external institutions – are regulated by specific laws, such as the LOLF (*Loi organique relative aux lois des finances*<sup>5</sup>) in France; the Public Financial Management and Control Law in



Turkey; or the Budget and Accounting Act of 1921,<sup>6</sup> the Congressional Budget and Impoundment Control Act of 1974,<sup>7</sup> amongst others, in the United States.

### 7.2.2 Content and scope

Public financial management is a complex matter where a range of factors come into play: the level and composition of public expenditure including its financing through revenue and/or deficits; the fiscal regime in place; existing budgetary procedures including control mechanisms; and last but not least, social issues, e.g., social (re)distribution through public spending, to name but a few components. A useful reference in this regard is the PEFA Public Finance Management (PFM) Performance Measurement Framework (PMF), developed as a common tool for monitoring public financial management systems, including (i) fiscal discipline, (ii) strategic resource allocation, and (iii) efficient use of resources for service delivery. As shown in Table 7.1, the PMF contains a set of indicators pertaining to the credibility, comprehensiveness and transparency of the budget, the budget cycle and donor practices relating to budgetary matters.<sup>8</sup> In many industrialized and mid-level income countries, the PMF has become a benchmark against which countries assess their national public financial management system.<sup>9</sup>

Regarding the trends observable in the OSCE region, many OSCE participating States (e.g., Canada, Denmark, France, the Netherlands, Sweden, and Norway) have introduced policy and performance based budgeting in the last two decades. Policies are translated into concrete programmes and actions with defined budget allocations

<sup>5</sup> France, Constitutional Bylaw No.2001-692 of 1 August, 2001 on budget acts, consolidated version of 17 April 2009, available from <http://www.legifrance.gouv.fr/Traductions/en-English/Legifrance-translations>

<sup>6</sup> See United States Code, Title 31, available from [www.law.cornell.edu/uscode/text/31](http://www.law.cornell.edu/uscode/text/31)

<sup>7</sup> Available from [www.gpo.gov/fdsys/pkg/GPO-RIDDICK-1992/pdf/GPO-RIDDICK-1992-34.pdf](http://www.gpo.gov/fdsys/pkg/GPO-RIDDICK-1992/pdf/GPO-RIDDICK-1992-34.pdf)

<sup>8</sup> See PEFA, *Public Finance Management, Performance Measurement Framework*, revised January 2011, p. 9, available from [http://www.pefa.org/sites/pefa.org/files/attachments/PMFEng-finalSZreprint04-12\\_1.pdf](http://www.pefa.org/sites/pefa.org/files/attachments/PMFEng-finalSZreprint04-12_1.pdf)

<sup>9</sup> See [http://www.pefa.org/en/assessment\\_search](http://www.pefa.org/en/assessment_search)

**Table 7.1** The PFM High-Level Performance Indicator Set – overview

<b>A. PFM-OUT-TURNS: Credibility of the budget</b>	
PI-1	Aggregate expenditure out-turn compared to original approved budget
PI-2	Composition of expenditure out-turn compared to original approved budget
PI-3	Aggregate revenue out-turn compared to original approved budget
PI-4	Stock and monitoring of expenditure payment arrears
<b>B. KEY CROSS-CUTTING ISSUES: Comprehensiveness and Transparency</b>	
PI-5	Classification of the budget
PI-6	Comprehensiveness of information included in budget documentation
PI-7	Extent of unreported government operations
PI-8	Transparency of inter-governmental fiscal relations
PI-9	Oversight of aggregate fiscal risk from other public sector entities
PI-10	Public access to key fiscal information
<b>C. BUDGET CYCLE</b>	
<b>C(i) Policy-Based Budgeting</b>	
PI-11	Orderliness and participation in the annual budget process
PI-12	Multi-year perspective in fiscal planning, expenditure policy and budgeting
<b>C (ii) Predictability and Control in Budget Execution</b>	
PI-13	Transparency of taxpayer obligations and liabilities
PI-14	Effectiveness of measures for taxpayer registration and tax assessment
PI-15	Effectiveness in collection of tax payments
PI-16	Predictability in the availability of funds for commitment of expenditures
PI-17	Recording and management of cash balances, debt and guarantees
PI-18	Effectiveness of payroll controls
PI-19	Competition, value for money and controls in procurement
PI-20	Effectiveness of internal controls for non-salary expenditure
PI-21	Effectiveness of internal audit
<b>C (iii) Accounting, Recording and Reporting</b>	
PI-22	Timeliness and regularity of accounts reconciliation
PI-23	Availability of information on resources received by service delivery units
PI-24	Quality and timeliness of in-year budget reports
PI-25	Quality and timeliness of annual financial statements
<b>C (iv) External Scrutiny and Audit</b>	
PI-26	Scope, nature and follow-up of external audit
PI-27	Legislative scrutiny of the annual budget law
PI-28	Legislative scrutiny of external audit reports
<b>D. DONOR PRACTICES</b>	
D-1	Predictability of Direct Budget Support
D-2	Financial information provided by donors for budgeting and reporting on project and program aid
D-3	Proportion of aid that is managed by use of national procedures

Source: "PFM Performance Measurement Framework", Revised January 2011.

and performance indicators. Also, increased attention is paid to the credibility of the budget, and countries make efforts to align actual aggregate expenditure with the originally approved budget.

The *oversight role played by parliamentary bodies* is another crucial issue. The legislature can hold the government financially accountable through budget oversight – be it through budgeted resource allocations or performance measurement. In this way, parliaments can help prevent the abuse or distortion of public funds and efficient budget allocation.

A further key element is *the existence of internal and external control institutions*. In addition to internal control, accounting and auditing units, the approved budget also needs to be audited by independent external bodies. This external monitoring of financial issues – generally performed by so-called Supreme Audit Institutions (SAI) – plays a fundamental role in preventing abuses.

The core element of preventing corruption in public financial management is *transparency*. This holds true for the preparation of the national or local budget as well as for its execution and monitoring. In this context, it is interesting to mention the Open Government Partnership that aims at improving the transparency, responsiveness, accountability and effectiveness of governments and increasing civic participation. To this end, it places a great emphasis on the systematic collection and publication of data on government spending and performance for essential public services and activities.<sup>10</sup>

### 7.3 Implementation and enforcement

There is a general global trend to make documents and data pertaining to budget preparation and execution publically available.<sup>11</sup> This also holds true for the OSCE region. According to the 2012 assessment of the NGO Open Budget Initiative, four of the six countries releasing “extensive information” about budgetary matters were OSCE participating States, namely France, Norway, Sweden, and the United Kingdom. Furthermore, Bulgaria, Croatia, the Czech Republic, Germany,

<sup>10</sup> Open Government Declaration, 2011. Available from <http://www.opengovpartnership.org/about/open-government-declaration>

<sup>11</sup> See Open Budget Initiative, *Open Budget Survey 2012*, p. 3, available from <http://internationalbudget.org/wp-content/uploads/OBI2012-Report-English.pdf>

Portugal, Russia, Slovakia, Slovenia, Spain, and the United States were reported to disclose “significant” amounts of information (against only six countries in 2010). Another 11 countries scored between 41 and 60 (out of total of 100 available points) as they publish “some” budgetary information.<sup>12</sup>

With regard to *financial control institutions*, public expenditure oversight through Supreme Audit Institutions (SAI) has generally proven to be a strong element in the 25 European countries assessed by Transparency International in 2011. The SAIs in France, Germany, Italy or Poland, to give only some examples, all received very high scores. The 2011 Global Integrity Report,<sup>13</sup> which surveyed about 30 countries including 11 OSCE participating States, had similar assessment results, giving Germany, Ireland, the former Yugoslav Republic of Macedonia, and the United States ‘strong’ and ‘very strong’ scores.



### 7.4 Integrity in revenue collection

The public administration of a State is only able to operate effectively if revenues (including taxes, duties and customs dues) are appropriately collected. Revenue collection must, therefore, be free from corruption in all its forms and from embezzlement.

Corruption may occur in revenue collecting systems when the laws are difficult to understand and can be open to differing interpretations. It may also occur when the payment of taxes requires frequent contact

<sup>12</sup> *Ibid.*, p.7.

<sup>13</sup> Available from <http://www.right2info.org/resources/publications/publications/global-integrity-report-2011>

### Box 7.1 Building integrity in customs administration

Growing cross-border trade and transportation in the globalized world economy are compelling governments to develop more efficient customs and border management procedures. With this in mind, the OSCE and the United Nations Economic Commission for Europe (UNECE) jointly published a *Handbook of Best Practices at Border Crossings – A Trade and Transport Facilitation Perspective* in 2012. The Handbook provides guidance and tools that can be used to harmonize and simplify existing procedures, increase transparency and accountability of regulations and improve interagency co-operation.

It acknowledges that the presence of corruption in customs and border management agencies seriously undermines the economic and political security of the country and reduces opportunities for economic, social and overall national development. The publication recognizes that customs administrations around the world play a key role in trade facilitation, revenue collection, community protection and national security, and that a lack of integrity in customs distorts trade and investment opportunities, undermines public trust in government administration and ultimately jeopardizes the well-being of all citizens. Integrity is thus identified as a prerequisite for the proper functioning of a customs administration.

The Handbook provides an overview of some of the key World Customs Organization's (WCO) integrity development tools such as the *Revised Arusha Declaration*, the *Revised Integrity Development Guide* and the *Model Code of Ethics and Conduct* for customs officials. It also showcases a number of awareness raising and capacity-building seminars organized jointly by the Office of the Co-ordinator of OSCE Economic and Environmental Activities

(OCEEA) and the WCO in Central Asia over the years. Such seminars would typically gather senior-level customs and border management officials from the region and offer a platform for the exchange of views on:

- Inter-linkages between the fight against corruption in customs, national economic development and the investment climate;
- Existing, customs specific, legal instruments and conventions linked to the fight against corruption and challenges related to their ratification and implementation;
- The implementation of sound human resource management policies and procedures as a key element in fostering higher levels of personal and professional integrity and thus also helping in the fight against corruption in customs;
- The need to intensify and strengthen co-operation, consultation and information sharing with private sector stakeholders, including jointly identifying areas of vulnerability;
- Potential for the development of joint customs/private sector anti-corruption initiatives;
- The use of technology, including limiting the opportunities for inappropriate use of official discretionary power;
- Opportunities for increased integration of customs work with that of other border management agencies to provide genuine single window capabilities;
- The development and implementation of customs sector specific strategies and reforms to more effectively combat corruption.

Source: OSCE/OCEEA, 2015

between taxpayers and tax administrators (e.g., a taxpayer may attempt to bribe a tax official into waiving a tax or turning a blind eye to a violation uncovered in the process of a tax audit). Such malpractices are more likely to happen in weakly governed administrations where such acts on the part of the officials are ignored or not easily discovered, and when discovered, dealt with mildly. Ineffective administration of tax and regulatory regimes and corrupt practices deprive the State of valuable tax income. It can also lead to an increase in an unofficial or shadow economy as entrepreneurs seek to avoid such a regime.

In many countries customs has been an area that is especially vulnerable to corruption. The World Customs Organization<sup>14</sup> (WCO) has found that corruption is most likely to occur where the organizational culture and behavioural norms do not strongly encourage

professionalism, integrity and non-corrupt behaviour supported by strong penalties for violators of the law. Other factors also play a role, such as low salary levels of customs officials, discretionary power of customs officials over the provision of goods or services and long and cumbersome procedures encouraging customers to 'jump the line' by paying a bribe to get their goods through quicker.

Corrupt customs officials can impact a country's economic development, investment climate and national stability and security. Untaxed goods as well as arms and illicit drugs, and illegal goods and protected plants and species can flow unchecked through porous borders. The damage to the country can extend well beyond the fiscal. Corrupt border police and customs officers may seriously endanger national and international security.

<sup>14</sup> For further information see <http://www.wcoomd.org/en/topics/integrity/overview.aspx>



Representatives of World Bank, OSCE and World Customs Organization discuss anti-corruption in Customs at the OSCE-supported conference promoting international experience in combating and preventing corruption in state revenue agencies, Astana, 10 September 2015

### 7.4.1 Suggested components for reform of revenue-collecting frameworks and entities

The following anti-corruption measures should be considered:

- i. *Simplification of tax and customs regulations:* These laws and codes are often highly complex and difficult to understand and give officials discretionary powers. To reduce corruption, rules should be simple and clear, there should be few exceptions, and the rules known to all. Information and documentation requirements should be minimized.
- ii. *The revenue administration should define their information and documentation needs in ways that minimize administrative requirements.* All stakeholders and the public at large should be kept informed of new notices and important announcements. If customs duties and the tax system are perceived to be fair, citizens' incentives for corruption will diminish.
- iii. *Standardization of procedures and interpretations:* Procedural manuals and electronic forms make revenue collection services more transparent, reduce officials' opportunities for unsupervised decision making and strengthen accountability. Standardized procedures should limit one-on-one contact between officials and customers and reduce the number of forms and/or approvals needed. Interpretation of customs regulations must be consistent. Importers and tax payers can only be expected to declare their liabilities in an environment where the interpretation of the laws is consistent and procedures are standardized, with each transaction treated in the same way as the previous one.
- iv. *Professional standards:* Experienced, highly trained managers should be recruited, instead of politically appointed heads of administration. Other staff should also be recruited and promoted based on merit, paid a living wage and given regular training. In addition, responsibilities should be separated according to function, and mechanisms for processing complaints put in place. Hiring procedures should be rationalized, exemplary performance rewarded and staff who are found in violation of customs regulations disciplined.
- v. *Controls:* Both tax and customs services should be subject to regular internal and external controls. In order to make controls effective, performance standards (relating to revenue targets and service standards) as well as codes of conduct should be in place. These codes need to be backed up by effective sanctions, which should include internal disciplinary measures for minor offences and the involvement of law enforcement agencies for more serious cases of fraud and corruption. The establishment of special vigilance units can support internal controls.
- vi. *Computerization:* Perhaps more than any other change, the introduction of computerized support for the processing of customs documents provides the opportunity to implement standardized procedures that leave little to the discretion of the officials.
- vii. *Customer surveys and consultation with users:* Customer surveys are useful tools to diagnose problems and monitor the ongoing effects of reforms. Finally, there should be regular consultation with private sector groups, civil society, the media and other government agencies.
- viii. *Budget and revenue transparency* should underpin all efforts to counter corruption in revenue administration and collection. The two important guides to which reference should be made are: (i) The International Monetary Fund's *Code of Good Practices on Fiscal Transparency*<sup>15</sup> and (ii) OECD *Best Practices for Budget Transparency*.<sup>16</sup>

<sup>15</sup> See [www.imf.org/external/np/fad/trans/code.htm](http://www.imf.org/external/np/fad/trans/code.htm)

<sup>16</sup> Available from [www.oecd.org/LongAbstract/0,3425,en\\_2649\\_34119\\_1905251\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/LongAbstract/0,3425,en_2649_34119_1905251_1_1_1_1,00.html)

## 7.4.2 Prohibition against tax deductibility for bribes

Although the OECD Anti-Bribery Convention does not specifically address the requirement to ensure the non-tax deductibility of bribes, Parties to the Convention are expected to implement the 2009 Recommendation of the Council on Tax Measures for Further Combating Bribery of Foreign Public Officials in International Business Transactions, which requires member countries to have in place legislation or other binding means to prohibit the tax deductibility of bribes to foreign public officials.

States should, therefore, proceed on the general premise that national law should include an express prohibition of the tax deductibility of bribes. That is further reinforced by Article 12 (4) of the UNCAC, which takes an even more expansive view and provides that: “Each State Party shall disallow the tax deductibility of expenses that constitute bribes, the latter being one of the constituent elements of the offences established in accordance with Articles 15 and 16 of this Convention [bribery of national & foreign public officials] and, where appropriate, other expenses incurred in furtherance of corrupt conduct.”

Another valuable resource for tax authorities and inspectors is the OECD *Bribery Awareness Handbook for Tax Examiners* (2009).<sup>17</sup>

In summary, minimizing corruption in revenue systems is important as:

- It provides the State with revenues with which to finance expenditures, provide basic public goods and safety nets, thus protecting the ordinary citizens from the cost of the negative consequences of corruption.
- It facilitates economic efficiency, by reducing the distortions caused when businesses avoid taxation. It also fosters fair competition between businesses when everyone has to pay tax.
- It promotes economic growth and development by improving the investment climate for both domestic and foreign enterprises through clear and transparent rules and regulations and a better ability of the government to finance infrastructure development and maintenance.
- It reduces external deficits and borrowing, and stabilizes the exchange rate. Corruption is often associated with high levels of capital flight.

- It reduces risks to the national and international stability and security from illegal activities.

Therefore, it is in the interest of the State to put in place revenue systems that ensure sound financial budgeting and management of public resources.

## 7.5 Conclusions

Public financial management is a key component of good governance and corruption prevention. There are several measures that States can take to ensure transparency and accountability in how public finances are managed. These include the introduction of policy and performance based budgeting; efforts to align aggregate expenditure with originally approved budgets and analyse any significant differences; and the introduction of sound, effective and transparent revenue collecting systems. Other important measures are the establishment of strong oversight bodies through parliamentary budget committees, internal control, accounting and auditing units as well as independent external bodies such as Supreme Audit Institutions. Furthermore, measures to inform about and include the public in the preparation, execution and monitoring of the national and local budgets are ways to increase effectiveness and accountability of the use of public funds. It also helps in communicating to the public how their money collected through taxes, different duties, customs dues and other public earnings are being used for the common good.

The movement towards more open and accountable management of public financial resources is also supported by many international and regional institutions such as the UN, IMF, OECD and EU.

<sup>17</sup> Available from <http://www.oecd.org/dataoecd/20/20/37131825.pdf>

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## CHAPTER 8

# Public Procurement

### CONTENTS

8.1	Vulnerability of public procurement to corruption	98
8.2	Circumstances and causes of corruption in public procurement	100
8.3	Detection of corruption schemes	102
8.4	The UN Convention against Corruption on public procurement	103
8.5	UNCITRAL Model Law on public procurement	104
8.6	Key reference points for preventing corruption in public procurement systems	106
8.7	Practical anti-corruption measures in public procurement	107
8.8	Conclusions	109
	Selected Bibliography	110
<i>Box 8.1</i>	<i>Contribution of anti-corruption measures to economic development</i>	<i>99</i>
<i>Box 8.2</i>	<i>World Bank definitions of procurement-related fraud and corruption</i>	<i>101</i>
<i>Box 8.3</i>	<i>Public monitoring in Russia</i>	<i>103</i>
<i>Box 8.4</i>	<i>Key pillars of the OECD Principles for Integrity in Public Procurement</i>	<i>106</i>
<i>Box 8.5</i>	<i>Improving legislation at national level</i>	<i>108</i>
<i>Box 8.6</i>	<i>Centralization of public procurement</i>	<i>108</i>

## CHAPTER 8

# Public Procurement

*The public procurement sector is recognized by many international bodies as well as by national governments as one of the most corruption-sensitive areas of government. Government<sup>1</sup> officials procure goods, works and services, paid for with public funds, and may have to exercise judgement in applying prescribed procedures on behalf of the government in so doing. The possible risks of abuse of such an official position for private gain are obvious. Suppliers to governments, in addition, may seek to offer bribes to the official, in order to gain commercial advantage over their rivals.*

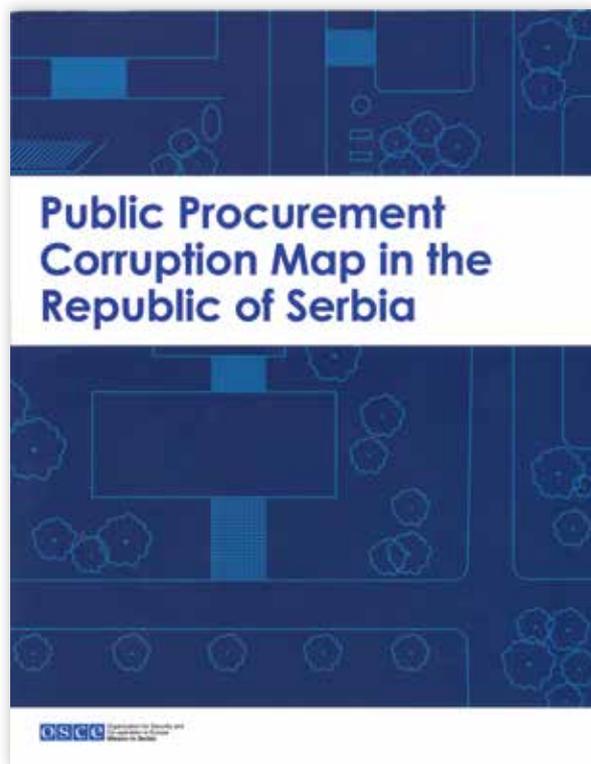
*Systemic efforts are required to establish and enforce principles of transparency, accountability and integrity and to support the fight against corruption and abuse in public procurement. The importance of public procurement cannot be overstated: public procurement is one of the key functions of modern governments. An efficient and effective public procurement system is therefore a pre-condition for a well-functioning government.*

*This Chapter identifies the vulnerabilities of public procurement to corruption and recommends preventive mechanisms. Key international agreements and legal texts, which contain procedures, rules and good practices designed to fight the scourge of corruption in national procurement systems, are presented, and concrete steps towards their implementation are suggested.*

## 8.1 Vulnerability of public procurement to corruption

Public procurement constitutes a major government activity. It is the process whereby governments, or public sector organizations, acquire goods, services and works from third parties. This process includes such complex spending areas as: infrastructure projects, such as the

<sup>1</sup> In the following, this may refer also to regional or local authorities or other entities providing a public service and that are obliged to apply public procurement regulations.



Cover of the OSCE-published "Public Procurement Corruption Map in the Republic of Serbia", November 2014

construction of roads, schools and hospitals; expensive medical equipment; routine items such as furniture or stationery; and services to citizens in education, social care, public health and other spheres.<sup>2</sup>

A large proportion of public money is spent on public procurement. For example, in OECD countries, public procurement accounts for a large share of government spending - an annual average of 13 per cent of GDP,

<sup>2</sup> Significant infrastructure projects may also take the form of public-private partnerships (PPP), which some countries treat separately from public procurement contracts, though it should be noted that PPPs run similar risks of corruption (and that the risks may be elevated given the complexity of the transactions)

### Box 8.1 Contribution of anti-corruption measures to economic development

As a result of anti-corruption investigations carried out in Italy in the early 1990s, there was a significant drop in public construction costs. The cost of constructing the Milan subway fell from the initial USD 227 million per km in 1991 to USD 97 million in 1995; the rail link costs fell from USD 54 million per km to USD 26 million; and the estimated cost of construction for a new airport terminal dropped from USD 3.2 billion to USD 1.3 billion.<sup>3</sup>

The introduction of such corruption prevention measures as a public tender and an independent observer resulted in a drastic reduction in the building costs of a section of the Trakia highway in Bulgaria: from the initial EUR 1.5 billion in 2005 to EUR 247 million in 2010.<sup>4</sup>

amounting to EUR 4.3 trillion and 30 per cent of total public expenditures.<sup>5</sup> The European Commission estimated the total expenditure of government, the public sector and utilities on procuring works, goods and services at 19 per cent of the EU's GDP in 2011, i.e. approximately EUR 2,415 billion.<sup>6</sup> Overall, over 167,000 contracts were advertised by these customers EU-wide in 2011.<sup>7</sup> Experts agree that, as a rule, in any country general government expenditure on procurement may account for 45 per cent of all public spending and up to 20 per cent of its GDP.<sup>8</sup>

The direct costs of corruption are estimated at around 3–4.5 per cent of the value of larger public procurement contracts in the EU.<sup>9</sup> According to some reports, 30 per cent or more of government spending on major infrastructure projects may be diverted for corrupt ends.<sup>10</sup>

Corruption wastes public funds - through higher prices and reduced quality - and may result in an almost uncontrollable rise in the cost of public services and works. Another feature of corruption is that contracted projects may be completely unnecessary in the first place, resulting in an even greater waste of national resources. In addition, collusion and cartel agreements to distort the procurement process have been seen in practice.

Earlier perceptions that corruption in public procurement is primarily a developing country problem have been overturned in recent years. Confronted with this challenge, governments of both developing and developed countries have demonstrated that effective measures can be taken to combat corruption in their public procurement systems,<sup>11</sup> also spurred by the United Nations Convention against Corruption (UNCAC), which came into force in 2005 and mandates certain requirements of public procurement systems.

With many international organizations addressing corruption, there is an emerging consensus at the international level on some key tools to prevent corruption: transparent public procurement laws; regulations and rules; and efficient and competitive<sup>12</sup> procurement processes, with procedural fairness and objective criteria to underpin decisions. Ensuring these features in the national system not only makes corruption less likely and more easy to detect, it also contributes significantly to achieving better terms for the delivery of goods and works and the supply of services, yields better contractual results and better developed product markets, and makes for a stronger and more diversified business sector.

These possible outcomes also demonstrate why implementation of anti-corruption policies in public procurement is an issue of national importance. Corruption and compromised value for money can strike public procurement at all levels of government; therefore, the relevant activities of central and regional governments, local authorities as well as state-owned enterprises that receive public funds should all be based on the principles of integrity, openness, competitiveness, accountability, credibility and cost-effectiveness.

3 Soreide, T., *Corruption in Public Procurement. Causes, Consequences and Cures*, 2002, Chr. Michelsen Institute, p. 1. Available from <http://bora.cmi.no/dspace/bitstream/10202/185/1/R%202002-1.pdf>

4 See *Public Procurement. Keeping government spending corruption-free*, Transparency International, 28 July 2011. Available from <http://blog.transparency.org/2011/07/28/public-procurement-keeping-government-spending-corruption-free/>

5 OECD, *Meeting of the Working Party of the Leading Practitioners on Public Procurement (LPP)*, 27-28 April 2015, at OECD Headquarters in Paris. - GOV/PGC/ETH/A(2015)2.

6 Slater, D. and McNeill, E., *EU Public Procurement Rules. The International Comparative Legal Guide to: Public Procurement 2015* (2014), 7th Edition, p. 1. Published by Global Legal Group.

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8 Schapper, P., *Corruption and Technology in Public Procurement*, 2007, World Bank, p. 6. Available from <http://siteresources.worldbank.org/INFORMATIONANDCOMMUNICATIONANDTECHNOLOGIES/Resources/CorruptionversusTechnologyinPublicProcurement.pdf>

9 See, further, *Identifying and Reducing Corruption in Public Procurement in the EU*, study prepared for the European Commission by PwC and Ecorys, with support of Utrecht University, 30 June 2013, p. 37. Available from [http://ec.europa.eu/anti\\_fraud/documents/anti-fraud-policy/research-and-studies/identifying\\_reducing\\_corruption\\_in\\_public\\_procurement\\_en.pdf](http://ec.europa.eu/anti_fraud/documents/anti-fraud-policy/research-and-studies/identifying_reducing_corruption_in_public_procurement_en.pdf)

10 Ibid., p. 32.

11 On the EU practices see, for example, Popesku, A.-I., *Public Procurement Corruption in the European Union*, Journal of Public Administration, Finance and Law, 2014. Available from: [http://www.jopaf.com/uploads/special-issue-1-2014/PUBLIC\\_PROCUREMENT\\_CORRUPTION\\_IN\\_THE\\_EUROPEAN\\_UNION.pdf](http://www.jopaf.com/uploads/special-issue-1-2014/PUBLIC_PROCUREMENT_CORRUPTION_IN_THE_EUROPEAN_UNION.pdf)

12 On competitive procurement see, for example, *OECD Recommendation on Fighting Bid Rigging in Public Procurement*, 2012. Available from <http://www.oecd.org/competition/oecdrecommendationonfightingbidrigginginpublicprocurement.htm>

It is important to bear in mind that the procurement process is a cycle, composed of three main phases, and is not limited to the selection of a supplier (which is the focus of many laws governing public procurement). The OECD-recommended *Principles for Integrity in Public Procurement* define the public procurement cycle as a sequence of related activities, from the needs assessment stage, through the award of the public contract, contract management and the final payment.<sup>13</sup>

## 8.2 Circumstances and causes of corruption in public procurement

Corruption in public procurement results from a complex set of circumstances and causes. Governments may have built an effective „line of defence“ in relation to some of them, but many challenges remain.

In general, there is a connection between a higher degree of legal and civic maturity of a system of government and of the democratic principles and institutions it embodies, and a better level of protection of public procurement from corruption. While the causes of corruption are many, it is evident that corruption schemes may take advantage of insufficient or unclear legal frameworks for public procurement at national and local levels, gaps and contradictions in the legislation, weak law enforcement, an application of unjustified exemptions from the general rules, and inadequate procurement infrastructure.

Consequently, all principles, rules and procedures governing public procurement should be fully disclosed, and appropriately implemented and managed. The exercise of best professional judgement may sometimes be necessary to ensure the government's needs are met and to achieve value for money in public procurement. However, the use of that judgement should be within established rules and procedures and be monitored if abuse is to be deterred and detected. Officials' powers need to be regulated by properly laying down the rights, duties and responsibilities of procurement officials.

Unscrupulous government officials may manipulate the social importance of procurement contracts and attempt to “justify” unnecessary technical features, or willfully over-estimate the amount and quality of what is to be procured, or seek to avoid transparency and

competition requirements by alleging the urgency of individual procurements.

Accordingly, principles and rules alone will not combat corruption. They need to be underpinned by guidelines on their implementation and use, best practice handbooks, codes of conduct and declaration of conflicts of interest, and appropriate monitoring and oversight procedures. In addition, these different approaches will need to be underpinned by adequate knowledge, skills and experience of public procurement officials, in turn requiring efforts to improve education and training. Appropriate interaction between the systems for the management of public finances and procurement is a further support and is also required by the UNCAC.

Government policy goals that can be pursued through procurement, such as those promoting environmental and social issues, including support for small- and medium-sized enterprises and minority groups, should be transparent and clearly declared. Different forms of independent public control and civil society participation are crucially important for monitoring the implementation of public priorities.

In many countries, procurement for the purposes of national defense and national security has traditionally been regulated by separate rules or exempted from the general public procurement system.<sup>14</sup> Though logical and stated to be aimed at safeguarding public interests, such separate rules may become a source of corrupting influence if misused by unscrupulous officials. Such separate rules may also compromise value for money where competition and transparency are not required. Modern regulatory systems, including that of the UNCITRAL Model Law on Public Procurement, have therefore significantly reduced the availability and scope of those exemptions.

In the public procurement context, corruption can also be facilitated if procurement officials are under pressure or under-rewarded, or if the system is inadequately resourced.<sup>15</sup> Furthermore, where procurement officials are subject to productivity targets measured by the

<sup>13</sup> See [www.oecd.org/gov/ethics/48994520.pdf](http://www.oecd.org/gov/ethics/48994520.pdf)

<sup>14</sup> For example, special features of procurement in the fields of defence and security are set out in a European Union directive: Directive 2009/81/EC of the European Parliament and of the Council of 13 July 2009. See <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:216:076:0136:en:PDF>

<sup>15</sup> Some researchers point to the “fraud triangle” which can be summarized into the three elements of: (1) pressure/motivation to commit fraud and/or corruption - which can result out of financial or emotional need, job performance, etc., (2) opportunity to seize - ineffective or lack of controls, inefficient monitoring or ineffective segregation of duties, and (3) rationalization - e.g., “it is a small amount to the company”, “I deserve it”, “Just this one/once”. See reference to Donald Cressy's hypothesis in Kalubanga, M., Kakwezi, P., and Kayiise, D., *The Effects of Fraudulent Procurement Practices on Public Procurement Performance*, International Journal of Business and Behavioral Sciences, Vol. 3, No.1; January 2013, pp. 23-24.

### Box 8.2 World Bank definitions of procurement-related fraud and corruption

- a) **“Corrupt practices”** – offering, giving, receiving, or soliciting, directly or indirectly, anything of value to influence improperly the actions of another party;
- b) **“Fraudulent practice”** – any act or omission, including a misrepresentation, that knowingly or recklessly misleads, or attempts to mislead, a party to obtain a financial or other benefit or to avoid an obligation;
- c) **“Collusive practice”** – an arrangement between two or more parties designed to achieve an improper purpose, including to influence improperly the actions of another party;
- d) **“Coercive practices”** – impairing or harming, or threatening to impair or harm, directly or indirectly, any party or the property of the party to influence improperly the actions of a party.

Source: *World Bank Guidelines. Procurement of Goods, Works, and Non-Consulting Services under IBRD Loans and IDA Credits & Grants by World Bank Borrowers*, revised July 2014, pp. 6-7.

number of contracts they conclude or similar objectives, the so-called “conspiracy of silence” and “procurement fatigue” syndromes may exacerbate the problem. In other words, in order to save time, effort and energy, public officials may fail to investigate possible instances of corruption or to refuse to agree to unfavourable provisions and contractual terms, or may turn a blind eye to poor contract results. Institutional mechanisms to support procurement officials in their work are therefore an important element of the fight against corruption. They include a culture of ethics and integrity, alerting officials to “red flags” and risks, and providing clear chains of responsibility and meaningful opportunities to raise possible corruption with supervisors or those in charge of monitoring public procurement.

Key features of a corruption resistant public procurement system are as follows: robust transparency mechanisms, including public availability of the applicable law and all rules; prior announcement and full prior disclosure of the terms of each procurement process; requirements for an objective description of the procuring entity’s needs; and public notice of that description, of who can participate and how the winner will be determined, together with the main contract terms. There must be rules and practices to ensure effective competition and mandated procedures for each procurement method. Moreover, the system must require a public award notice or notice of cancellation at the end of each process. Open tendering is often the procurement method most likely to achieve these features in practice. Finally, the legal framework and public procurement system must ensure a meaningful right to challenge and appeal against breaches of procedures and the decisions taken by the procurement officials throughout the process (e.g., on which suppliers are qualified and which bids are responsive).

Some problems arise due to deadlines. Very often budgetary and investment cycles, or seasonal construction cycles, do not match. This can result in gaps

between different schedules. The end of the financial year or the “fourth quarter” problem is a case in point. In this period both public officials and suppliers may collude in order to ensure the spending of public funds. This “rush” is also a kind of corruption, especially when procurement is willfully delayed so as to motivate using single tendering for reasons of urgency.

Though commonly considered primarily as a way for procurement officials to communicate their needs to suppliers, transparency has important internal and external functions. Requiring procurement officials to record their decisions and rationale allows for robust data gathering, which in turn helps enable effective monitoring and evaluation of the process. The complexity of available information on procurement processes can also play into the hands of corruption. On a daily, or even hourly, basis, numerous procuring bodies place, enter into and complete a vast number of contracts. With such a large overflow and dispersion of information, corruption can be hard to detect in the overall multitude of procurement cases. Nonetheless, modern data-mining tools can reduce the difficulty.

It is also clear that efforts to combat corruption in procurement cannot succeed if they take the form of short-term, one-off programmes and projects. Effective action against corruption requires continuing efforts. Different tools should be tailored to different risks in order to guarantee the appropriate implementation of individual procurements. Systemic and consistent strategies, which include preventive measures and risk management throughout the entire public procurement cycle, should be developed and implemented. Anti-corruption in this field must be based upon joint efforts of government bodies, businesses, and civil society.

## 8.3 Detection of corruption schemes

Elements of corruption in procurement cannot be completely concealed from the public or the private sector. Contractors generate money for bribes and gifts to officials by overcharging customers, lowering the quality of execution to below the design level, selling products and medicines past their sell-by date, and failing to observe delivery dates. The adverse effects of corrupt procurement practices could be observed not only by experts, but by large sections of the public, the media, and, most importantly, by civil society if the above transparency measures were to be in place. People can find out when procurement fraud and abuse may be taking place, because they are the end-users of public benefits, goods and services delivered under such procurement contracts and may be able to judge their real value and quality. Also, competing businesses monitor each other's behaviour, and they are in a position to know the origins and terms of individual contracts.

In order to develop and implement anti-corruption measures in public procurement, it is important to have a clear idea of which areas and stages of procurement, and which items to be procured are most likely to be exposed to the risk of corruption. The fight against corruption can only be effective if the corrupt activity is detected on time, investigated, and the perpetrator punished accordingly.

A starting point for the development of anti-corruption strategies in procurement is to identify the areas prone to corruption. This can be done by drawing up "maps" of corruption risks in the national procurement system and placing "red signal flags" on the map to highlight these areas. Any procurement system or procedure can be vulnerable to corruption, though the risks may be higher in systems with overall less robust governance and democratic accountability. Just as there is no one type of corruption, no ideal systems or procedures exist to combat the problem. It is important to understand that, firstly, even competitive procurement procedures do not automatically rule out the possibility of corrupt practices, and, secondly, the risk of corruption exists at all stages of the procurement cycle.

A key challenge in detecting procurement-related corruption is that the risks are present not only in the tendering stage but also in the planning and execution stages as well as in the stage of acceptance and registration of contract results. Cases of possible corruption can be identified within the behaviour and

activities of procurement officials and contractors at each stage of the procurement cycle.

The following are some indicators of corruption in public procurement:

- non-compliance of procurement procedures with the national procurement legislation;
- non-compliance with the in-house guidelines for procurement procedures;
- purchasing goods, services and work without *bona fide* and appropriate justification of their necessity, as well as their scope and cost;
- repurchase or false purchase of goods, work and services, which have already been made, done or delivered;
- unfounded claims that certain procurements are urgent, complex, or unique in order to exempt them from the general rules;
- procurement of goods, work and services with excessive quality;
- over-inflating the procurement price because the bribe is usually calculated as an agreed percentage of the contract price;
- sending out tender invitations to preselected suppliers only, and using other means of curbing competition;
- using bogus pre-qualification, so that only those who have paid a bribe appear on the final tender list;
- procuring entities providing assistance with tender bids to one participant in the procurement process; this may include advising the participant's employees on various aspects of the forthcoming bids' evaluation;
- sharing of non-public information with a specific supplier about other participants;
- sharing of confidential information with information "brokers"; this creates a situation in which pieces of information are sold to different participants;
- unreasonable and exclusive demands that only one possible supplier could fulfill;
- drawing up very general framework specifications and terms of reference that can be adjusted and even changed in the execution stage in order to derive benefit from such changes;
- entering into a significant number of contracts with a single supplier in the absence of any procurement competition;
- soliciting a procurement order, but actually signing a contract on very different terms;
- unauthorized signing of contracts, or acting under a power of attorney whose areas of responsibility do not provide for such actions or for any liability they incur;

### Box 8.3 Public monitoring in Russia

Starting from 2012, the Russian Federation has been carrying out public monitoring of particularly large contracts worth over RUB 1 billion. Buyers are obliged to post documentation about such procurements on a dedicated official website. Citizens, community organizations and suppliers have a right to submit comments and suggestions in relation to the proposed contracts, as well as to participate in the public face-to-face hearings on these contracts.

The initial monitoring results have quickly revealed the “pressure points” in the planned procurements. They include: insufficient justification for the initial (maximum) contract price; inadequate preparation of the specifications and technical documentation; as well as procuring entities’ infringements of certain norms and rules of procurement. As a result of public discussions, procuring authorities have begun to introduce necessary amendments to the documentation, and the regulatory bodies receive the information they need to carry out operational checks.<sup>16</sup>

- entering into additional agreements, revising the original schedules of work and estimates, allowing adjustments, or even changing the scope of the contract to bring about a benefit;
- acceptance of the delivered goods, executed work and rendered services without documents verifying the quality and the actual volume;
- ignoring delays and other inefficiencies in the completion of contracts, as well as not applying penalties for any breach of contractual obligations.

Suppliers can also introduce corrupt and fraudulent schemes. These include:

- price collusion, which sometimes even occurs in online reverse auctions;
- bribes, delivery of gifts, employment of procurement officials’ family members, payment of medical treatment and recreation for procurement officials and their families, or their children’s education;
- active interference in the preparation of the procurement process;
- interference in the contract pricing rationale;
- presenting their own costs of supply as the market prices, without any correlation to the actual market price;
- dumping in order to obtain contracts;
- resale of contractual obligations;
- inflating the volume of work;
- low or inadequate performance quality, use of cheaper goods.

Recognizing indications of potential corrupt actions, the so-called “red flags”, helps to create a detailed map of corruption risks and the necessary practical framework for anti-corruption strategies. The effective use of such a map will, in practice, require significant data gathering and evaluation. The frequency and thoroughness of monitoring should be proportional to the relative risks. Tracking and recognition of suspicious circumstances that occur during the procurement process is an

essential element of preventing corruption in public procurement.

A less commonly-discussed but nonetheless important distortion in public procurement markets is collusion. Collusion involves two or more bidders agreeing to distort the competition for a procurement contract. Corruption and collusion in public procurement should be viewed “as concomitant threats to the integrity of public procurement”<sup>17</sup> and may be linked. For example, a corrupt procurement official might ask for bribes from colluding bidders to turn a blind eye to collusive practices. The detection schemes noted above should also be designed to identify possible collusive rings.

## 8.4 The UN Convention against Corruption on public procurement

Basic principles and approaches to combating corruption are enshrined in the United Nations Convention against Corruption. Article 9 of the Convention, within its Preventive Measures Chapter, is dedicated to public procurement.<sup>18</sup>

The introduction to, and five components of, Article 9 (1) describe the key features of an effective system to counter corruption in public procurement. The primary objective is to prevent corruption by requiring transparency, competition and the use of objective criteria throughout the procurement process.

<sup>16</sup> See the Russian Federation Accounts Chamber website: [www.ach.gov.ru](http://www.ach.gov.ru)

<sup>17</sup> See OECD, Global Forum on Competition, *Roundtable on Collusion and Corruption in Public Procurement*, October 2010 – DAF/COMP/GE(2010)6. Available from <http://www.oecd.org/competition/cartels/46235884.pdf>

<sup>18</sup> While this is the most relevant article in the context of public procurement, Article 6 addresses anti-corruption bodies (and it is generally recommended that these bodies and public procurement agencies should co-ordinate their activities); Article 8 requires codes of conduct for civil servants, which should include procurement officials; and Article 10 requires transparency in public administration, which addresses parts of the procurement cycle that may fall outside a public procurement law.

## United Nations Convention against Corruption

### *Article 9. Public procurement and management of public finances*

1. Each State Party shall, in accordance with the fundamental principles of its legal system, take the necessary steps to establish appropriate systems of procurement, based on transparency, competition and objective criteria in decision-making, that are effective, inter alia, in preventing corruption. Such systems, which may take into account appropriate threshold values in their application, shall address, inter alia:
  - a) The public distribution of information relating to procurement procedures and contracts, including information on invitations to tender and relevant or pertinent information on the award of contracts, allowing potential tenderers sufficient time to prepare and submit their tenders;
  - b) The establishment, in advance, of conditions for participation, including selection and award criteria and tendering rules, and their publication;
  - c) The use of predetermined and objective criteria in public procurement decisions, in order to facilitate the subsequent verification of the correct application of the rules and procedures;
  - d) An effective system of domestic review, including an effective system of appeal, to ensure legal recourse and remedies in the event that the rules or procedures established pursuant to this paragraph are not followed;
  - e) Where appropriate, measures to regulate matters regarding personnel responsible for procurement, such as declaration of interest in particular public procurements, screening procedures and training requirements.

[...]

Source: [www.unodc.org/unodc/en/treaties/CAC/](http://www.unodc.org/unodc/en/treaties/CAC/)

The establishment of an effective *legal framework* for public procurement remains the essential prerequisite for the implementation of the provisions of the Convention and the prevention of corruption. A legal framework comprises the primary law, secondary legislation (implementing regulations, by-laws and/or decrees), and other rules that procurement officials must follow. It should be clear which officials are bound to follow which parts of the legal framework. While it is good practice to have one legal framework that applies throughout a State, the differences in the types of procurement handled centrally and by local government may require some different provisions. Where this is the case, the governing principles and procedures should be as consistent as possible.

The legal framework should be supported by appropriate legal infrastructure – such as rules on the administration of government contracts – and guidance on which other laws procurement officials need to take into account (e.g., employment and environmental standards). The entire legal framework should be freely available to the public as well as to procurement officials.

The legal framework needs also to be supported by effective guidance on its use in practice, and a public procurement agency or similar body should be entrusted with this task.

## 8.5 UNCITRAL Model Law on public procurement

The UNCITRAL Model Law on Public Procurement is a template available to national governments for a primary procurement law for their domestic economies. It is intended to provide all the essential procedures and principles for a national system and to be flexibly implemented to accord with local circumstances. The Model Law was developed by the United Nations Commission on International Trade Law (UNCITRAL) and adopted at the Commission's 44th session in 2011.<sup>19</sup> UNCITRAL also developed and adopted a *Guide to Enactment of the UNCITRAL Model Law on Public Procurement* in 2012.<sup>20</sup>

The Model Law makes provision for new procurement procedures, while respecting generally accepted standards of transparency, competition and objectivity, and determines relations between procurement parties: procuring entities, participants, suppliers, an independent body and the regulator. It addresses the application of e-commerce to the public procurement context, including allowing for automated electronic trading procedures, which today provide an effective manner of combating corruption while maximizing the potential to secure value for money.

The Model Law reflects the key requirements of the UNCAC. For example: it requires prior publication of announcements for each procurement procedure (with

<sup>19</sup> The new law has replaced the Model Law on Procurement of Goods (Works) and Services, 1994.

<sup>20</sup> Available from <https://www.uncitral.org/pdf/english/texts/procurem/ml-procurement-2011/pre-guide-2012.pdf>

## The UNCITRAL Model Law on Public Procurement contains an article that sets out the anti-corruption tool of adopting a code of conduct for public procurement authorities.

### Article 26. Code of Conduct

A code of conduct for officers or employees of procuring entities shall be enacted [by the adopting State]. It shall address, inter alia, the prevention of conflicts of interest in procurement and, where appropriate, measures to regulate

matters regarding personnel responsible for procurement, such as declarations of interest in particular procurements, screening procedures and training requirements. The code of conduct so enacted shall be promptly made accessible to the public and systematically maintained.<sup>21</sup>

relevant details) and notices of the award of procurement contracts; it does not permit the use of discriminatory descriptions (such as trade names); it requires prior disclosure of all the criteria that will determine which firms can participate and how the winner will be determined; and it mandates open tendering as the default procurement method (this method is considered to be the most likely to provide transparency, competition and objectivity). It also offers other procedures designed for different types of procurement that may arise in a variety of procurement situations and in the different institutional and economic contexts of different countries. Its norms can also apply to complex procurement with a high innovative component. One of the innovations in the latest issue of Model Law is the determination of the conditions and application rules for framework agreements - a procurement method which has become commonplace in recent years.

The Model Law implements the principle of *maximizing economy and efficiency of procurement* (often referred to as achieving value for money). Overall, the Model Law gives flexibility to public entities to seek to achieve the greatest benefits from procurement for society, within the boundaries of the Model Law itself and, in particular, subject to rigorous transparency mechanisms to allow for the oversight of the process.

Public procurement entities are required to respect and ensure the *principle of full and open competition among suppliers and contractors* and to encourage broad participation of suppliers to enable effective competition, including both domestic suppliers and those from overseas. Although the provisions contain only a few direct references to competition, the establishment of a competitive procurement environment is fundamental to the whole architecture of the Model Law. The Model Law also addresses the more challenging environment of competition in highly concentrated markets, and contains measures designed to avoid collusion.



Alexey Stukalo, Deputy Co-ordinator, OSCE/OCEEA (left), and Michel Nussbaumer, Director of the EBRD Legal Transition Programme (right), at the EBRD-OSCE Regional seminar on enhancing public procurement regulation, Vienna, 28 May 2015

Another important principle of the Model Law is that of *fair, equal and equitable treatment* of all suppliers by the procuring entity. In conjunction with the *principle of objectivity* throughout the procurement process, as provided for in the Model Law, and *the principle of integrity of the process*, including the prevention of conflicts of interest, the principle of fair treatment establishes a crucial requirement for all national procurement systems - that of public confidence in the public procurement system. When society does not trust the actions of the procuring entity and mainly perceives corruption that compromises value for money and sustainable results, the ability of this procuring entity, and the procurement system as a whole, to achieve its goals, is crippled.

As explained in the Guide to Enactment, *transparency* in public procurement under the Model Law involves five essential elements:

- 1) The public disclosure of all the rules (law, regulations, decrees, etc.) that apply in the procurement process;
- 2) Timely and advance publication of planned procurements;

<sup>21</sup> See the text of the Revised Model Law at <https://www.uncitral.org/pdf/english/texts/procurem/ml-procurement-2011/2011-Model-Law-on-Public-Procurement-e.pdf>

## Box 8.4 Key pillars of the OECD Principles for Integrity in Public Procurement

### A. Transparency

1. Governments should provide an adequate degree of transparency in the entire procurement cycle in order to promote fair and equitable treatment for potential suppliers.
2. Governments should maximize transparency in competitive tendering and take precautionary measures to enhance integrity, in particular, for exceptions to competitive tendering.

### B. Good management

3. Governments should ensure that public funds are used in procurement according to the intended purposes.
4. Governments should ensure that procurement officials meet high professional standards of knowledge, skills and integrity.

### C. Prevention of official misconduct, compliance with legal and corporate requirements and monitoring

5. Governments should establish mechanisms to prevent the risk of non-compliance with integrity in public procurement.

6. Governments should encourage close co-operation between government and the private sector to maintain high standards of integrity, in particular in contract management.
7. Governments should provide specific mechanisms to monitor public procurement, as well as to detect official misconduct and apply the necessary sanctions.

### D. Accountability and control

8. Governments should establish a clear chain of responsibility together with effective control mechanisms.
9. Governments should handle complaints by potential suppliers in a fair and timely manner.
10. Governments should empower civil society organizations, media and the wider public to scrutinize public procurement.

Source: adapted from OECD *Principles for Integrity in Public Procurement*, 2009.

- 3) The precise description of the subject matter of the procurements, including the objective requirements for participation and deciding the winner;
- 4) The application of the required procurement procedures in practice (that is, it can be seen that officials in fact comply with them);
- 5) The existence of a system to monitor that these rules are being followed and to enforce them if necessary.

It should be emphasized that the Model Law provides for the subsequent development by the enacting State of secondary legislation as described above, in which detailed procedures and options for using technologies should be laid out.

The EBRD-UNCITRAL Initiative on Improving Public Procurement Legislation in the CIS countries and Mongolia, whose partners include the OSCE/Office of the Co-ordinator of OSCE Economic and Environmental Activities, the World Bank, the Asian Development Bank, and the OECD,<sup>22</sup> is aimed at promoting the UNCITRAL Model Law on Public Procurement. Its approach is to work with governments across the region within a single and comprehensive framework, and to encourage upgraded public procurement regulation in the CIS countries and Mongolia.

## 8.6 Key reference points for preventing corruption in public procurement systems

International organizations and international financial institutions attach high importance to establishing corruption prevention mechanisms in different countries. A series of international initiatives and decisions form a platform that can be used to fight corruption in national public procurement systems.

The ten OECD *Principles for Integrity in Public Procurement* are instrumental in achieving this goal.<sup>23</sup>

To help put these principles into practice, the OECD created a methodology document – the so-called Checklist.<sup>24</sup> The suggested solutions are premised on the existence of three phases in the procurement cycle:

- 1) pre-tendering, which includes needs assessment, planning and budgeting, preparation of technical specifications and choice of procurement procedures;
- 2) tendering, from the publication of the tender notice to the award of the contract;
- 3) post-tendering, including contract management, receipt of goods and services, and payment.

<sup>22</sup> For more on the Initiative see <http://www.ppi-ebd-uncitral.com/index.php/en/ebd-uncitral-initiative>

<sup>23</sup> OECD, *Principles for Integrity in Public Procurement*, 2009, Paris, OECD Publishing. Available from [www.oecd.org/gov/ethics/48994520.pdf](http://www.oecd.org/gov/ethics/48994520.pdf)

<sup>24</sup> Ibid. pp. 51-73.

## Post-tendering stage of procurement

Given that the post-tendering phase is characterized by high corruption risks, as shown above, the Checklist recommends the following actions in relation to contract management and payment:

- obtain documentary evidence that the received goods and services are in line with expected standards;
- ensure that the final accounting or audit of the contract

(project) is not carried out by personnel involved in former phases to ensure the separation of duties and authorization;

- ensure the timely release of funds for payments against contractual conditions and the scope of work;
- consider the possibility of a post-contractual (post-project) assessment.<sup>25</sup>

The Checklist offers participants of the procurement process, as well as regulatory bodies, step-by-step actions at each stage of the procurement. Their execution helps to greatly reduce corruption risks and ensure the integrity and effectiveness of procurements.

The *OSCE Ministerial Council Declaration on Strengthening Good Governance and Combating Corruption, Money-Laundering and the Financing of Terrorism*, adopted in 2012,<sup>26</sup> underscores the importance of fair and transparent public procurement systems, taking into account such instruments as the UNCITRAL Model Law on Public Procurement and the World Trade Organization (WTO) Agreement on Government Procurement (GPA).

In countries that have adopted the GPA, public procurement is open to contractors from the States that have acceded to it. At present, the GPA has 17 parties comprising 45 WTO members. Another 30 WTO members participate in the GPA Committee as observers. Out of these, 10 members are in the process of acceding to the GPA. The fundamental aim of the GPA is to open government procurement markets among its parties provided that there is transparency, integrity and competition in those markets. As a result of several rounds of negotiations, the GPA parties have opened procurement activities worth an estimated USD 1.7 trillion annually to international competition.<sup>27</sup>

The most recent European Union Directive on public procurement, *Directive 2014/24/EU* of 26 February 2014, has also placed an enhanced emphasis on fighting corruption in public procurement.<sup>28</sup>

The new World Bank *Procurement Framework* is focused on achieving value for money, sustainable development

and integrity in procurement funded by the World Bank. It is also designed to increase the Bank's support to countries in developing their own procurement systems.<sup>29</sup>

International public procurement standards and recommendations on best procurement practices have also been developed by the:

- International Labour Organization in *Labour Clauses (Public Contracts) Convention*, 1949;
- European Bank for Reconstruction and Development in *Procurement Policies and Rules*, August 2000; and
- International Monetary Fund in its *Code of Good Practices on Fiscal Transparency*, 2007, and *Manual on Fiscal Transparency*, 2007.

## 8.7 Practical anti-corruption measures in public procurement

The development of an efficient *legal framework*, based on the UN Convention against Corruption and other international legal instruments and standards, must be accompanied by the establishment of the necessary *procurement infrastructure*, including an information system, e-commerce platforms, databases and other resources, to ensure the implementation of the principles of transparency, objectivity and accountability.

It is also essential to strengthen the *institutional framework* of procurement. This may include the creation of special procurement bodies and the establishment of the appropriate competent authorities and services.

It is also essential to take steps to train and develop the *human resources* of procurement – professional buyers. It is not enough to merely establish conditions for fair and efficient procurement; conditions must be implemented by procurement officials in practice. It is those officials

<sup>25</sup> Ibid., p. 72.

<sup>26</sup> The OSCE Ministerial Council Declaration on Strengthening Good Governance and Combating Corruption, Money-Laundering and the Financing of Terrorism (2012), Dublin. Available from [www.osce.org/cio/97968](http://www.osce.org/cio/97968)

<sup>27</sup> Adapted from WTO website, GPA page at [https://www.wto.org/english/tratop\\_e/gproc\\_e/gp\\_gpa\\_e.htm](https://www.wto.org/english/tratop_e/gproc_e/gp_gpa_e.htm)

<sup>28</sup> Available from <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0024&from=EN>

<sup>29</sup> See *New World Bank Procurement Framework Approved*, 21 July 2015, at <http://www.worldbank.org/en/news/press-release/2015/07/21/world-bank-procurement-framework>

### Box 8.5 Improving legislation at national level

The basic set of US procurement rules, the Federal Acquisition Regulation, mandatory for federal procuring authorities, contains detailed requirements for the planning of contracts by public servants, control over contract performance, as well as other requirements for mandatory procurement procedures, which are often left to the discretion of the procuring entity in some legal systems.<sup>30</sup>

On 5 April 2013, the Russian Federation adopted a new law “On contractual system in the procurement of goods, works and services for national and municipal needs”. This Law regulates the entire procurement cycle, from the initial planning to the final execution of a contract, acceptance and recording of its results, as well as monitoring, control and audit of all procurement processes and their results.<sup>31</sup>

### Box 8.6 Centralization of public procurement

In the majority of the EU Member States public procurement is carried out by a central purchasing authority on the basis of the EU general regulations embedded in national legislation.<sup>32</sup> The EU Directive 2014/24 of 26 February 2014 specifies: “There is a strong trend emerging across Union public procurement markets towards the aggregation of demand by public purchasers, with a view to obtaining economies of scale, including lower prices and transaction costs, and to improving and professionalizing procurement management. This can be achieved by concentrating purchases either by the number

of contracting authorities involved or by volume and value over time. However, the aggregation and centralization of purchases should be carefully monitored in order to avoid excessive concentration of purchasing power and collusion, and to preserve transparency and competition, as well as market access opportunities for SMEs.”<sup>33</sup>

In the United States a centralized government authority, the General Services Administration, was established in 1949. In Canada, the Ministry of Public Works and Services was set up in 1996.

whose actions determine whether procurement is fair, geared toward the public interest and cost-effective.

In addition, special targeted anti-corruption activities should take place. An integral part of these activities is the establishment of *internal control* institutions, institutions of independent *external audit* (control), as well as institutions dealing with *appeals and grievances and resolution of disputes* between contract parties.

#### Special corruption prevention steps

There are a number of special corruption prevention steps that countries and procurement entities could consider. They may serve as a “starting point” for those who are just embarking on this work.<sup>34</sup> All these steps are based on the international legal framework in the area of procurement, and have been tested and practically applied in a large number of countries. They are as follows:

- ▶ Development of e-commerce and e-technologies in public procurement

- ▶ Ensuring transparency of public procurement procedures at all stages of the procurement cycle

The public availability of procurement information is largely dependent on the type of information concerned. For example, the OECD member countries more frequently make information available about the pre-tendering and tendering stages of the procurement cycle, including laws and policies (34 countries), as well as selection and bids evaluation criteria (21 countries). In comparison, fewer OECD member countries publish information on the post-tendering stage in particular, justification for awarding contracts (13 countries), contract modifications (11 countries) or information that enables the tracking of procurement spending (6 countries).<sup>35</sup>

- ▶ Criminalization of bribery
- ▶ Public monitoring and supervision
- ▶ Independence of public procurement checks/controls and audits

Considerable work to strengthen procurement audit methodology is carried out by the International Organisation of Supreme Audit Institutions (INTOSAI) and regional associations of independent external government audit bodies.

<sup>30</sup> See <http://acquisition.gov/far/>

<sup>31</sup> See <http://www.gov-zakupki.ru/zakon/44-fz-id126>

<sup>32</sup> OSCE, *Strategic Approaches to Corruption Prevention in the OSCE Region, Review Report on the Implementation of OSCE Commitments for the 20<sup>th</sup> OSCE Economic and Environmental Forum*, 2012, EEF.GAL/20/12, Vienna, 5 September 2012.

<sup>33</sup> See <http://eur-lex.europa.eu/legal-content/EN/TEXT/PDF/?uri=CELEX:32014L0024&from=EN> On EU countries see also OECD, *Centralised Purchasing Systems in the European Union*, 2011, Sigma Papers No. 47, OECD Publishing.

Available from <http://dx.doi.org/10.1787/5kgkqv703xw-en>

<sup>34</sup> See also *The Global Programme against Corruption. UN Anti-corruption Toolkit*, 3rd Edition, Vienna, September 2004.

<sup>35</sup> See OECD, *Government at a Glance*, 2011, p. 150.

- ▶ Creation of “islands of integrity” - pilot regions, procurement organizations, types of procurement which apply a full range of appropriate corruption prevention measures. Expansion of this regime to cover an increasing number of public procurement contracts, procurement bodies and suppliers.<sup>36</sup>
- ▶ Establishment of proper appeals procedures against unlawful and unjust decisions.

A considerable number of countries have set up independent complaints mechanisms. In addition, some countries have established mechanisms for alternative dispute resolution, including procurement ombudsmen, settlement agreement procedures, and arbitration hearings. For example, Canada has set up the Office of the Procurement Ombudsman.

## 8.8 Conclusions

The development of effective anti-corruption methodologies would not be possible without comparing and building upon efforts undertaken by different countries and international agencies. Mapping and comparative evaluation of procurement systems provide up-to-date information on the comprehensiveness and sufficiency of anti-corruption actions. Ensuring a high level of transparency, impartiality and fairness in procurement decisions and actions is a continuous process.

It is important that countries and their designated organizations have a clear understanding of international public procurement standards, including requirements for the legal framework, structure of governance and procurement performing bodies, information management and other aspects of procurement infrastructure. Such an understanding will also assist in modernizing national procurement systems and in delivering better value for money for the taxpayer.

The World Bank, in collaboration with the OECD Development Assistance Committee (DAC), has developed a methodology for assessing procurement systems (MAPS).<sup>37</sup> MAPS offers a set of indicators for the evaluation and comparison of different procurement systems. It includes special indicators to be used as

benchmarks in assessing the effectiveness of anti-corruption measures and determining the procurement system’s weaknesses:

1. Existence of a legal framework for procurement that contains requirements for tender documentation and contracts, as well as legal provisions to combat corruption, fraud, conflict of interests, and unethical behaviour, and that determines actions to be taken in such cases.
2. Whether the legal framework defines responsibility and accountability and establishes penalties for procurement participants implicated in corrupt and fraudulent practices.
3. Confirmation of the existence of an enforcement system for the execution of established norms and enactment of sanctions.
4. Existence of special measures to prevent corruption and fraud.
5. Involvement of the private sector, civil society and end-users to create an honest and ethical public procurement market.
6. Existence of operational mechanisms that make information on corruption, fraud and unethical conduct available to decision makers.
7. Existence of a code of conduct for procurement participants.

The assessment system is being expanded to include such aspects as productivity, efficiency, openness, effectiveness, professionalism, relationships with suppliers and end users, and other indicators.

<sup>36</sup> See detailed information in *The Global Programme against Corruption. UN Anti-corruption Toolkit*, 3<sup>rd</sup> Edition, Vienna, September 2004, pp. 267-268.

<sup>37</sup> OECD, *Methodology for Assessing Procurement Systems (MAPS)*, 2009. Available from <http://www.oecd.org/dac/effectiveness/45454394.pdf>

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## CHAPTER 9

# Political Party Funding

### CONTENTS

9.1	International standards and commitments	112
9.2	Donations	114
	<b>9.2.1 Private donations</b>	<b>114</b>
	<b>9.2.2 Bans on certain types of donations</b>	<b>114</b>
	<b>9.2.3 Limits on donations and expenditure</b>	<b>115</b>
	<b>9.2.4 State funding</b>	<b>115</b>
9.3	State oversight	116
9.4	Civil society involvement	117
9.5	Conclusions	118
	Selected Bibliography	118

## CHAPTER 9

# Political Party Funding

*Political parties play an essential role in democracies and they need sufficient funding to fulfil their core functions. Without financing, a political party would not be able to operate or to communicate with the electorate.*

*At the same time, regulating political party funding is essential to guarantee their accountability to the general public. It is crucial to prevent corrupt political party funding as such behaviour gives the impression that access to the democratic decision-making process can be bought. Financial transparency is vital to keep the interest and trust of the general public in government and it also enables voters to make informed decisions about political parties when they cast their ballot.*

*The risk of corrupt political party and campaign financing is exacerbated if there is a lack of legitimate sources of funding, as political parties could then be forced to find finance from private actors who will want something in return. The aim of anti-corruption activities in this area is not to curtail funding, but to ensure that parties are funded from legitimate sources and that their financial transactions are not veiled by secrecy.*

*Attempts to limit corrupt political party funding have taken three main routes: restrictions on sources of funding and spending, financial disclosure as well as state subsidies. However, there is no consensus on the most effective way of dealing with corruption in party funding, and there is a lack of reliable evidence to suggest which approach is best.*

## 9.1 International standards and commitments

Money in politics is a sensitive issue and the relative lack of consensus on how best to regulate it may explain why this issue has largely been left to nation States to regulate. Nevertheless, commitments have been made

by States on a global and regional level that address the issue of political party financing.

By signing the United Nations Convention against Corruption (UNCAC) States have agreed in Article 7 (2) “to consider adopting appropriate legislative and administrative measures [...] to prescribe criteria concerning candidature for and election to public office.” They have also agreed in Article 7 (3) to “consider taking appropriate legislative and administrative measures, [...] to enhance transparency in the funding of candidatures for elected public office and, where applicable, the funding of political parties.” The aim of these obligations is to strengthen prevention and combating of corruption in the States through the promotion of transparent selection and funding criteria of persons seeking election to public office.

The Council of Europe has issued more detailed standards as well as guidance documents on this matter. The Council of Europe Committee of Ministers issued Recommendation Rec(2003)4 on common rules against corruption in the funding of political parties and electoral campaigns. This document covers issues such as external sources of funding, the need to regulate both, ordinary party finance and electoral campaign finance (since the two are deeply interconnected in practice), transparency and the need for effective and independent supervision as well as proportionate and dissuasive sanctions for violations.<sup>1</sup>

In 2011, the OSCE Office for Democratic Institutions and Human Rights (ODIHR) in conjunction with the Council of Europe’s European Commission for Democracy through Law (Venice Commission) produced guidelines on expertise and good practice for OSCE participating States, called *Guidelines on Political*

<sup>1</sup> See Council of Europe, *Recommendation Rec(2003)4 of the Committee of Ministers to member states on common rules against corruption in the funding of political parties and electoral campaigns*. Available from <https://wcd.coe.int/ViewDoc.jsp?id=2183>



Measures to make political parties in Ukraine and in the wider OSCE region more transparent and accountable are discussed at the OSCE/ODIHR-organized expert workshop in Kyiv, 14 July 2015

*Party Regulation.*<sup>2</sup> These guidelines largely incorporate the 2003(4) Recommendation but also cover additional areas. They were created as a tool to assist OSCE participating States and Council of Europe member States in formulating legal frameworks that comply with OSCE commitments and international standards.<sup>3</sup>

The Group of States against Corruption (GRECO) monitors the Council of Europe Recommendation and has published a summary of the results of its work up to 2011.<sup>4</sup> The Review of GRECO's Third Evaluation Round concluded that member States still have much to do to comply with the Recommendation, although there has been considerable progress in numerous areas, particularly in defining what constitutes parties' sphere of activity, the presentation and publication of their financial accounts, the independence of the relevant supervisory bodies, the focus of that supervision and the flexibility of available sanctions. The report highlighted some of the remaining shortcomings in party funding oversight:<sup>5</sup>

- The transparency of some sources of income of parties, such as donations in kind, party membership fees, loans or sponsorship are often neglected by the legislation or regulated in an inconsistent manner, leaving the door open for abusive practices.
- Anonymous donations are still possible in some countries.
- Legislation and financial/accounting standards for political financing reporting in many countries do not provide for the adequate consolidation of statements which would take into account, for instance, local party bodies and other entities involved in election campaigns.
- Financial information is often not published in an easily accessible and timely way.
- A large number of States fail to have a sufficiently independent supervisory body and in some States, such a body does not exist or has limited functions.
- Sanctions are often weak, not flexible enough, limited in scope or not applied. In other cases, sanctions may be disproportionately severe.

Developing and implementing political finance standards in the OSCE participating States requires an ongoing dialogue. As an important contribution to this, the OSCE/ODIHR holds seminars in participating States to support the promotion and strengthening of the democratic functioning of political parties and electoral processes, in line with OSCE commitments.

<sup>2</sup> See OSCE/ODIHR, *Guidelines on Political Party Regulation*, 2011, available from [www.osce.org/odihr/77812](http://www.osce.org/odihr/77812)

<sup>3</sup> In particular see [www.legislationline.org](http://www.legislationline.org) for international norms and standards, ODIHR legal opinions and examples of good state practice on human dimension issues.

<sup>4</sup> See Doublet, Y.-M., *Fighting Corruption - Political Funding*, 2012, Thematic Review of GRECO's Third Evaluation Round, GRECO. Available from [http://www.coe.int/t/dghl/monitoring/greco/general/DOUBLET\\_EN.pdf](http://www.coe.int/t/dghl/monitoring/greco/general/DOUBLET_EN.pdf)  
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<sup>5</sup> See Press release regarding the report, available from [http://www.coe.int/t/dghl/monitoring/greco/news/News\(20120509\)ActRep2011\\_en.asp](http://www.coe.int/t/dghl/monitoring/greco/news/News(20120509)ActRep2011_en.asp)

## 9.2 Donations

### 9.2.1 Private donations

Arguably the most legitimate source of income for political parties is contributions and membership subscriptions by ordinary citizens. Unfortunately, small donations from large numbers of individuals often prove insufficient to fund ongoing party activities and electoral campaigns, as a result parties have frequently had to rely on large donations from a limited number of rich individuals, private companies or trade unions. Over time, politicians may become closer to these interests than to the electorate.

One antidote to undue influence by donors is transparency. For instance, it is more difficult for corporate donors to demand government contracts in return for their contributions if these contributions are duly recorded and made public. If the funding process is not transparent, the public is left to draw its own conclusions and it is likely to suspect those who receive lucrative government contracts of having secretly funded the political party in power. Indeed, money that finds its way secretly into the coffers of political parties may be illicitly acquired or not declared to tax authorities.

Subsequently, the Council of Europe Recommendation (2003)4 advocates that political parties should be required to make public the names of those who give donations above a certain threshold.<sup>6</sup>

However, transparency alone may not be sufficient if the public remains suspicious about the influence wielded by those who make large donations. Other forms of regulations may be required, such as bans and limits on donations and spending.

### 9.2.2 Bans on certain types of donations

Some forms of donations may be considered so detrimental to the democratic process or creating such risks of political corruption that they should be banned completely. The *Guidelines on Political Party Regulation* (Articles 172-175) mentions anonymous donations and state owned/controlled companies as types of actors that could be banned from making donations, or at least face specific restrictions.

6 Depending on the system, the reason for the threshold could be to reduce the administrative burden on those who submit and receive financial reports, or to protect the privacy of those making small donations. For further details also see Article 3 (b) of the CoE Recommendation 2003(4) on common rules against corruption in the funding of political parties and electoral campaigns.

The Council of Europe Recommendation (2003)4, Article 7 further recommends that “States should specifically limit, prohibit or otherwise regulate donations from foreign donors.” Many countries ban foreign donations completely, including Greece, Ireland, Slovenia and Spain. In Germany, foreign donations are possible only from citizens or corporations from European Union (EU) countries, or if they do not exceed EUR 1000.<sup>7</sup> According to the International Institute for Democracy and Electoral Assistance (IDEA), 77 per cent of OSCE participating States use some form of ban on foreign donations, as compared to 67.5 per cent worldwide.<sup>8</sup>

In sum, the most common bans on donations in OSCE participating States are from foreign sources, state institutions (largely as a way of preventing abuse of state/administrative resources); companies with partial state ownership and companies that benefit from government contracts.

A particularly important issue when discussing corruption in the political sphere concerns corporate donations. As noted above, corporations may make political donations in the expectation of government contracts, tax relief or other benefits. In its 2005 *Standards of Political Funding and Favours*, Transparency International (TI) discussed this issue and the conclusion was that “Banning corporate money in political finance is one answer, but could be counterproductive if the result is to inhibit diversity of parties within a democracy, or drive donations under the table.”<sup>9</sup> Where corporate donations are allowed, TI argued that transparency and limits on donations are important. Companies should list all donations and publish their policy on political donations. They should not make political donations in countries where they have no legal presence, and listed companies should give very serious consideration to the option of requiring shareholder approval for such donations.<sup>10</sup>

7 For more on regulation of foreign donations in the CoE member States please see Venice Commission, *Opinion on the Prohibition of Financial Contributions to Political Parties from Foreign Sources*, 2006, pp. 14-17. Available at [http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2006\)014-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2006)014-e)

8 Analysis of data from the International IDEA political finance database, available from [www.idea.int/political-finance](http://www.idea.int/political-finance). Unless otherwise specified, information in Chapter 9 about regulations in OSCE participating States is taken from this database.

9 See Transparency International, *Standards of Political Funding and Favours*, 2005, p. 2, available from [http://www.transparency.org/whatwedo/publication/policy\\_position\\_01\\_2005\\_standards\\_on\\_political\\_funding\\_and\\_favours](http://www.transparency.org/whatwedo/publication/policy_position_01_2005_standards_on_political_funding_and_favours)

10 Ibid.



- state funding (without spending limits) could lead to increased spending on election campaigns, which in some contexts can be seen as undesirable;<sup>16</sup>
- if the threshold for receiving funding is low, state funding could lead to a profusion of small, weak parties, which can hinder the consolidation of a country’s political institutions;
- if, on the other hand, the threshold is very high, or if the provision is based exclusively on past performance, state funding may lead to the petrification of the party system;
- state funding of political parties is often unpopular with voters, who are unwilling to see tax money distributed among political parties they do not trust.

These mixed views among observers may explain why international standards fall short of directly recommending financial subsidies (the Council of Europe Recommendation (2003)<sup>4</sup> for example, while stating that the state “should provide support to political parties”, only adds that “State support may be financial”).

An important issue is the extent to which political parties depend on state support. The Council of Europe Recommendation (2003)<sup>4</sup> states that “State support should be limited to reasonable contributions” (Article 1), while the *Guidelines on Political Party Regulation* notes that such assistance “must be carefully designed to ensure the utility of such funding while not eradicating the need for private contributions or nullifying the impact of individual donations” (Article 177). The reality is somewhat different, as it seems that once public funding has been introduced in OSCE participating States, it tends to become the dominant source of funding. GRECO country evaluations of 20 OSCE participating States show that the average dependency on public funding is around two thirds, and while in some countries, state funding represents a minority of the funds received (as in Armenia, the Czech Republic, Germany and the United Kingdom), in others, very little of party income comes from private sources. In Croatia, Greece, Belgium, Poland, Spain and Slovakia, public funds amount to 80 per cent or more of total party income. More specifically, GRECO has found that the German legislation on political financing has contributed to an intelligent balance between private and public funding of the political formations so that the latter do not rely solely on state support.<sup>17</sup>

<sup>16</sup> See, for example, Transparency Serbia report *Presidential and Parliamentary Election Campaign Financing in Serbia*, 2012. Available from [http://www.transparentnost.org.rs/images/stories/Election%20Campaign%20Financing%20in%20Serbia%20Report%202012%20\(Final\).pdf](http://www.transparentnost.org.rs/images/stories/Election%20Campaign%20Financing%20in%20Serbia%20Report%202012%20(Final).pdf)

<sup>17</sup> See GRECO, *Evaluation Report on Germany on Transparency of Party Funding*, 2009, pp. 9 and 20.

The most common form of *indirect* state funding in OSCE participating States is free or subsidized access to media. This is followed by tax relief for political parties or their donors (48 per cent) and premises for campaign meetings (37 per cent). Less common forms of indirect public funding include interest-free loans and subsidized postage for letters to voters. Indirect public funding can be a useful tool for supporting political parties, with a lower risk that government resources are used for political corruption.

### 9.3 State oversight

Restrictions on party funding will have no impact on political corruption unless they are observed and, where necessary, enforced. However, political finance legislation is notoriously difficult to enforce. It is important to design regulations in a way that encourages parties and politicians to comply with them: for example, in Germany parties are provided with subsidies that match private donations they receive and are below a certain size; this motivates parties to seek small donations rather than large ones. If the provision of the subsidy is also conditional on the submission of a properly audited financial report, this will also motivate parties towards transparency.

Nevertheless, oversight and enforcement remain essential components for detecting and addressing violations: monitoring and enforcing agencies should have a strong capability of identifying practices of corruption (resulting in a ‘high chance of being caught’); and, through their design, sanctions should effectively discourage corrupt practices and non-compliance with applicable regulations (sanctions must be higher than the tolerable ‘cost of doing business’). Detailed information must be available in order for judgements to be made if donation bans, spending limits, or other regulations have been violated. The main basis for official oversight should be financial reports submitted by political parties and candidates. The *Guidelines on Political Party Regulation* states that:

“Reports on campaign financing should be turned in to the proper authorities within a timely deadline of no more than 30 days after the elections. Such reports should be required not only for the party as a whole but for individual candidates and lists of candidates... Political parties should be required to submit disclosure reports to the appropriate regulatory authority at least on an annual basis even in the non-campaign period.” (Articles 200 and 202).



Session of the conference “Money in Politics” co-organized by the OSCE/ODIHR with State Audit Office of Georgia and other partners, Tbilisi, 18 February 2016

However, stakeholders are unlikely to submit accurate financial reports unless they know that inaccuracies may be detected and penalized. Therefore, independent monitoring and implementation based on political will and sufficient capacity is a must. It is vital that the regulatory body is pro-active rather than simply following procedures, and that it engages in an ongoing dialogue with key stakeholders. The *Guidelines on Political Party Regulation* subsequently recommend that the responsible institution “...should be given the power to monitor accounts and conduct audits of financial reports submitted by parties and candidates” (Article 214). The most common solution is to place this responsibility with the Electoral Management Body, but some OSCE participating States also use auditing institutions, courts or anti-corruption institutions. No matter which institution is in charge of overseeing political finance, it needs to co-operate closely with related institutions such as anti-corruption bodies (see Chapter 3 of this Handbook) and, in relation to criminal charges, with the police.

One example of such reporting requirements and review is that used in Germany. The Basic Law and the Political Parties Act stipulates that the President of the Bundestag receives parties’ annual financial reports by the end of the third quarter of the following year. A certified auditor verifies the financial reports before the submission. The reports include detailed income, expenditure and asset accounting, and list all donations as well as the names of donors whose total contribution exceeded EUR 10,000. If a party does not meet these requirements, a fine double or even three

times the amount of the misstated donation can be imposed.<sup>18</sup>

In recent years, many GRECO member States have taken steps to establish the supervision of political financing within a permanent body provided with guarantees of operational independence. Ultimately, however, the effectiveness of formal oversight is dependent on the willingness of the main actors to implement the regulations. A large proportion of the countries reviewed by GRECO have never or very rarely applied sanctions against political finance violations or have applied such sanctions only in case of formal breaches, indicating that much work remains to be done.<sup>19</sup>

## 9.4 Civil society involvement

NGOs (as well as an active media) play a crucial role in raising public awareness by investigating campaign income and spending, scrutinizing party accounts and identifying inaccuracies in reports and other violations. Monitoring abuse of state/administrative resources and vote buying are other important areas. In doing this, civil society groups also empower citizens to make informed decisions when they go to vote. Finally, civil society organizations in many countries play a leading role in advocating for legal reform and for implementing

<sup>18</sup> See OSCE/ODIHR, *Federal Republic of Germany - Elections to the Federal Parliament (Bundestag)*, 22 September 2013, OSCE/ODIHR Election Expert Team Final Report, p. 7

<sup>19</sup> See GRECO, Third Evaluation Round (launched in 2007), Evaluation and Compliance Reports, available from [http://www.coe.int/t/dghl/monitoring/greco/evaluations/round3/ReportsRound3\\_en.asp](http://www.coe.int/t/dghl/monitoring/greco/evaluations/round3/ReportsRound3_en.asp)

institutions to take their role in this field more seriously. Given the difficulties inherent in detecting violations of political finance regulations, the institutions responsible for oversight should explicitly acknowledge the role of non-governmental oversight in revealing possible violations.

While such efforts must be led by NGOs in each country, there are a number of international NGOs that offer guidance on work in the field of political party funding. Transparency International includes political finance as a main global priority and in 2012, they produced a Regional Policy Paper on *Political Party Integrity: More accountable, more democratic*<sup>20</sup> that looks at anti-corruption safeguards related to political party financing in 25 European countries. It finds that political parties have the lowest level of perceived integrity among constituents due to political financing and high risk of vote buying by powerful interest groups due to weak regulations, donation disclosure requirement and party financial reporting, and insufficient mechanisms for oversight and enforcement.

The International Foundation for Electoral Systems (IFES) also assists efforts of civil society monitoring, formal oversight and reform initiatives. The organization has engaged in such activities in over 20 countries in the last two years.<sup>21</sup>

The media can also play a significant part in controlling the role of money in politics. Many cases of political corruption come to light through scandals revealed

by media rather than through formal investigations. While these scandals themselves may further reduce public confidence in politicians and political parties in the short term, they often provide a crucial impetus for reform. Media outlets must however be careful not to get involved in corruption themselves. Given the importance of mass media in modern election campaigning, it is tempting for politicians or parties to use illegitimate ways to seek positive media coverage and 'hidden advertising' outside of formal campaign advertising. Legislation protecting media freedom and establishing rules on media coverage and behaviour (particularly for electronic media) should be designed to minimize the likelihood of political bias. For more details, see Chapter 14 on Media.

## 9.5 Conclusions

Corrupt funding of political parties is a serious threat to the rule of law, democracy and human rights. While there has been definite progress in the field of transparency in political party funding over the last decade, a number of issues remain, as set out in the above mentioned GRECO report.

These and other related issues must be addressed in order for political corruption to be effectively combated. Political finance should also not be seen in isolation; instead, its regulation should be seen within the context of a national integrity system. Abuse of state/administrative resources cannot be eradicated unless issues of ethical public administration are addressed, while illicit influence on parties/politicians must also be addressed by other mechanisms such as conflict of interest regulation, lobbying regulation, etc.

<sup>20</sup> Produced as part of the TI's European National Integrity Systems study conducted in 25 European countries in 2011-2012. For more information see [http://www.transparency.org/whatwedo/activity/european\\_national\\_integrity\\_systems\\_project](http://www.transparency.org/whatwedo/activity/european_national_integrity_systems_project)

<sup>21</sup> See [www.ifes.org](http://www.ifes.org)

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# CHAPTER 10

# Regulating Lobbying

## CONTENTS

10.1	Definition and background	120
10.2	Potential risks of lobbying	121
10.3	Regulation of lobbying	121
10.3.1	Europe	123
10.3.2	North America	125
10.3.3	Designing lobbying regulation	128
10.4	Conclusions	129
	Selected Bibliography	130
<i>Box 10.1</i>	<i>OECD: getting the regulatory framework right</i>	122
<i>Box 10.2</i>	<i>Key elements of the German system</i>	123
<i>Box 10.3</i>	<i>Key elements of the Polish system</i>	124
<i>Box 10.4</i>	<i>Key elements of the Lithuanian system</i>	124
<i>Box 10.5</i>	<i>Key elements of the system of the EU institutions</i>	125
<i>Box 10.6</i>	<i>Key elements of the Canadian system</i>	126
<i>Box 10.7</i>	<i>Key elements of the United States system</i>	127
<i>Table 10.1</i>	<i>The Different Regulatory Systems</i>	128

## CHAPTER 10

# Regulating Lobbying

*Lobbying is an integral part of modern democracies as a way of attempting to influence political decisions. It may be understood as actions by groups or organizations to influence government decisions (especially, but not limited to the adoption or amendment of laws) through communications and contacts with public officials. Lobbying may be conducted by groups or organizations on their own, or by a professional lobbyist on their behalf. Where lobbying is properly regulated, it can provide an important channel for different voices, furnish governments with expert information and help to improve policy, legislation and regulations.*

*However, where it is not effectively regulated or limited, lobbying may easily become a conduit for illicit influence and corruption. The balance, then, is a potentially difficult one: to ensure access by permitting lobbying that is appropriate and transparent, yet, prevent its abuse to exercise improper influence.*

## 10.1 Definition and background

### What is lobbying?

Lobbying typically involves individuals or groups, with varying or specific interests, communicating with others in order to attempt to influence decisions by elected or appointed governmental officials. The *Recommendation on Principles for Transparency and Integrity in Lobbying* of the Organisation for Economic Co-operation and Development (OECD) defines lobbying as “the oral or written communication with a public official to influence legislation, policy or administrative decisions.”<sup>1</sup> According to a recent report for the Venice Commission, “Lobbying activity can be regarded as the act of individuals or groups, each with varying and

specific interest, attempting to influence decisions taken at the political level.”<sup>2</sup>

Lobbying may aim to have an impact on a range of different types of decisions. The most obvious is legislation - for example lobbying for a new law to be drafted or adopted (or not adopted), lobbying for or against amendments to laws or draft laws. Legislation includes primary laws but also any other legal regulation, such as implementing regulations issued to operationalize a law – a rich ground for lobbyists, as in many countries, the small print of such regulations is often crucial, and not that visible. In addition to legislation, lobbying can also be directed at other key decisions, such as zoning or planning processes, decisions on major infrastructure projects, etc.

Lobbyists may do many things to try and exert influence. These include the following:

- direct communication in person in a variety of settings, including meetings and social settings;
- offering presentations;
- drafting and delivering reports and papers;
- written letters, telephone conversations, email exchanges and social media;
- writing, initiating or commissioning media articles or other media output to strengthen their own arguments.

As this list implies, lobbying may be conducted through direct interaction with officials, but it may also be pursued through indirect means such as placing media articles to influence or put pressure on policymakers. The focus of this Chapter is on direct interactions with officials and how these can be regulated.

<sup>1</sup> Available from <http://acts.oecd.org/Instruments/ShowInstrumentView.aspx?InstrumentID=256&InstrumentPID=250&Lang=en&Book=False>

<sup>2</sup> Chair, R. *et al*, *Report on the Legal Framework for Lobbying in Council of Europe Member States*, Venice Commission Study No. 590/2010, p. 3.

### Who is a lobbyist?

As the Venice Commission report usefully summarizes, “Lobby/interest groups/extra-institutional actors may include, but are not necessarily limited to, those with economic interests (such as corporations), professional interests (such as trade unions or representatives of a professional society) and civil society interests (such as environmental and human rights groups). Such groups may directly, or indirectly through consultants they have hired, seek to have public policy outputs reflect their preferences.”<sup>3</sup> This summary presents the two most important points regarding who lobbyists are:

- Lobbyists may represent a wide range of interests. The obvious examples are economic self-interest – for example a company lobbying to secure regulations that favour it. But organizations that are established to protect broader public interests also engage in lobbying – such as NGOs. An important point to clarify here is that while such organizations may fall under the definition of lobbying, *regulations* on lobbying may exclude such organizations (see Section 10.3).
- Organizations or groups (such as a company) may lobby on their own or they may hire a professional lobbyist to do so for them. Some organizations may employ persons whose job is to lobby for them – or ‘in-house’ lobbyists as defined in Canada’s lobbying regulations (see Section 10.3.2).

## 10.2 Potential risks of lobbying

Lobbying carries risks and may not always be in the public interest. There may be inappropriate interactions between lobbyists and lobbied officials such as exchanges of favours or even clear-cut bribes. Large corporate interests with significant resources to mobilize expertise and ensure their presence in the decision-making process can have a disproportionate influence on the distribution of resources.

In many countries, lobbyists are increasingly being viewed as being generally too close to policy makers – a trend exacerbated by the increasing overlap between the public and private sectors. Lobbying can ultimately shade into bribery, for example where a company or lobbyist bribes a legislator to secure amendments in legislation. It may result in the criminal act of trading in influence, namely where a company or individual pays a lobbyist to exert undue influence to secure them benefits. The main

international legal frameworks promoting transparency and good public governance require that bribery and trading in influence be criminalized. Both the United Nations Convention against Corruption (UNCAC) and the Council of Europe Criminal Law Convention on Corruption include provisions on bribery and trading in influence.

In the context of its Fourth Evaluation Round, which covers the prevention of corruption of parliamentarians (launched in 2012), the Group of States against Corruption (GRECO) has identified lobbying activities as a source of risks of corruption. Although only a small number of countries have been examined to date, the introduction of adequate rules on lobbying (or their improvement) has been recommended to more than half of the countries so far. Moreover, in December 2013, the Committee of Ministers of the Council of Europe has instructed that a feasibility study be conducted with regard to a possible European instrument on lobbying. The following section outlines how lobbying can be regulated and provides some country examples.

## 10.3 Regulation of lobbying

The main objective of regulating lobbying is to restrict undue influence by particular interests on political decisions. Mechanisms to achieve this are designed to ensure i) that lobbying is transparent and ii) that – mainly as a result of greater transparency – those involved are accountable for the lobbying in which they engage or are engaged. This Chapter focuses primarily on these mechanisms.

There is no clear agreement on whether explicit regulation of lobbying - i.e. regulation of those that lobby - will achieve these goals. Clearly, lobbying regulation can only work effectively if it is part of a wider good governance framework that includes other mechanisms to curb undue influence and corruption. Among such mechanisms, the following are particularly important:

- *Regulation of decision-making processes* that may be targeted by lobbyists. The legislative process is a key example. It is vital that the legislative process both in the executive branch and parliament is designed to minimize risks of corruption, for example by ensuring clear and transparent processes for the publication of drafts, consultation of stakeholders and the wider public, etc.

<sup>3</sup> Ibid.

### Box 10.1 OECD: getting the regulatory framework right

The OECD identified the following “interdependent and mutually reinforcing elements” of good governance that should be harmonized with regulations on lobbying:

- Standards of expected conduct established by **codes of conduct** for public officials.
- Provisions criminalizing **undue influencing** of public decision making, such as influence trafficking, bribery and other corruption offences.
- Constitutional right to **petition government**, exercise freedom of speech and association.
- Processes for regularly **consulting** representatives of employers and employees, for example in the framework of “social partnerships”.

- Policies and practices for enhancing **citizen engagement** through public consultation and participation.
- Standards and procedures to ensure **access to government information** related to the decision-making process, for instance by freedom of information legislation.
- Judicial and administrative **review** of decisions.
- Rules on **political parties and election campaign financing**.
- Procedures for **reporting corruption, misconduct and providing protection** for whistleblowers.

Source: OECD, *Lobbyists, Government and Trust (Volume 1): Increasing Transparency through Legislation*, 2009, p. 25.

- *Regulation of persons that are lobbied.* This means essentially rules and regulations that apply to officials who may be the subject of lobbying. These include: regulations requiring officials to declare contacts that they have with lobbyists; regulations on conflict of interest, gifts as well as codes of conduct; or regulations on financing of political parties.

The OECD has also identified a number of wider governance measures that should be in place to ensure effective restraints on lobbying (see Box 10.1). Lobbying regulation should therefore be designed taking the wider regulatory context into account. Where appropriate, it should be accompanied by changes to that context as well.

This said, there is nevertheless a growing trend towards regulating lobbying. Lobbying regulations have, for example, been introduced in Australia, Canada, France, Georgia, Germany, Hungary, Lithuania, the former Yugoslav Republic of Macedonia, Poland, Slovenia and the United States. Regulations also exist at the European Parliament and the European Commission. Regulations in Germany, Poland, Lithuania, Canada, the United States and at European Union institutions are described briefly in Sections 10.3.1-10.3.2.

#### Scope of lobbying regulation

A key issue in lobbying regulation is how to define who (or what) constitutes a ‘lobbyist’. In particular, should lobbying rules apply to civil society organizations? Civil Society Organizations (CSOs) obviously lobby on policy issues, but usually, their reasons for doing so are not based on self-interest, as compared with the case of a company lobbying on regulations that affect its business. It is important to ensure that rules do not prevent ordinary citizens and CSOs from participating in the political process. Therefore, for

example, in Canada individuals who are unpaid and work on a voluntary basis are not regulated as lobbyists. However, when efforts to influence public officials are paid for, the Canadian and United States systems do require registration even if such lobbying is not done for profit. Lithuania excludes the activities of non-profit organizations “in the common interests of their members” from the coverage of the term lobbying.<sup>4</sup>

#### Components of lobbying regulation

The minority of States that have introduced regulations and laws on lobbying have tended to focus on one or more of the following measures:<sup>5</sup>

- requiring lobbyists to register publicly;
- requiring lobbyists to disclose with which public actors, on which issues and in whose interest the lobbyist has engaged;
- requiring lobbyists to disclose information about income and spending related to lobbying activities;
- making publicly available a list of lobbyists (including the above details) for citizens to scrutinize; and
- prohibiting former public officials from immediately becoming lobbyists once they have left public office (requiring a ‘cooling off’ period).

The aims and type of regulation vary considerably among countries that have regulated lobbying explicitly. For example, a report by the Latvian NGO Providus suggested that in certain countries in Eastern Europe, professional lobbyists do little more than simply secure

<sup>4</sup> Kalnins, V., *Transparency in Lobbying: Comparative Review of Existing and Emerging Regulatory Regimes*, 2011, Centre for Public Policy PROVIDUS, pp. 30-31. Available from [http://pasos.org/wp-content/uploads/2011/10/Comparative-report\\_lobbying-PASOS.doc](http://pasos.org/wp-content/uploads/2011/10/Comparative-report_lobbying-PASOS.doc)

<sup>5</sup> With modifications, the following list draws on: Murphy, G., *Regulating Lobbying: Promoting Transparency or Straw Man*, Presentation, Seminar “Research Skills for Undergraduate Students”, 12 March 2010, Undergraduate Seminars Series, Dublin City University, Dublin Region Higher Education Alliance.

access for an individual or entity to a relevant official, and do not advocate on the issue itself.<sup>6</sup> In other countries such as the United States, lobbyists may engage in much more, providing analysis and communication with officials to advocate a client's position. The examples mentioned are not intended to illustrate 'better' and 'worse' forms of lobbying, but simply to demonstrate that the issues that need regulating will differ from country to country.

The first of the mechanisms mentioned above - registration - is necessary in order for the others to be possible. Registration gives state authorities, ordinary citizens, journalists, as well as other lobbyists the opportunity to see who is lobbying. Lobbyists who register can then be required to provide further information, such as whom they represent, who they lobby or have lobbied, and how they have done so (for example, by declaring individual meetings and communication, money spent, etc.).

Ideally, a register of lobbyists should be available on the Internet to allow for fast and efficient scrutiny of the data. For example, the Center for Responsive Politics, an American NGO, uses the Internet filings of lobbyists who fall under the lobbying legislation of the United States to publish extensive and easily navigable information on American lobbyists and interests.<sup>7</sup>

As mentioned above, any system of registration and disclosure of information should avoid restricting the ability of individuals and civil society to voice preferences and campaign on issues of public policy, including petitioning the government, public servants and parliament.

### Voluntary vs. "legal" regulation

At an extreme, lobbying regulation may impose obligations on any lobbyist, backed up with sanctions for failing to comply. This is the model in Canada, Lithuania, Poland and the United States. At the other extreme, regulations may be entirely voluntary, as is the case for European Union institutions. Intermediate scenarios include those where, for instance, lobbying registration is voluntary, but is a condition for gaining formal access to policy makers (such as in Germany). Although a recent report for the Venice Commission understood lobbying regulation to include only binding and sanctionable rules,<sup>8</sup> it should not be assumed that binding regulations

will necessarily function more effectively than voluntary ones. The following subsections provide examples of regulation from five countries, along with regulations for European Union institutions.

## 10.3.1 Europe

### Germany

Germany was the first European State to put in place explicit formal rules on the registration of lobbyists in 1972. The rules cover associations and their representatives who engage in interest representation. Groups wishing to lobby at either the German Parliament (Bundestag) or the federal Government must register, providing details of its name, composition of its board of management or directors, the sphere of its interest, number of members, names of its representatives, and the office address. The register is public.

A registered entity is given access both to the Parliament and federal Government buildings and is able to participate in consultation on, and preparation of, federal legislation. However, as noted by Chari *et al.*, the Parliament may invite organizations that are not registered lobbyists to present information on an ad hoc basis<sup>9</sup>

#### Box 10.2 Key elements of the German system:

- Applies to contact with Federal Parliament and Government;
- Registration is a condition for access to Parliament and Government buildings;
- Access can be denied for unregistered representatives but no other formal sanctions for non-compliance.

### Poland

Poland has regulated the issue of lobbying through the 2005 Law "On Lobbying Activity in the Law-making Process"<sup>10</sup> and three additional decrees.<sup>11</sup>

The Law applies to lobbying carried out in the lower house of the Parliament (the Sejm) and the governmental ministries. It excludes the President's office, the Senate and local Government. It distinguishes between two

6 Kalnins *op cit.*, p. 12.

7 See Lobbying Database of the Center for Responsive Politics, available from <https://www.opensecrets.org/lobby/>

8 Chari, R. *et al.*, *Report on the Legal Framework for Lobbying in Council of Europe Member States*, Venice Commission Study No. 590/2010, p. 4.

9 Chari, R., Hogan, J., Murphy, G., *Regulating lobbying: a global comparison*, 2010, Manchester University Press, p. 61.

10 Poland, Law of July 7, 2005 "On Lobbying Activity in the Law-making Process", Journal of Laws 2005, No. 169, item 1414.

11 Poland, Decree of the Minister of Internal Affairs and Administration of 20 February 2006 "On Registry of Subjects Performing Professional Lobbying Activity" (Journal of Laws No. 34 of 2006, item 240); Decree of the Council of Ministers of 24 January 2006 "On Declaration of Interest in Works on Drafts of Normative Acts" (Journal of Laws No. 34 of 2006, item 236); Decree of the Council of Ministers of 7 February 2006 "On Public Hearing on Drafts of Secondary Acts" (Journal of Law No. 30 of 2006, item 207).

types of lobbying: lobbying activity and professional lobbying activity. The former is defined as “every activity carried out by legally permissible means which aims to exert influence on public authority bodies in the law-making process”. Professional lobbying activity is defined as “remunerated lobbying activity carried out on behalf of third parties for the purpose of interests of these parties being taken into account in the law-making process”. Professional lobbying can be carried out by a legal entity or an individual on a contractual basis. Professional lobbyists are required to register. The Register of Professional Lobbyists and Lobbying Firms is administered by the ministry responsible for public administration and is public. Those who carry out professional lobbying without having registered are subject to a fine. Each public authority must report back on an annual basis, providing a list of cases where the institution was lobbied, the lobbyists involved, and the nature of the lobbying (e.g., whether it was for or against the proposal in question); the report is published in the official Public Information Bulletin.

The Polish regulations provide an interesting example of a combination of regulation of lobbying in the sense that is the focus of this Chapter, and regulation of lobbying in a broader sense. In addition to the provisions on professional lobbying, the Law requires that the Government keeps a register of legislative works throughout its term of office. The register is posted on the Public Information Bulletin (BIP) website and encompasses: draft proposals to draft laws, draft laws and draft governmental decrees. Following the publication of the register, anyone is entitled to submit, by way of an official form, a notification of interest in the work of the presented drafts. Such a notification is submitted to the body responsible for developing the specific draft in question and is also posted on the BIP website. The notifying party may participate in the public hearing concerning the given draft. Such a hearing may take place only once during the entire legislative process and is conducted by the relevant ministry.

### Box 10.3 Key elements of the Polish system:

- Distinction between lobbying as a general activity and professional lobbying;
- Only applies to the lower house of the Parliament and the Government;
- Professional lobbyists (paid and acting on behalf of a third party) are required to register;
- Information on who lobbied with which institutions and on which issues is prepared and published by the respective public authorities;
- Fines for professional lobbyists who fail to register.

### Lithuania

Lithuania<sup>12</sup> regulates lobbying through the Law on Lobbying Activity, which was passed in June 2000 and was slightly amended in 2003. The Act is concerned entirely with lobbying the legislative process and does not apply to attempts to influence other decisions or processes. The Law defines lobbying as any activity undertaken by an individual or legal entity (paid or unpaid) in order to influence the legislative process in the interests of a client. The definition of lobbying is explicitly elaborated to exclude activities such as those of non-profit organizations in the common interests of their members, or the expression of an opinion by an individual on a legal or draft legal act where the individual is not acting in the interests of a client (i.e. as a lobbyist).

Lobbyists must register with the Chief Official Ethics Commission, which is responsible for the supervision and enforcement of the Law and *inter alia* drafts and approves the Lobbyists’ Code of Ethics. Former state politicians, public officials and servants and judges may not apply for registration as a lobbyist for one year after the termination of their mandate. Lobbyists must file an annual report on lobbying activities conducted during the previous year, including details of all clients, legislation lobbied, together with spending on and income from lobbying activities. This is submitted to the Commission. An interesting provision in the Lithuanian legislation prohibits the amount of remuneration of a lobbyist being related to the outcome of the lobbying (i.e. whether a legal act is passed, amended, etc.). In other words, contingency fees are prohibited.

Lobbyists that violate the law may have their activities suspended or terminated, be subject to administrative fines and also be liable for damages caused to other persons by their lobbying activities.

### Box 10.4 Key elements of the Lithuanian system:

- Only lobbying that focuses on legislative processes covered;
- Duty of lobbyists to register with Chief Official Ethics Commission and report annually on activities; publication of details on lobbyists;
- Comprehensive disclosure requirements (clients, lobbied issues, spending);
- Sanctions include suspension or termination of the lobbyist’s activities and administrative fines. The law also foresees liability for damages caused by lobbying activities;
- One-year ‘cooling-off’ period for politicians and other public officials before they may become lobbyists.

<sup>12</sup> The description of the Lithuanian model draws largely on the following source: Chari, R., Hogan, J., Murphy, G. *Regulating lobbying: a global comparison*, 2010, Manchester University Press, pp. 74-75.

Not all States that have introduced lobbying regulations have continued with them. For example, in 2006, Hungary passed the Act XLIX on Lobbying Activities which it withdrew in 2011 as ineffective as very few lobbyists registered under the Act.

### European Union

In addition to some States adopting lobbying laws, European Union (EU) institutions have also moved towards lobbying regulation. The European Parliament in 1997 and European Commission in 2008 established voluntary registers of lobbyists, following concerns over lobbying and undue influence that emerged from the 1980s onwards. In 2011, the European Parliament and European Commission merged their registers into the joint *Transparency Register*. The register covers “all activities... [with certain exceptions]... carried out with the objective of directly or indirectly influencing the formulation or implementation of policy and the decision-making processes of the EU institutions, irrespective of where they are undertaken and of the channel or medium of communication used, for example via outsourcing, media, contracts with professional intermediaries, think tanks, platforms, forums, campaigns and grassroots initiatives.” ‘Directly influencing’ means “influencing by way of a direct contact or communication with the EU institutions or other action following up on such activities.” ‘Indirectly influencing’ means “influencing through the use of intermediate vectors such as media, public opinion, conferences or social events, targeting the EU institutions.”<sup>13</sup>

Organizations engaging in such activities may register. If they do so, they are bound to observe a Code of Conduct.<sup>14</sup> Those applying for registration have to provide:

- Data about the registrant (including legally responsible persons, the number of persons involved in the activities within the scope of the register, fields of interest, activities, affiliation to networks, countries where operations are carried out, membership and, if applicable, number of members);
- Legislative proposals covered by registrant’s activities;

- Turnover attributable to the activities falling within the scope of the register or an estimate of the cost of the activities or the overall budget, information about the clients on behalf of whom activities are carried out and revenues received by registrants for representation activities.<sup>15</sup>

As of September 2015, there were around 8,200 organizations listed in the *Transparency Register*, compared to around 4,000 in 2001.<sup>16</sup>

#### Box 10.5 Key elements of the system of the EU institutions:

- Joint *Transparency Register* of the European Parliament and the European Commission;
- Voluntary registration - in principle, it is not prohibited to lobby without registration;
- Registration is open to organizations, not individuals, with the exception of self-employed lobbyists;
- Registrants may receive an entry pass to the premises of the European Parliament, and the Parliament and Commission offer other specific incentives for registration (for example proactive provision of information to registrants);
- Registrants are bound by the Code of Conduct;
- Non-compliance with the Code of Conduct may carry several kinds of sanctions (written notification, temporary suspension, removal from the register for one or two years, de-activation or formal withdrawal of the authorization for access to European Parliament premises and loss of other incentives).

### 10.3.2 North America

Canada and the United States have advanced systems of regulation for the registration of lobbyists, which have influenced the design of lobbying regulation in Europe and elsewhere considerably.

#### Canada

In Canada,<sup>17</sup> the Lobbyists’ Registration Act was enacted in 1989 to make the activities of lobbyists transparent, without hindering access to government. The Act required lobbyists to register and to disclose certain information through a public registry, but did not seek

13 Article 7, *Agreement between the European Parliament and the European Commission on the transparency register for organisations and self-employed individuals engaged in EU policy-making and policy implementation*, 2014. Available at [http://eur-lex.europa.eu/legal-content/en/TXT/?uri=uriserv:OJ.L\\_.2014.277.01.0011.01.ENG](http://eur-lex.europa.eu/legal-content/en/TXT/?uri=uriserv:OJ.L_.2014.277.01.0011.01.ENG)

14 Code of Conduct for Lobbyists, available at [http://ec.europa.eu/transparencyregister/public/staticPage/displayStaticPage.do;TRPUBLICID=pr od=XSvQVn0CsJrYGn2tmjDT2sfSvPHLBYSN8YnVVtDg3LhjpLHb9hT-2138266547?locale=en&reference=CODE\\_OF\\_CONDUCT](http://ec.europa.eu/transparencyregister/public/staticPage/displayStaticPage.do;TRPUBLICID=pr od=XSvQVn0CsJrYGn2tmjDT2sfSvPHLBYSN8YnVVtDg3LhjpLHb9hT-2138266547?locale=en&reference=CODE_OF_CONDUCT)

15 See Annex 2 of *Agreement between the European Parliament and the European Commission on the transparency register for organisations and self-employed individuals engaged in EU policy-making and policy implementation*, 2014, Official Journal of the European Union, L 277.

16 See: *Transparency Register*, available at <http://ec.europa.eu/transparencyregister/public/homePage.do>; OECD, *Lobbyists, Governments and Public Trust, Volume 3: Implementing the OECD Principles for Transparency and Integrity in Lobbying*, 2014, OECD Publishing, Chapter 10, p. 146.

17 See Holmes, N. and Lithwick, D., *The Federal Lobbying System: The Lobbying Act and The Lobbyists’ Code of Conduct*, 2011, Background Paper, Library of the Canadian Parliament, available from [www.parl.gc.ca/Content/LOP/ResearchPublications/2011-73-e.htm](http://www.parl.gc.ca/Content/LOP/ResearchPublications/2011-73-e.htm)

to regulate their activities further. Following a series of amendments, in 2006, the legislation was revamped into the Lobbying Act, in force since 2008.<sup>18</sup>

The Act distinguishes between consultant lobbyists and in-house lobbyists. A consultant lobbyist is one paid by a client to (a) arrange a meeting between a federal public office holder and another person, or (b) communicate with a federal public office holder in respect of a legislative proposal, bill, resolution, regulation, policy, programme, grant, contribution or contract. An in-house lobbyist is an individual within an organization or corporation employed on his/her own or with others whose duties involve communicating with federal public office holders in respect of a legislative proposal, bill, resolution, regulation, policy, programme, grant or contribution, where those duties constitute 20 per cent of his overall duties.

Where a person is a lobbyist based on the above definitions, s/he or a senior officer of his/her corporate/organization file an initial return with the Commissioner of Lobbying setting out prescribed particulars with respect to lobbying activities - within 10 days for consultant lobbyists, and within two months for organizations employing in-house lobbyists. The filing must include *inter alia* particulars of who will be lobbied and the subject matter.

Lobbyists must also file a monthly report of certain communications with designated federal public office holders, which include ministers, deputy ministers, associate and assistant deputy ministers, senior executives of the Crown and political aides. Specifically, if a consultant lobbyist had oral communications which were arranged in advance with a designated public office holder that were (a) initiated by a person other than a public office holder in respect of a legislative proposal, bill, resolution, regulation, policy, programme, grant, contribution or contract, or (b) initiated by a public office holder in respect of a grant, contribution or contact, the consultant lobbyist must file a return setting out such communications during that month. In-house lobbyists must report similarly except they do not have to file on communications relating to the awarding of crown contracts. The details (dates, participants and topics) of lobbyists' meetings with designated officials are reported and posted online.

As in Lithuania, contingency fees for consultant lobbyists are prohibited. Lobbyists are also obliged to observe the Lobbyists' Code of Conduct approved by the

Commissioner of Lobbying. A key provision of the Code is that a lobbyist shall not place a public office holder in a conflict of interest by proposing or undertaking any action that would constitute improper influence on the public office holder (Rule 8). While there are no fines or penalties for breaches of the Code of Conduct, the Commissioner investigates alleged breaches, which are then tabled in a report to both Houses of Parliament.

Violations of the Act on the other hand are subject to potentially stringent sanctions. A failure to file a return or knowingly making a false or misleading statement in a return, may be subject to a fine of up to CAD 200,000 and up to two years imprisonment. Violations of the other provisions of the Act may result in a fine of up to CAD 50,000.

#### Box 10.6 Key elements of the Canadian system:

- Lobbyists required to register and report communications with designated officials;
- Public disclosure of all communications;
- Oversight by an independent regulator, the Commissioner of Lobbying;
- Five-year cooling off period for senior officials before they may become lobbyists;
- Significant sanctions for violations.

#### United States

Since the 1970s, lobbying activity in the United States has grown steadily in terms of the numbers of lobbyists and the size of lobbying budgets. According to the Center for Responsive Politics, the number of registered lobbyists increased from 10,405 in 1998 to 14,841 in 2007, while total lobbying spending rose from USD 1.45 billion in 1997 to USD 3.52 billion in 2010 and 2011; however, both the number of lobbyists and spending have fallen since these peak figures.<sup>19</sup>

Lobbying regulation was first introduced by the Federal Regulation of Lobbying Act in 1946. Following a number of changes in legislation, the main pieces of federal lobbying legislation are the Byrd Amendment (31 US Code, §1352) of 1989, the Lobbying Disclosure Act of 1995 and the Honest Leadership and Open Government Act of 2007.

The legislation of the United States establishes extensive lobbying disclosure requirements:

<sup>18</sup> Canada, *Lobbying Act* (R.S.C., 1985, c. 44 (4th Supp.)), current to November 25, 2014. Available from <http://laws.justice.gc.ca/eng/acts/L-12.4/>

<sup>19</sup> See data at the Lobbying Database of the Center for Responsive Politics, available from <https://www.opensecrets.org/lobby/>

- Lobbyists with income or lobbying expenses that exceed a certain threshold (in any quarter, USD 3000 income per client, or USD 11,500 total lobbying expenses) must register with the Secretary of the Senate and the Clerk of the House of Representatives.<sup>20</sup> Part-time lobbyists must register if they spend 20 per cent or more of their working time engaged in lobbying activities in any quarter and have two or more lobbying contacts with a legislator. The registration requirement also applies to in-house lobbyists, but not to non-profit organizations with the exception of churches. NGOs and charities, which tend to enjoy tax exemptions, are generally permitted to lobby as long as their lobbying does not form a core part of their organizations' expenditures.
- Lobbyists must submit quarterly reports disclosing a wide range of information about them and their organizations, names and titles of their clients, issues lobbied on, as well as their income per client and estimate of lobbying expenses.<sup>21</sup>
- Separate registrations and reports must be submitted for each client.

All registrations and reports must be available on the Internet. The Government Accountability Office annually reports on registrants and lobbyists compliance with disclosure requirements.

Lobbyists who fail to submit a quarterly report, knowingly provide an incorrect report, or fail to correct it within 60 days of being notified that the report is incorrect may be subject to fines of up to USD 200,000, and imprisonment of up to five years.<sup>22</sup>

There is no code of conduct for lobbyists. However, the 2007 amendments to the Lobbying Disclosure Act made lobbyists potentially liable for facilitating or encouraging violations of the congressional ethics rules by Members of Congress. In addition, lobbyists are required to certify in writing on a special semi-annual report that they have read the rules of the Senate and House of Representatives relating to restrictions on gifts and travel, and certify that they have not knowingly caused a violation of these rules.<sup>23</sup>

<sup>20</sup> See US Lobbying Discloser Act Guidance (1998), Reviewed June 17, 2014 / Last Revised February 15, 2013, Section 2. Available from [http://lobbyingdisclosure.house.gov/amended\\_lda\\_guide.html](http://lobbyingdisclosure.house.gov/amended_lda_guide.html)

<sup>21</sup> See Martini, M., *Influence of interest groups on policy-making*, 2012, U4, Transparency International, p.6. Available from <http://www.u4.no/publications/influence-of-interest-groups-on-policy-making/>

<sup>22</sup> See Magloff, L., *Federal Lobbying Guidelines*, 2014, Deman Media, available from <http://smallbusiness.chron.com/federal-lobbying-guidelines-14110.html>

<sup>23</sup> See Holman, C., and Luneburg, W., *Lobbying and transparency: A comparative analysis of regulatory reform*, 2012, available from <http://www.palgrave-journals.com/iga/journal/v1/n1/full/iga20124a.html>

The Byrd Amendment prohibits the use of federal funds, either through grants, contracts, or co-operative agreements, in lobbying activities. The Amendment also provides for the monitoring of any lobbying expenditures made by recipients of federal funds. Concerning the activities of government agencies, the 1919 Anti-Lobbying Act (18 US Code §1913), a criminal statute, prohibits the use of appropriated (i.e. Government) funds, whether directly or indirectly to pay for activities that might be seen as lobbying in connection with any law or range of government decisions. Violations may be sanctioned by fines, imprisonment and removal from office. However, the Act has been subject to ongoing debates over the interpretation of what exactly is prohibited, and no one has ever been prosecuted.

The Honest Leadership and Open Government Act attempted to restrict the phenomenon of 'revolving doors' by prohibiting Members of Congress from engaging in lobbying activities for a designated period - two years for former members of the House of Representatives and one year for former Senators. Similarly, over 20 States stipulate a period of time that must elapse before a former legislator can represent clients to the legislature. Cooling-off periods range from one to two years. Some States, such as California, extend the ban to all former government officials and ban them from contacting specified government agencies for a period of one year. In New Mexico, there is a permanent ban on officials (including legislators) representing a person in dealings with the government on any matter in which the former public official participated 'personally and substantially' while still a public official.

Congress receives reports from the Attorney General every six months with information about how the Lobbying Disclosure Act is administered, including information about filing of registrations.<sup>24</sup>

#### Box 10.7 Key elements of the United States system:

- Some of the most extensive disclosure requirements in the world;
- Obligation for lobbyists to register and submit quarterly reports thereafter;
- Heavy legal sanctions for non-compliance;
- Prohibition to use federal funds in lobbying activities;
- 'Cooling-off' periods for House and Senate members as well as for senior executive branch officials.

<sup>24</sup> See OECD, *Lobbyists, Governments and Public Trust, Volume 3: Implementing the OECD Principles for Transparency and Integrity in Lobbying*, 2014, OECD Publishing, p.94

**Table 10.1** The Different Regulatory Systems

	Lowly Regulated Systems	Medium Regulated Systems	Highly Regulated Systems
<b>Registration Regulations</b>	Rules on individual registration, but few details required	Rules on individual registration, more details required	Rules on individual Registration are extremely rigorous
<b>Targets of lobbyists defined</b>	Only members of the legislature and staff	Members of the legislature and staff; executive and staff; agency heads and public servants/officers	Members of the legislature and staff; executive and staff; agency heads and public servants/officers
<b>Spending Disclosure</b>	No rules on individual spending disclosure, or employer spending disclosure	Some regulations on individual spending disclosure; none on employer spending disclosure	Tight regulations on individual spending disclosure, and employer spending disclosure
<b>Electronic Filing</b>	Weak online registration and paperwork required	Robust system for online registration, no paperwork necessary	Robust system for online registration, no paperwork necessary
<b>Public Access</b>	List of lobbyists available, but not detailed, or updated frequently	List of lobbyists available, detailed, and updated frequently	List of lobbyists and their spending disclosures available, detailed, and updated frequently
<b>Enforcement</b>	Little enforcement capabilities invested in state agency	In theory, state agency possesses enforcement capabilities, though infrequently used	State agency can, and does, conduct mandatory reviews/audits
<b>Revolving door provision</b>	No cooling off period before former legislators can register as lobbyists	There is a cooling off period before former legislators can register as lobbyists	There is a cooling off period before former legislators can register as lobbyists

Source: Reproduced from Chari, R., Hogan, J., Murphy, G., *Report on the Legal Framework for the Regulation of Lobbying in the Council of Europe Member States*, 2011, European Commission for Democracy Through Law (Venice Commission), Study No. 590/2010, pp. 28-29. Available from <http://esi.praguesummerschools.org/files/esi/15esi.pdf>

### 10.3.3 Designing lobbying regulation

Based on the experience and examples of different countries such as those described in this section, systems can be roughly classified according to how stringently they regulate lobbying. A Venice Commission publication on lobbying distinguishes between three levels of regulation – lowly regulated, medium regulated and highly regulated (see Table 10.1). Again, in order to understand a particular system – or to design one, the wider regulatory context is crucial. A ‘highly regulated system’ may, in reality, be very weak if other aspects of good governance are missing.

Before considering which type of lobbying regulation to adopt, policy makers should conduct a careful assessment of the current system and the way in which it regulates access to policy and decision-making processes. Questions that should be asked include the following:

- Is most lobbying activity being carried out in a transparent and accountable manner? A negative answer indicates a need to consider regulation.
- If not, and if regulation is not already in place, should concerns be addressed by (i) self-regulation

or (ii) laws/formal regulations? The former option appears suitable where lobbying as a profession is reasonably organized and, at least to some extent, willing to assume greater discipline and transparency. Otherwise regulation by statute or other formal provisions of particular public bodies would be the likely choice.

- Should laws be confined to particular lobbying targets (e.g., the central legislature and/or the executive)? As no single recipe exists, the national circumstances (e.g., where the most serious problems exist) will be decisive in this regard.
- Who should be categorized as a ‘lobbyist’ under any laws/regulations? One of the core choices is between covering everyone who engages in policy advocacy versus covering only the “hired guns”, lobbyists for a fee. Another distinction can be drawn between the so-called private-interest and public-interest representatives. No particular option can be regarded *a priori* right or wrong. Factors to consider include how common is the practice of using hired lobbyists in the given country in general, which types of organizations do and do not tend to engage in extensive lobbying, etc.

- How broad should the definition of 'lobbying activities' be? Different jurisdictions may or may not choose to include activities such as preparatory/research work to support direct lobbying or activities carried out within formal consultation mechanisms (e.g., during public hearings).
- How detailed should lobbying disclosure requirements be? For example, should it just be the identity of the lobbyist, or include all clients, and/or even expenses and income related to lobbying? A strong case can be made that the public should know who lobbies whom, on what issue and in whose interests. Likewise, former public officials should have some 'cooling-off' period. The degree of stringency of regulations needed is a fine balancing act and will also vary by jurisdiction. Stricter requirements can be a legitimate public demand, but over-regulation may block legitimate participation and encourage circumvention of the rules.
- Should regulation be backed by sanctions (or for example, just public disclosure of breaches) and if so, how stringent? A system which relies on sanctions can only work effectively if there is capacity for impartial and determined enforcement.

## 10.4 Conclusions

Lobbying is an inescapable phenomenon in any political system. If anything, this is especially the case in democracies, since they are in essence designed to be open to influence. In other words, lobbyists are likely to be an integral part of the democratic political process. However, lobbying brings risks. In particular, unrestricted lobbying may result in corruption, while depriving ordinary citizens and the general public of the right to participate in the policy process on equal terms, or be informed about who is influencing policy and how.

Designing procedures for lobbying, measures to regulate those that are lobbied, and/or lobbying regulations can mitigate such risks. The main components of lobbying regulations are clear rules on registration of lobbyists and disclosure of their activities.

However, States that have adopted lobbying regulations remain in a minority. The OECD reports that adopting lobbying regulation has proven difficult for decision makers due to its complex and sensitive nature.<sup>25</sup> Many countries continue to rely on self-regulation of lobbying activities. The examples of lobbying regulation from Europe and North America provided in this Chapter can serve as guidance on how to enhance transparency and integrity for lobbyists, improve the policy making process and underpin public trust in government.

<sup>25</sup> See <http://www.oecd.org/corruption/ethics/lobbying.htm>

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# CHAPTER 11

# Protection of 'Whistleblowers'

## CONTENTS

11.1 International standards and initiatives	132
11.2 National approaches: laws with differing scope	134
11.3 Key features and risks	135
11.3.1 Protected ways of disclosure	135
11.3.2 Confidentiality and anonymity	136
11.3.3 The burden of proof of non-retaliation	137
11.3.4 False allegations	137
11.3.5 Rewards	137
11.4 Non-governmental initiatives	137
11.5 Conclusions and recommendations	138
Selected Bibliography	139
<i>Box 11.1 The United Kingdom's legislation on whistleblowing and whistleblower protection</i>	135
<i>Box 11.2 Guidelines on whistleblowing of the European Commission</i>	135
<i>Box 11.3 Technology enables effective corruption investigations in spite of the whistleblower's anonymity</i>	136

## CHAPTER 11

# Protection of 'Whistleblowers'

*Information provided by insiders accounts for the detection of almost 45 per cent of frauds committed in the private sector, according to international studies.<sup>1</sup> This illustrates the importance of encouraging and enabling the internal notification of misconduct or wrongdoing – or whistleblowing. Whistleblowing is increasingly recognized around the world as an essential element to prevent and fight corruption both in the public and private sector. The risk of corruption - and other financial crimes - is significantly heightened in environments where the reporting of wrongdoing is not supported or protected.*

*People working within an organization are likely to be the best placed to notice acts of corruption or other misconduct. However, the culture prevailing at the workplace and in society can often deter employees from speaking up, even when they are duty-bound to report suspected corruption. By blowing the whistle, employees potentially risk losing their jobs and thereby their livelihoods or to face other detrimental action. Comprehensive and effective whistleblower protection shields reporting persons from such risks.*

### 11.1 International standards and initiatives

The need to protect those who come forward to report wrongdoing is explicitly recognized in several international instruments, namely the Council of Europe Civil Law Convention on Corruption (Article 9) and the United Nations Convention against Corruption (UNCAC) (Article 33). All these provisions require States Parties to protect persons who report corruption to the competent authorities from retaliation. Also, in the Dublin Ministerial Council Declaration on Strengthening Good Governance and Combating

Corruption, Money-laundering and the Financing of Terrorism (2012), the OSCE participating States have recognized the importance of intensifying their efforts to put in place measures to effectively protect whistleblowers in the public and private sector and their family members.

#### OSCE Ministerial Council Declaration on Strengthening Good Governance

*[...] "We recognize the importance of extending sufficient protection to whistleblowers in the public and private sector, as they play a key role in the prevention and detection of corruption, thus defending the public interest. We will intensify our efforts to take appropriate measures to put in place and implement legal mechanisms for the effective protection of whistleblowers and their close family members, from retaliation, intimidation or other psychological or physical harm, or the unwarranted loss of their liberty or livelihood. We recognize such measures to be necessary elements of an effective anti-corruption regime." [...]*

#### International instruments recognizing the need for whistleblower protection

##### UNCAC

###### **Article 33. Protection of reporting persons**

Each State Party shall consider incorporating into its domestic legal system appropriate measures to provide protection against any unjustified treatment for any person who reports in good faith and on reasonable grounds to the competent authorities any facts concerning offences established in accordance with this Convention.

##### **Council of Europe Civil Law Convention on Corruption**

###### **Article 9. Protection of employees**

Each Party shall provide in its internal law for appropriate protection against any unjustified sanction for employees who have reasonable grounds to suspect corruption and who report in good faith their suspicion to responsible persons or authorities.

<sup>1</sup> See, for instance, Price Waterhouse Coopers, *Economic crime: people, culture and controls – The 4<sup>th</sup> biennial Global Economic Crime Survey*, 2007, Investigations and Forensic Services, p. 10.

The aim of Article 9 of the Council of Europe Civil Law Convention on Corruption is primarily meant to safeguard the employment relationship, the career and the psychological integrity of the persons who raise a concern or “blow the whistle”. These measures are mainly of a civil and administrative legal nature.

A whistleblower may also become a witness to a criminal lawsuit, in which case they may need to benefit from further protective measures for their personal safety. These are typically provided for in criminal legislation and are applied in more exceptional cases (change of identity, police protection, relocation including for close relatives), also due to the related cost. The Council of Europe Criminal Law Convention on Corruption deals with these measures separately, under Article 22, in a similar way that other international Conventions differentiate between whistleblower protection and witness protection.

### Council of Europe Criminal Law Convention on Corruption

#### **Article 22. Protection of collaborators of justice and witnesses**

Each Party shall adopt such measures as may be necessary to provide effective and appropriate protection for: (a) those who report the criminal offences established in accordance with Articles 2 to 14 or otherwise co-operate with the investigating or prosecuting authorities; (b) witnesses who give testimony concerning these offences.

In relation to the implementation of the UNCAC Article 33, the review reports of the ongoing first review cycle under the UNCAC Review of Implementation Mechanism have noted that the protection of reporting persons indeed plays a key role in the fight against corruption. While some countries have already taken legislative steps in this regard, many have not; therefore, reviewers recommended that countries encourage their relevant national authorities to adopt such implementing measures.<sup>2</sup> In response to the interest in the subject, the UNODC has recently produced a *Resource Guide on Good Practices in the Protection of Reporting Persons*.<sup>3</sup>

When it comes to the implementation of the Council of Europe instruments, the Group of States against Corruption (GRECO) has also examined whistleblowing in its member States during its second evaluation round and discussed the findings in its 7th General Activity Report (2006). It noted that “despite the widespread existence of requirements for officials to report corruption, GRECO has rarely found that these have helped to change the culture of silence that corruption can breed.” It therefore recommended to almost half of its member States to take further steps to improve whistleblower protection, notably by:

- ensuring that laws entail protection against all types of retaliation (not just dismissal);
- providing confidential advisers to assist staff wishing to make reports;
- addressing in the law any possible contradiction between whistleblowing and the disclosure of confidential information;
- making sure that the regulations are properly promulgated and thus known to staff.

Furthermore, the Council of Europe’s Parliamentary Assembly passed *Resolution 1729*<sup>4</sup> in 2010, inviting member States to put in place appropriate legislation for the protection of whistleblowers. The Resolution, while underlining the lack of comprehensive legislation amongst most Council of Europe member States, positively highlighted the regulations adopted by the United Kingdom and the United States and set out guiding principles to be followed. In 2015 it was followed by another - *Resolution 2060* on the protection of whistleblowers. In April 2014, the Council of Europe adopted *Recommendation CM/Rec(2014)7* on the protection of whistleblowers, which provides the member States with a detailed soft law instrument on the issue.<sup>5</sup>

Although the Organisation for Economic Co-operation and Development (OECD) Anti-Bribery Convention does not expressly contain a provision on the protection of whistleblowers, the organization’s *2009 Anti-Bribery Recommendation* asks States Parties to put in place “appropriate measures [...] to protect from discriminatory or disciplinary action public and private sector employees who report in good faith and on reasonable grounds to the competent authorities suspected acts of bribery of foreign public officials

<sup>2</sup> See UNODC, *State of Implementation of the United Nations Convention against Corruption: Criminalization, Law Enforcement and International Cooperation*, 2015. Available from [http://www.unodc.org/documents/treaties/UNCAC/COSP/session6/15-03457\\_ebook.pdf](http://www.unodc.org/documents/treaties/UNCAC/COSP/session6/15-03457_ebook.pdf)

<sup>3</sup> Available at [http://www.unodc.org/documents/corruption/Publications/2015/15-04741\\_Person\\_Guide\\_eBook.pdf](http://www.unodc.org/documents/corruption/Publications/2015/15-04741_Person_Guide_eBook.pdf)

<sup>4</sup> Available from <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17851&lang=en>

<sup>5</sup> For further details regarding *Recommendation CM/Rec(2014)7 of the Committee of Ministers to member States on the protection of whistleblowers* see [www.coe.int/t/dghl/standardsetting/cdcj/whistleblowers/protecting\\_whistleblowers\\_EN.asp?](http://www.coe.int/t/dghl/standardsetting/cdcj/whistleblowers/protecting_whistleblowers_EN.asp?)

in international business transactions.”<sup>6</sup> Annex II to the 2009 Anti-Bribery Recommendation,<sup>7</sup> which is intended to help companies to prevent foreign bribery in their business dealings, entails similar elements for businesses. In addition, principle 4 of the 1998 OECD *Recommendation on Improving Ethical Conduct in Public Service* states: “Public servants should know their rights and obligations when exposing wrongdoing”<sup>8</sup> and the 2003 OECD *Recommendation of the Council on Guidelines for Managing Conflict of Interest in the Public Service*<sup>9</sup> advises countries to provide clear whistleblowing regulations, take steps to ensure protection against reprisal and non-abuse of complaint mechanisms. In 2012, the OECD, on behalf of the Group of 20 (G20) and its Anti-Corruption Working Group, prepared a *Study on Whistleblower Protection Frameworks, Compendium of Best Practices and Guiding Principles for Legislation*.<sup>10</sup>

## 11.2 National approaches: laws with differing scope

Different legislative approaches can be found at the national level. More recent legislation in the matter tends to be drafted as a stand-alone law, or as part of corruption-related laws. In most States however, provisions geared towards protecting the reporting person are contained in other legal texts, including labour laws or freedom of expression regulations.

Another distinguishing feature is the scope of application in terms of persons and information qualifying for protection. Some legislation is sectoral, i.e. it deals with protection of public sector and private sector employees separately, while other laws cover both sectors. In addition, laws can limit protection to the disclosure of malpractice related to corruption or can extend protection to the reporting to any form of misconduct.

The G20 Study on *Whistleblower Protection Frameworks, Compendium of Best Practices and Guiding Principles for Legislation* states that “the UK ... [is] considered to have one of the most developed comprehensive legal systems, having adopted a single disclosure regime for both private and public sector whistleblowing protection.” It provides an example of detailed definition of protected disclosures in the United Kingdom based on the country’s Public Interest Disclosure Act of 1998 (for more information on the Act, see Box 11.1).

The 2012 Transparency International (TI) report *Money, Politics, Power: Corruption Risks in Europe*<sup>11</sup> found that of the 25 European countries assessed, only the United Kingdom and Norway have “dedicated whistleblower protection that extend to all workers, in the public and private sector, including contractors and consultants.” It highlights that whistleblowing in practice is still rare in European countries due to lack of political will, the negative connotation associated with reporting, insufficient legal and institutional protection and lack of awareness of protection mechanisms among the public and employees.

A more recent study, released during the Australian 2014 Presidency of the G20, *Whistleblower Protection Laws in G20 Countries - Priorities for Action*<sup>12</sup> analyzed the state of whistleblower protection rules in the G20 countries, with regard to the identification of wrongdoing in both the public and private sectors. Each country’s laws were assessed against a set of 14 criteria developed from five internationally recognized sets of whistleblower principles for best legislative practice. According to the study, while many shortcomings in whistleblowing protection still remain, significant progress has been made in the G20 countries since 2010. Most G20 countries are adopting a best practice approach to a range of key elements including the breadth of types of retaliation at which protections are aimed, broad definitions of who can qualify as a ‘whistleblower’, and wider options for reporting for whistleblowers. In the OSCE region, meaningful progress has been achieved in the whistleblower protection laws of France and the United States.

6 See OECD, *Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions*, 2009, Section IX.iii.

7 Ibid., Annex II, par.11ii.

8 See OECD, *Recommendation of the Council on Improving Ethical Conduct in the Public Service Including Principles for Managing Ethics in the Public Service*, 1998, available from [http://www.oecd.org/officialdocuments/publicdisplaysdocumentpdf?cote=C\(98\)70/FINAL&docLanguage=En](http://www.oecd.org/officialdocuments/publicdisplaysdocumentpdf?cote=C(98)70/FINAL&docLanguage=En)

9 See OECD, *Recommendation of the Council on Guidelines for Managing Conflict of Interest in the Public Service*, 2003, <http://www.oecd.org/gov/ethics/oecdguidelinesformanagingconflictinterestinthepublicservice.htm>

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11 Transparency International, *Money, Politics, Power: Corruption Risks in Europe*, 2012, available from [http://www.transparency.org/whatwedo/publication/money\\_politics\\_and\\_power\\_corruption\\_risks\\_in\\_europe](http://www.transparency.org/whatwedo/publication/money_politics_and_power_corruption_risks_in_europe)

12 See Wolfe, S., Worth, M., Dreyfus, S., Brown, A. J., *Whistleblower Protection Laws in G20 Countries - Priorities for Action*, 2014, Blueprint for Free Speech, University of Melbourne, Griffith University and Transparency International Australia. Available from <http://transparency.org.au/wp-content/uploads/2014/06/Action-Plan-June-2014-Whistleblower-Protection-Rules-G20-Countries.pdf>

### Box 11.1 The United Kingdom's legislation on whistleblowing and whistleblower protection

The United Kingdom's law on whistleblowing, *The Public Interest Disclosure Act 1998*,<sup>13</sup> is a stand-alone piece of legislation, which was designed in co-operation with civil society, namely the NGO *Public Concern at Work*. Its main features are as follows:

- It covers most workers, including employees, contractors, trainees, agency workers, police officers and home workers;
- It applies to people at work raising genuine concerns about corruption or any other crime, civil offences (including negligence, breach of contract, breach of administrative law), miscarriages of justice, dangers to health and safety or the environment, and any cover-up of any of these; the worker does not have to prove the malpractice, nor does it matter if the persons to whom the malpractice is reported are already aware of it; it applies whether or not the information is confidential or whether the malpractice is occurring in the United Kingdom or overseas;
- It protects concerns raised in good faith internally with an employer, and externally, to one of the regulatory bodies, to the police in serious cases, and to the media in certain circumstances, particularly if the other routes have been tried and failed and the malpractice is ongoing; the legislation foresees a three-step approach from internal to external disclosure, presupposing a higher level of evidence the further the reporting person raises concerns outside the organization where misconduct has occurred;
- It compensates for any detriment (i.e. victimization), including injury to feelings, and those who are dismissed can seek interim relief within seven days to continue in employment; those found to have been unfairly dismissed for blowing the whistle are compensated for their full financial losses (uncapped);
- Cases are dealt with swiftly by Employment Tribunals, but they are not made public, unless the whistleblower so consents, which means that some issues of public concern may not become public.

### Box 11.2 Guidelines on whistleblowing of the European Commission

In 2012, the European Commission communicated new guidelines on whistleblowing,<sup>14</sup> which are innovative in many regards and could serve as an example for other public and private entities. The new guidelines are to clearly inform staff members of the European Commission on (i) when they have to report; (ii) in which way they can blow the whistle; and (iii) what protection can be granted to a reporting person. The goal is to encourage staff to come forward and report relevant information on serious irregularities 'in the line of duty'. In drawing up these guidelines, the Commission looked at best practice around the world, and also consulted Transparency International and Public Concern at Work.

- The guidelines include the following innovative key features:
  - They refer to a 'duty' to report serious irregularities and not to a 'right' to report. This duty is counterbalanced with solid protection for reports made in good faith,
- while also highlighting that malicious reporting aimed at harming another person's integrity or reputation is prohibited and liable to disciplinary action;
- The 'good faith' of the whistleblower – understood as the belief in the veracity of the facts reported – is presumed unless and until proven otherwise;
  - The whistleblower can use different reporting channels (internal and, if necessary, external), including bypassing hierarchy;
  - The guidelines set out a zero tolerance policy for retaliation against whistleblowers. They also foresee the possibility to change department within the Commission and provide for protection from retaliation in relation to future career steps. Staff uncertain as to whether or not to lodge a report can seek advice. The pertinent institution (the Commission or European Anti-Fraud Office - OLAF) has to provide feedback to the whistleblower once the report has been lodged.

An innovative private sector regulation can be found in the United States, where the *Sarbanes-Oxley Act*<sup>15</sup> was passed in 2002. The said Act prevents companies from being registered at the United States Stock Exchange, unless they have policies – approved by their auditors – allowing for confidential reporting. If employees who report to the authorities suffer any damage, they have a right to take civil action under Section 806. While the focus of Sarbanes-Oxley is on fraud rather than

corruption, in practice, any whistleblowing scheme is likely to cover both (and indeed other wrongdoing).

## 11.3 Key features and risks

### 11.3.1 Protected ways of disclosure

Concerns about misconduct can be raised either internally or externally. As briefly mentioned above, the United Kingdom legislation on whistleblowing sets out a three-step approach, starting with internal reporting

13 See A Guide to PIDA, Public Interest Disclosure Act 1998, available from [www.pcaw.org.uk/guide-to-pida](http://www.pcaw.org.uk/guide-to-pida)

14 Available from <http://www.coe.int/t/dghl/standardsetting/cdcj/whistleblowers/EU%20guidelines%20-%20Whistleblowing.pdf>

15 Available from [www.sec.gov/about/laws/soa2002.pdf](http://www.sec.gov/about/laws/soa2002.pdf)

### Box 11.3 Technology enables effective corruption investigations in spite of the whistleblower's anonymity

An Internet-based corruption reporting system used by the State Police in Lower Saxony (Germany) since 2003 provides for sophisticated technical safeguards which enable citizens to send a report via this system with the option to remain anonymous and at the same time, enables them to enter into and maintain a dialogue with investigators. The system uses several layers of encryption so that no one, either within or outside the police service, can detect the identity of anyone who has opted to remain anonymous. The combination of secured anonymity and unlimited bi-directional communication distinguishes the system from common reporting mechanisms (telephone hotline, email, etc.). The system operates like a 'blind' letterbox where both parties can drop off messages. So far, it has been used by more than 2,000 whistleblowers in Lower Saxony and is known as the Business Keeper Monitoring System.

Source: adapted from Business Keeper AG, <http://www.business-keeper.com/whistleblowing-and-compliance.html>

The same system was also launched in Kenya in 2006. The online reporting tool was introduced to address gaps in the country's legal and institutional anti-corruption framework to ensure adequate legal and actual protection for whistleblowers. The Kenyan authorities have reported that "the average quality of online-generated reports is better than those from other channels." Regarding public authorities, the system has also been introduced by the Moroccan anti-corruption authority ICPC (Instance Centrale de Prévention de la Corruption), the Austrian Office of Prosecution for Economic Crime and Corruption and the State Police of Baden-Wuerttemberg (Germany).

Source: for more information, please see [www.cmi.no/publications/file/3789-reducing-risks-of-reporting-corruption.pdf](http://www.cmi.no/publications/file/3789-reducing-risks-of-reporting-corruption.pdf)

to the employer, and if ineffective or not possible, to an external regulatory or law enforcement body, and as a last resort, to the media.

It makes sense that the first route for reports should be within the organization itself, including reports made to supervisors, directors or internal oversight bodies. Therefore, channels and mechanisms need to be in place to enable employees to bring up concerns with their employer. In this way, the employer is given the opportunity to intervene in a timely manner; the focus should be on the concern; this, in turn, will likely resolve the situation more quickly and may even deter further malpractice. In this sense, whistleblowing should be seen ideally to be a tool of effective management rather than a means for destabilising an organization.

Under certain circumstances, however, internal reporting is not possible or ineffective. Thus, external reporting channels should be made available. These might include a 'regulator' (such as auditors or a National Audit Office), an ombudsman, an anti-corruption agency or a law enforcement institution.

The involvement of the media can sometimes add more heat than light. It is therefore reasonable that reporting to the media should be regarded as a last resort to the whistleblower, implying that a reporting person should turn to the media only if other channels of reporting cannot be used. There is a growing body of jurisprudence on such cases, such as cases considered under Article 10 of the European Human Rights Convention by the European Court of Human Rights.<sup>16</sup>

### 11.3.2 Confidentiality and anonymity

Above all, whistleblower protection entails the protection of the whistleblower's identity through the means of confidentiality. In this scenario, the reporting person discloses information under the condition that their identity may not be made public without prior consent, even though it may eventually need to be made known during any legal proceedings, which, in turn, might trigger witness protection at a later stage.

Confidentiality is different from anonymity. If a whistle is blown anonymously, the whistleblower does not reveal his or her identity when reporting about corruption or other forms of misconduct. In certain circumstances, this approach can prove useful – especially when the bodies entrusted with receiving complaints are regarded as not sufficiently independent or when the physical well-being is in danger. The drawbacks of anonymous reporting are that it may also increase the risk of frivolous, malicious and false reporting, the reporting person cannot be protected as the person's identity remains unknown, the investigative services cannot ask him or her for clarification or additional information and the person cannot receive feedback on the progress of the issue raised. In addition, anonymity does not shield from retaliation at a later stage, as the circumstances of the disclosure often allow tracing the hint back to a certain circle of persons.

<sup>16</sup> See UNODC, *Resource Guide on Good Practice in the Protection of Reporting Persons*, 2015, p. 41 et seq.

### 11.3.3 The burden of proof of non-retaliation

To avoid work related retaliation following public reporting, it is important for whistleblower laws to shift the burden of proof of non-retaliation to the employer. This is because the employee can face difficulties in proving that the retaliatory measures have been taken for the very reason that he/she has blown the whistle. It is therefore recommended that the measure taken by the employer is assumed to be retaliatory unless the latter can demonstrate that the measure would have been taken even if the whistle had not been blown. Latvian (labour) law, for instance, has adopted this approach.

### 11.3.4 False allegations

Another issue is the protection of the rights and reputation of an individual against malicious allegations. Legislation and policies should therefore include clear rules to discourage false allegations and to restore any damage they may cause. However, libel laws are used regularly to silence those who dare to speak up. A reasonable balance between the rights of the individual, whose reputation could be harmed through false allegations, and the protection of the whistleblower therefore needs to be struck.

### 11.3.5 Rewards

A culture of whistleblowing can be promoted on the basis of ethical arguments, namely that it is a civic duty. However, financial rewards might also be considered. The best-known reward system is the *qui tam* provisions contained in the United States False Claims Act, which dates back to 1863. These provisions allow citizens with evidence of fraud against government contracts to sue, on behalf of the government, in order to recover the stolen funds. In compensation for the risk and costs of filing a *qui tam* case, the whistleblower may be awarded a portion of the funds recovered, typically between 15 and 30 per cent of the total amount. Yet, there are risks attached to the *qui tam* provisions, notably that a whistleblower might not report a fraud immediately in the hope of increasing his eventual reward.

In addition, the *Dodd-Frank Wall Street Reform and Consumer Protection Act*<sup>17</sup> of 2010, passed in the wake of the recent financial crisis, has also added new provisions to encourage whistleblowers to come

forward. In particular, it has allowed the United States Securities and Exchange Commission (SEC) to create a programme within the SEC that encourages people to report securities violations. The SEC runs a reward system which allows employees from anywhere in the world blowing the whistle on securities violations to claim a reward where the SEC fines their employer USD 1 million or more. Employees can claim an award even if they raised the concern internally.<sup>18</sup> The risk of relating whistleblowing to rewards is that false allegations are made or, as noted earlier, that there are wrong incentives to postpone reporting suspected corruption when it can be hoped that the volume of the corruption, and thus of the reward, can be increased.

While rewards can prove to be an effective means of encouraging whistleblowing, they have to be implemented with great caution. When there is a duty to report as part of an employment contract or a code of conduct, rewards are not required.

## 11.4 Non-governmental initiatives

The previously mentioned NGO *Public Concern at Work* in the United Kingdom is not only advocating for the introduction of whistleblowing legislation in the country but it is also involved in the drafting of the current legislation. Other NGOs such as Transparency International (TI) have also been active in relation to whistleblower protection, for example by developing guidelines and principles for whistleblowing legislation and policies. In 2009, TI published a regional report<sup>19</sup> on the whistleblowing frameworks in 10 European countries (namely Bulgaria, the Czech Republic, Estonia, Hungary, Ireland, Italy, Latvia, Lithuania, Romania, and Slovakia). The report identified "weaknesses, opportunities and entry points to introduce stronger and more effective whistleblowing mechanisms in these countries"<sup>20</sup> and led to the development of principles for whistleblowing to assist States: the *Recommended draft principles for whistleblowing legislation*<sup>21</sup> and the *Policy Position No 1/2010: Whistleblowing: an effective tool in the fight against corruption*<sup>22</sup> which set out the minimum requirements for whistleblowing regulation,

<sup>18</sup> See [www.sec.gov/whistleblower](http://www.sec.gov/whistleblower)

<sup>19</sup> See Transparency International, *Alternative to Silence: Whistleblower Protection in 10 European Countries*, 2009, available from [www.transparency.org/whatwedo/pub/alternative\\_to\\_silence\\_whistleblower\\_protection\\_in\\_10\\_european\\_countries](http://www.transparency.org/whatwedo/pub/alternative_to_silence_whistleblower_protection_in_10_european_countries)

<sup>20</sup> *Ibid.*, p.3.

<sup>21</sup> Available from [www.transparency.org/files/content/activity/2009\\_PrinciplesForWhistleblowingLegislation\\_EN.pdf](http://www.transparency.org/files/content/activity/2009_PrinciplesForWhistleblowingLegislation_EN.pdf)

<sup>22</sup> Available from [http://www.transparency.org/whatwedo/publication/policy\\_position\\_01\\_2010\\_whistleblowing\\_an\\_effective\\_tool\\_in\\_the\\_fight\\_against\\_corruption](http://www.transparency.org/whatwedo/publication/policy_position_01_2010_whistleblowing_an_effective_tool_in_the_fight_against_corruption)

<sup>17</sup> Available from [www.sec.gov/about/laws/wallstreetreform-cpa.pdf](http://www.sec.gov/about/laws/wallstreetreform-cpa.pdf)

such as the need to have dedicated legislation rather than a fragmented legal approach. In addition, several TI chapters have established hotlines for the reporting of suspicions. In 2013, the TI published a report *International Principles for Whistleblower Protection* which “will be updated and refined as experiences with legislation and practices continue to unfold.”<sup>23</sup>

## 11.5 Conclusions and recommendations

To bring together the lessons covered by this chapter, the following key points identified by Transparency International in its Policy Position No1/2010 on whistleblowing may serve as a useful summary:

- A single, comprehensive legal framework which covers the public, private and not-for-profit sectors is most effective;
- Enforcement is essential;
- The whistleblower’s safety should be ensured;
- Internal and external reporting should be protected and confidentiality ensured;
- Strong and transparent internal policies and channels are needed in organizations to create the right environment for honest reporting;
- Impartial and accountable investigations need to be carried out;
- Good communication and consultation with staff is needed on the organization’s whistleblowing policy;
- Public support is needed to promote whistleblowing;
- Data on the public benefit of whistleblowing should be collected and published; and
- A proper societal and legal environment is needed ensuring freedom of expression, access to information and the existence of an independent media.

All in all, the existence of a comprehensive framework consisting of policies, legislation and institutions for receiving and investigating reports of suspected acts of corruption as well as retaliatory actions is important to enable whistleblowing and to protect those who blow the whistle from potential harm. It is also essential that such a framework is supported by awareness raising and training activities for everyone involved. Above and beyond these structures, however, it is important to recall that without adequate leadership within organizations on the issue, any whistleblowing policy, law or institution is bound to fail due to the still reluctant acceptance in many cultures and societies of the notion of reporting wrongdoing. The message from the top, “that it is acceptable and indeed encouraged to raise a concern (i.e. whistleblowing)” must thus be communicated clearly and with conviction. Whistleblowing should be seen as an effective management tool and an early warning mechanism that helps protect the public from misuse of public funds, and employees and shareholders from financial and other damages.

<sup>23</sup> Available from [http://www.transparency.org/whatwedo/publication/international\\_principles\\_for\\_whistleblower\\_legislation](http://www.transparency.org/whatwedo/publication/international_principles_for_whistleblower_legislation)

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## CHAPTER 12

# Participation of Civil Society

### CONTENTS

12.1	Defining civil society	142
12.2	Roles of civil society and academia in combating corruption	143
12.3	International drivers	145
12.4	Anti-corruption toolkits	146
12.5	Regional and international initiatives	146
12.6	Conclusions	147
	Selected Bibliography	148
<i>Box 12.1</i>	<i>The French association Sherpa</i>	<i>144</i>
<i>Box 12.2</i>	<i>The Center for the Study of Democracy: pioneering anti-corruption in Bulgaria</i>	<i>145</i>
<i>Box 12.3</i>	<i>Civil society initiatives taken by the Council of Europe</i>	<i>145</i>
<i>Table 12.1</i>	<i>Overview of provisions for transparency and civil society participation of three key international conventions</i>	<i>143</i>

## CHAPTER 12

# Participation of Civil Society

*Combating corruption is a multifaceted and crosscutting enterprise that involves not only a multitude of state agents but also very much builds on society at large. In the fight against corruption, society is mostly represented through a range of non-state actors, though the commitment and behaviour of each individual member of a society is equally important. Non-state actors include, notably, civil society organizations (CSOs), academia, the private sector, and the media.*

*Non-state actors play a key role in raising societal awareness regarding corruption-related matters, and this, in turn, can help increase public demand for anti-corruption efforts and foster public scrutiny of projects realized and progress made. In addition, civil society is increasingly playing a role in tripartite partnerships with government and the private sector and is seen working with state actors in developing and implementing anti-corruption programmes, including as a social monitor. Other activities include holding focus meetings and initiating debates to develop new thinking at the grassroots level, providing help and advice to citizens (e.g., whistleblowers), developing policy guidelines and recommendations, undertaking diverse monitoring activities, and participating in law-making.*

*These roles of civil society, non-governmental organizations (NGOs) and academia in the fight against corruption are discussed in more detail in this Chapter.*

## 12.1 Defining civil society

The civil society movement against corruption received an important boost in the early 1990s when the international anti-corruption NGO coalition Transparency International (TI) was founded, which today maintains national chapters in many OSCE participating States and in over 100 countries worldwide.<sup>1</sup>

<sup>1</sup> See [www.transparency.org/whoware/organisation/our\\_chapters](http://www.transparency.org/whoware/organisation/our_chapters)



A poster prepared as part of an anti-corruption public information campaign under the slogan “Show the Face of Corruption” launched by the OSCE Presence in Albania and the National Co-ordinator against Corruption, Tirana, December 2015

Today, dedicated non-governmental anti-corruption organizations work in a broad range of areas in the fight against corruption; they are increasingly joined by and work closely with CSOs from related fields, such as human rights and environmental protection.

The definition of what constitutes civil society varies. It may be broadly defined as made up of non-state actors in view of a common interest. As the World Bank puts it, “the term civil society [is used] to refer to the wide array of non-governmental and not-for-profit organizations that have a presence in public life, expressing the interests and values of their members or others, based on ethical, cultural, political, scientific, religious or philanthropic considerations. Civil Society Organizations (CSOs) therefore refer to a wide array of organizations: community groups, non-governmental organizations (NGOs), labour unions, indigenous groups, charitable organizations, faith-based organizations, professional associations, and foundations”<sup>2</sup> – a definition widely shared by TI.<sup>3</sup>

<sup>2</sup> See <http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/CSO/0,,contentMDK:20101499~menuPK:244752~pagePK:220503~piPK:220476~theSitePK:228717,00.html>

<sup>3</sup> Pope, J., *TI Source Book: Confronting Corruption: The Elements of a National Integrity System*, 2000, Berlin, Transparency International, p. 130.

**Table 12.1** Overview of provisions for transparency and civil society participation of three key international conventions

Name of review group	Civil society participation	Publication of report/results
OECD Working Group on Bribery (OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions)	Yes (civil society and private sector), notably during on-site visits of peer reviewers	Yes: Report and recommendations published after adoption by the Working Group on Bribery 'by consensus -1' (i.e. agreement by concerned country not required)
Implementation Review Group <sup>4</sup> (UN Convention against Corruption)	Voluntary involvement of CSOs during self-assessment and onsite visit encouraged; briefing of CSOs at the margins of CoSP meetings	Yes in parts: Executive Summary published; publication of full report voluntary <sup>5</sup>
GRECO (Council of Europe Civil and Criminal Law Conventions against Corruption, Protocol to the Criminal Law Convention and three other "soft law" instruments)	Yes (NGOs, media, academics, the private sector), notably during on-site visits of peer reviewers and when preparing for an evaluation round	Compliance reports published with recommendations, subject to agreement of the reviewed countries; idem for the compliance reports (which examine the follow-up to recommendations contained in the evaluation reports)

## 12.2 Roles of civil society and academia in combating corruption

A well-developed civil society represents a wide range of interests, ensuring that the issue of anti-corruption is approached from a variety of different perspectives. The activities that non-state actors, and notably CSOs and academia, can undertake to contribute to the fight against corruption are numerous, examples of which will be provided hereafter:

- **Awareness raising, public education and training:** The traditional domain of civil society intervention is awareness raising and fostering public debate about corruption and anti-corruption. Anti-corruption training is conducted by a range of NGOs and academia. The media also plays an important role in these efforts by not only reporting on corruption cases but also on anti-corruption movements and rights and responsibilities of citizens in this regard.
- **Monitoring government performance, increasing transparency of government operations and government accountability:** A core activity of civil society is monitoring government performance related to corruption prevention in corruption-prone areas (such as public procurement) as well as to anti-corruption reform. Civil society also promotes such initiatives as e-governance that encourage citizen participation in the decision-

making process and make government more accountable, transparent, and effective.

- **Monitoring political party financing and election processes:** Due to their particular vulnerability to corruption, electoral matters often become a focus of anti-corruption activists.
- **Monitoring the implementation of international anti-corruption instruments:** One of the most prominent initiatives in this field is the UNCAC Coalition, a global network of about 370 CSOs from over 100 countries, which has been active in promoting the ratification and monitoring of the UNCAC at the international, regional and national level since 2006.<sup>6</sup> The Coalition has participated as a relevant non-governmental organization in accordance with Rule 17 (2) of the Rules of Procedure at the Conference of States Parties to the UNCAC and is advocating for the entrenchment of active and effective CSO participation in the UNCAC review process. Participation of civil society in on-site visits during the official UNCAC review process is strongly encouraged by the UNODC and other stakeholders, though it remains voluntary on the part of UNCAC States Parties. Experience shows that the majority of countries included meetings with CSOs in the country visit agenda, providing civil society with the opportunity to meet and discuss the issues under review with the governmental experts from the reviewing States Parties.

<sup>5</sup> For latest statistics on Self-assessment checklists, Executive Summaries and Country Reports, see <http://www.unodc.org/unodc/en/treaties/CAC/country-profile/index.html>

<sup>6</sup> The full list of participating CSO is available from [www.uncaccoalition.org/about-us/members-list](http://www.uncaccoalition.org/about-us/members-list)

<sup>4</sup> See <http://www.unodc.org/unodc/en/treaties/CAC/IRG-sessions.html>

### Box 12.1 The French association Sherpa

Sherpa is a Paris-based non-profit organization dedicated to fairer and sustainable development by protecting and defending victims of economic crimes. The association brings together international lawyers and works in close collaboration with civil society organizations from all over the world. As a legal think tank, Sherpa proposes changes to the law and then conducts advocacy campaigns at both national and international levels to promote better regulation, with a particular focus on regulating transnational financial flows and commercial activities.

Most notable amongst its range of activities are its campaigns, which aim at establishing legal means for victim populations to achieve the recovery and repatriation of ill-gotten gains from foreign jurisdictions. These campaigns are based on the recognition that in some countries it may be the ruling elite that is plundering the country, which therefore would have no interest in co-operating with foreign jurisdictions for the recovery of the assets that they themselves have stolen.

Adapted from: <http://www.asso-sherpa.org/home>

The UNCAC shadow reports, which CSOs publish, represent a useful information supplement that ensures a voice from civil society. In these shadow reports, CSOs present their own assessment of a given country's compliance with UNCAC; such reports are available on the UNCAC Coalition website. Another recent example of CSO involvement in monitoring activities is the compilation of the so-called 'National Integrity System' studies of 25 European countries<sup>7</sup> done by Transparency International in preparation of the periodical reports of the newly established EU monitoring mechanism.

- **Monitoring and revealing acts of corruption:** Civil society, including the media, plays a crucial role in disclosing corruption cases, which importantly contributes to raising the public's awareness of the extent of corruption and of particular cases of corruption. Such disclosures put pressure on enforcement agencies to investigate and prosecute known cases, and on government to act more resolutely against corruption. An interesting example of civil society engagement with a view to putting pressure on law enforcement agencies to investigate and prosecute corruption cases is that of the French NGO Sherpa (see Box 12.1).
- **Research and information hub:** Civil society, and in particular academia, plays an important role in conducting long-term studies and generating information and knowledge products for public consumption. TI, for instance, regularly publishes a study on "the transparency of corporate reporting on a range of anti-corruption measures among the 105 largest publicly listed multinational companies" that are worth more than USD 11 trillion.<sup>8</sup> Academic institutions dedicating their research and teaching

to the fight against corruption exist in a growing number of countries, and law or political science scholars from across the OSCE region contribute to better understanding of underlying causes and consequences, as well as remedies against corruption. This growing knowledge base is increasingly made available through specific platforms such as the Anti-Corruption Academic Initiative, which encourages universities to devote attention to the subject and to assess it from different thematic angles.<sup>9</sup> The major multicentre research project "Anticorruption Policies Revisited: Global Trends and European Responses to the Challenge of Corruption", bringing together 20 research groups from 15 EU countries, started in 2012 and will run until 2017.<sup>10</sup>

- **Participation in legislative or policy drafting processes:** As mentioned in Chapter 11 on whistleblower protection (see Box 11.1), the United Kingdom-based NGO Public Concern at Work, which is concerned with the protection of reporting person, was, after successful advocacy and awareness raising activities in the 1990s, asked by the British Government to help draft legislation protecting whistleblowers. Other examples regarding the participation of civil society actors in contributing with drafting suggestions and in monitoring the law-making processes as well as the implementation of new laws and regulations include the work of the Hungarian chapter of TI. It has, for example, closely followed the new law on campaign financing, which entered into force at the beginning of 2014. It has set up a website dedicated to monitoring the parties' campaign spending ([kepmutatas.hu](http://kepmutatas.hu)).<sup>11</sup> Civil society is increasingly involved in the development of official anti-corruption policies and strategies in many countries.

<sup>7</sup> The reports are available from [www.transparency.org/enis](http://www.transparency.org/enis)

<sup>8</sup> Transparency International, *Transparency in corporate reporting: Assessing the world's largest companies*, 2012. Available from [www.transparency.org/whatwedo/pub/transparency\\_in\\_corporate\\_reporting\\_assessing\\_the\\_worlds\\_largest\\_companies](http://www.transparency.org/whatwedo/pub/transparency_in_corporate_reporting_assessing_the_worlds_largest_companies)

<sup>9</sup> See <http://www.track.unodc.org/Education/Pages/ACAD.aspx>

<sup>10</sup> For further details see <http://anticorpp.eu/project/overview/>

<sup>11</sup> For further information on the anti-corruption activities of Transparency International Hungary see [http://www.transparency.hu/WHAT\\_WE\\_DO](http://www.transparency.hu/WHAT_WE_DO)

### Box 12.2 The Center for the Study of Democracy: pioneering anti-corruption in Bulgaria

The Center for the Study of Democracy (CSD) was founded in 1989 as a non-governmental, non-partisan organization aiming to assist the creation of democratic institutions and to set the agenda of the emerging civil society in Bulgaria by building bridges between knowledge and policymaking.

The Center's anti-corruption work has earned it recognition as a constructive, independent partner of the Bulgarian government and the European Commission in this area. Its focus on widening civic control of the state administration through implementing specific, measurable, result-driven actions has led its partners to define CSD's role as a 'think-tank with teeth' that plays a key role in critically analysing anti-corruption reform while also partnering with relevant actors in contributing to the reform process.

In 1998, the Center pioneered the first anti-corruption programme in the country. It set up a public-private coalition of fellow NGOs and reform-minded politicians, who prepared *Clean Future: the Anti-Corruption Action Plan for Bulgaria*. The coalition developed the *Corruption Monitoring System (CMS)*, including the Corruption Assessment Report (CAR), to gauge on an annual basis corruption risks and anti-corruption progress in the country. The CMS has been included in the *UN Anti-Corruption Toolkit* as a best practice national corruption monitoring system.

Source: Centre for the Study of Democracy, [www.csd.bg](http://www.csd.bg)

### Box 12.3 Civil society initiatives taken by the Council of Europe

The Council of Europe has developed a number of civil society initiatives in order to improve the relationship between NGOs and its member State governments.

In Russia, for instance, the Framework Co-operation Programme on 'Strengthening Civil Society and Civic Participation in the Russian Federation' has been implemented: international NGOs worked with local civil society actors in order to strengthen the co-operation between NGOs and public authorities so as

to foster the role of civil society in public life and policy making.

In addition, the Council of Europe and the European Union have assisted in setting up a Civil Society Leadership Network in Armenia, Azerbaijan, Georgia, Moldova, and Ukraine. These are focused on civil society leaders to encourage them to advocate for democratic policy and promote European democracy standards.

## 12.3 International drivers

Effective civil society participation in anti-corruption efforts through either of the above-mentioned activities can only take place if certain fundamental rights are guaranteed, namely freedom of expression and freedom of association and assembly. These rights are enshrined in and protected by a range of international texts, including the European Convention on Human Rights (1950),<sup>12</sup> Document of the Copenhagen Meeting of the Human Dimension of the Conference on Security and Co-operation in Europe (1990)<sup>13</sup> and Charter of Fundamental Rights of the European Union (2000).<sup>14</sup> If these rights are restricted in one way or another, the ability of CSOs to take action against corruption is greatly hampered. Examples of where such restricted rights can interfere with CSO activities include, for example, the existence of unreasonably burdensome and lengthy registration processes for NGOs.

At the international level, Article 13 of the UNCAC asserts that each State Party "shall take appropriate measures [...] to promote the active participation of individuals and groups outside the public sector, such as civil society, non-governmental organizations and community-based organizations, in the prevention of and the fight against corruption and to raise public awareness regarding the existence, causes and gravity of and the threat posed by corruption."<sup>15</sup> Article 10 of the UNCAC, which deals with public reporting in the context of corruption prevention, asks States Parties to take measures that enhance transparency of public administration, inter alia to adopt "procedures or regulations allowing members of the general public to obtain [...] information on the organization, functioning and decision-making processes of its public administration [...]"

<sup>12</sup> See European Convention on Human Rights (ECHR), Articles 10 and 11. Available from [https://ec.europa.eu/digital-agenda/sites/digital-agenda/files/Convention\\_ENG.pdf](https://ec.europa.eu/digital-agenda/sites/digital-agenda/files/Convention_ENG.pdf)

<sup>13</sup> Available from <http://www.osce.org/odihr/elections/14304?download=true>

<sup>14</sup> European Union, Charter of Fundamental Rights of the European Union (2000/C 364/01), Articles 11 and 12.

<sup>15</sup> Available from [www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026\\_E.pdf](http://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf)

## 12.4 Anti-corruption toolkits

A number of anti-corruption toolkits have been developed to assist civil society, and in particular NGOs, in engaging in the fight against corruption.

The *UN Anti-Corruption Toolkit* of 2004,<sup>16</sup> drafted by the UNODC and meant to be comprehensive, includes an exploration of roles that NGOs can assume in combating corruption. It emphasizes that in the area of anti-corruption “Policies and practical measures are most likely to succeed if they enjoy the full support, participation, and ‘ownership’ of civil society. Finally, only a well-developed and aware civil society ultimately has the capacity to monitor anti-corruption efforts, expose and deter corrupt practices and, where measures have been successful, credibly establish that institutions are not corrupt.”<sup>17</sup> Its Tool #20, for instance, sets out the essentials of an awareness-raising programme and its desired impact; Tool #22 explains the concept behind social control boards which are composed of specialized NGOs sitting side by side with Government representatives; Tool #24 covers the concept of citizens’ charters, providing an example from the United Kingdom, etc.<sup>18</sup>

The *TI Corruption Fighters’ Toolkit*<sup>19</sup> presents practical civil society experiences from a number of countries in Europe, South America, and Asia, including the Middle East. Examples of these experiences include stories of radio broadcasting of anti-corruption messages in Brazil, building transparency in budgeting and public procurement at the local level in Serbia, the production of a manual to help citizens through the process of acquiring construction permits in Lebanon, a programme developed in Kazakhstan to raise standards in the judicial system, and monitoring and creating a database of institutional and geographical aspects of corruption in Lithuania.

Richard Holloway’s *NGO Corruption Fighters’ Resource Book*<sup>20</sup> is directed at NGOs and focuses on how NGOs can utilize monitoring and advocacy in the context of their anti-corruption activities. The author notes that “For NGOs, corruption is not simply the re-organising of government so that it works more efficiently ... – they see corruption as a social cancer that impoverishes and

disempowers the poor, increases social and economic polarity, destroys the social fabric, damages democracy, and institutionalises inequities and malpractice... . NGOs have in-depth knowledge of the issues and challenges of the sectors in which they work, and in particular the sectors and processes that are susceptible to corruption.”<sup>21</sup> The Resource Book focuses on two key tools for NGO work – monitoring and advocacy, as well as on project management tools.

## 12.5 Regional and international initiatives

Besides these international instruments, regional organizations have developed initiatives and set up programmes to foster civic participation and non-state actor engagement. For example, the OECD has advocated for civil society empowerment and the inclusion of private actors in the fight against corruption for more than a decade. The beginning of this policy was marked by the 1999 Anti-Corruption Initiative for Asia-Pacific under the joint leadership of the Asian Development Bank (ADB) and the OECD and the 2001 Anti-Corruption Action Plan for Asia and the Pacific, which explicitly designates one of its three pillars to “supporting active public involvement” (pillar 3) through several means.<sup>22</sup> Also, the OECD Anti-Corruption Network for Eastern Europe and Central Asia actively involves civil society in its activities, notably in the peer review programme under the 2003 Istanbul Anti-Corruption Action Plan. The third round of monitoring methodology provides for involvement of non-governmental partners on a par with the governments of countries under monitoring. They can provide replies and comments to the monitoring questionnaire and draft report, and participate in the on-site visits and discussion of reports.<sup>23</sup>

The World Bank directly funded civil society organizations (CSOs) working in the field of good governance and anti-corruption through its Civil Society Fund (formerly the Small Grants Programme). It operated in many OSCE participating States and grants were allocated to CSOs in Armenia, Croatia, Georgia, Serbia, the former Yugoslav Republic of Macedonia and Turkey among other countries. In 2012 this programme was replaced by the Global Partnership for Social Accountability (GPSA).<sup>24</sup> The GPSA is a global, multi-

16 See <http://unpan1.un.org/intradoc/groups/public/documents/un/unpan020658.pdf>

17 Ibid., Chapter I - Introduction, para 10.

18 Ibid., pp. 58-60.

19 Transparency International, *Corruption Fighters’ Toolkit: Civil Society Experiences and Emerging Strategies*, 2002. Available from [http://archive.transparency.org/tools/e\\_toolkit/corruption\\_fighters\\_tool\\_kit\\_2002](http://archive.transparency.org/tools/e_toolkit/corruption_fighters_tool_kit_2002)

20 Holloway, Richard, *NGO Corruption Fighters’ Resource Book - How NGOs can use monitoring and advocacy to fight corruption*. 2006. Unpublished. Available from <http://www.richardholloway.org/wp-content/uploads/2014/04/NGO-Corruption-Fighters-Resource-Book-Impact-pdf.pdf>

21 Ibid., p. 12.

22 See <http://www.oecd.org/site/adboecdanti-corruptioninitiative/anti-corruptionactionplanforasiaandthepacific.htm>

23 More information available from [www.oecd.org/corruption/acn](http://www.oecd.org/corruption/acn)

24 For more details see <http://www.thegpsa.org/sa/>

stakeholder coalition that aims to increase levels of accountability at the country level. It provides support to CSOs in developing countries that are working with their governments to promote greater transparency and accountability.

The OSCE, too, has undertaken several programmes and activities to enhance civil society participation in good governance and anti-corruption efforts in South-Eastern Europe, South Caucasus and Central Asia, in addition to supporting the implementation of the pertinent UNCAC commitments. At the Dublin Ministerial Conference in 2012, the OSCE participating States reiterated their encouragement of the Organization “to continue the dialogue and co-operation between governments, civil society and the private sector in order to support good governance efforts, including combating corruption [...] in the participating States.”<sup>25</sup>

Recently, a group of States has set up the Open Government Partnership, an international initiative that aims at improving the transparency, responsiveness, accountability and effectiveness of governments and at increasing civic participation. One core component of the initiative is aimed at supporting civic participation in decision-making and policy formulation, including “mechanisms to enable greater collaboration between governments and civil society organizations and businesses.”<sup>26</sup>

## 12.6 Conclusions

CSOs and academia play a key role in preventing and combating corruption, together with other non-state actors such as the private sector and the media. Their functions are manifold. Traditionally, CSOs and academia have been especially active in education and awareness raising. Academia’s role is particularly important in the generation of knowledge and in supporting the creation of an anti-corruption culture by introducing anti-corruption and ethics courses in education curriculums.

The role of CSOs as watchdogs and oversight institutions, whether in formalized arrangements or informally, has also been widely recognized. Together with the media, CSOs are often critical in monitoring the performance of government and public administration, and in this context also in exposing corruption cases. In addition, both local and international CSOs contribute greatly to holding governments accountable to international and domestic policy and legislative commitments, as for example in the context of monitoring the implementation of the UNCAC. Finally, in a growing number of countries, governments recognize civil society as the most effective ally in forging anti-corruption coalitions and form partnerships with CSOs and academia for activities ranging from awareness raising to legislative drafting processes, policy formation, and monitoring the implementation of anti-corruption strategies.

In all these activities, however, a range of challenges remains for civil society and CSOs in particular, notably in relation to their political and financial independence, and their capacity to engage in long-term strategic work. Overall, however, it can be observed that across the OSCE region civil society plays an increasingly important and highly diverse role in the fight against corruption and, despite sometimes considerable opposition by groups with vested interests, has succeeded in raising its profile and its involvement in this endeavour.

<sup>25</sup> See *Declaration on Strengthening Good Governance and Combating of Corruption, Money-Laundering and the Financing of Terrorism*, Part III (MC.DOC/2/12). Further documents supporting civil society participation in combating corruption include the *OSCE Strategy Document for the Economic and Environmental Dimension* MC(11)JOUR/2, and *Istanbul Charter for European Security* (SUM.DOC/1/99), available from <http://www.osce.org/>

<sup>26</sup> Open Government Partnership, *Open Government Declaration*, 2011. Available from [www.opengovpartnership.org/open-government-declaration](http://www.opengovpartnership.org/open-government-declaration)

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## CHAPTER 13

# Initiatives in the Private Sector

### CONTENTS

13.1	Intergovernmental anti-bribery treaties and initiatives	150
13.2	Private sector measures against bribery	154
13.2.1	Internal compliance programmes	154
13.2.2	Collective Action against corruption: business and multi-stakeholder initiatives	155
13.3	Conclusions	157
	Selected Bibliography	158
<i>Box 13.1</i>	<i>Fighting corruption in international road transport: Global Anti-Corruption Initiative (GAGI)</i>	152
<i>Box 13.2</i>	<i>The Russian Ministry of Labour and Social Security: recommendations on measures against corruption</i>	155
<i>Box 13.3</i>	<i>Global cross-sector Collective Action: World Economic Forum Partnering against Corruption Initiative (PACI)</i>	156
<i>Box 13.4</i>	<i>The Business Anti-Corruption Portal</i>	156
<i>Box 13.5</i>	<i>International Chamber of Commerce (ICC) Anti-Corruption Clause</i>	157

## CHAPTER 13

# Initiatives in the Private Sector

Although a range of other forms of corrupt practices in the private sector exists, such as private sector fraud or embezzlement, when we refer to corruption involving the private sector, we usually focus our attention on two types, namely:

- bribery by a private sector entity of a national or foreign public official (so-called private-to-public corruption);
- bribery by a private sector entity of the representative of another private sector entity (so-called private-to-private corruption).

Any corrupt transaction - including these forms of bribery as well as cartels, duopolies and any other form of informal agreement - undermines 'fair play', thereby distorting competition, manipulating efforts to secure a level playing field and ultimately reducing the effectiveness of the market. Bribery is highly corrosive,<sup>1</sup> damages a country's economy, reduces foreign investment and undermines economic growth potential. In addition, bribery distorts public investments. Consequences of this may be the allocation of public funds to suit private interests rather than for the public good. When bribery serves to influence building site inspectors, for example, it can also have devastating impacts on the environment or on the safety of public infrastructure. Public entities thus have a vital interest in addressing the issue.

There are also compelling reasons why it is in the interest of the private sector to tackle corruption. Apart from moral considerations, the risk of legal action against a company and its management has increased considerably in the past decade - especially in light of potential impacts of bribery on people's health and safety or the environment. In particular, this is due to the spread of corporate criminal liability for bribery provisions in national legislation and a growing body of jurisprudence that holds senior management criminally liable. In addition,

reputational risks (loss of public trust in a company) and business risks (increased cost of doing business) related to corruption are increasingly understood and considered by leading companies around the world.

## 13.1 Intergovernmental anti-bribery treaties and initiatives

In OSCE participating States, three main regional and international instruments are particularly relevant for the role of the private sector in combating bribery, namely:

- the Organisation for Economic Co-operation and Development (OECD) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (1997);<sup>2</sup>
- the Council of Europe Criminal Law Convention on Corruption (1999);<sup>3</sup> and
- the United Nations Convention against Corruption (2003).<sup>4</sup>

The *OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions* requires signatory parties to criminalize the practice of bribing foreign officials in the conduct of international business transactions and prescribes the liability of legal persons; both measures have a particularly wide ranging impact on companies. The Convention is complemented by the Recommendation on the Tax Deductibility of Bribes to Foreign Public Officials (1996), Recommendation of the Development Assistance Committee on Anti-Corruption Proposals for Bilateral Aid Procurement (1996), Recommendation of the Council on Bribery and Officially Supported Export Credits (2006), OECD Guidelines for Multinational

<sup>1</sup> The World Bank has estimated that "bribery has become a \$1 trillion industry", see <http://live.worldbank.org/corruption-can-it-ever-be-controlled>

<sup>2</sup> See [http://www.oecd.org/daf/anti-bribery/ConvCombatBribery\\_ENG.pdf](http://www.oecd.org/daf/anti-bribery/ConvCombatBribery_ENG.pdf)

<sup>3</sup> See <http://conventions.coe.int/Treaty/en/Reports/Html/173.htm>

<sup>4</sup> Available from <https://www.unodc.org/unodc/en/treaties/CAC/>

Enterprises - Section VI on combating bribery (2008), and the Recommendation for Further Combating Bribery of Foreign Public Officials in International Business Transactions (2009). Finally, the OECD has an in-depth peer review mechanism, which, in its current phase, goes as far as reviewing law-enforcement practices of signatory countries under their respective foreign bribery legislations. At this stage, the OECD Convention has been ratified by all 34 OECD member countries and 7 non-members (Argentina, Brazil, Bulgaria, Colombia, Latvia, Russia, and South Africa).

The *Council of Europe Criminal Law Convention on Corruption* covers both public and private sector corruption, and a broad range of offences relevant for the private sector, such as domestic and foreign bribery, money laundering, and accounting offences. As regards private sector bribery specifically, Articles 7 and 8 of the Convention criminalize acts involving “in the course of business activity (...) any persons who direct or work for, in any capacity, private sector entities.” These articles establish a parallel with public sector bribery offences in that they incriminate the active and passive forms of criminal conduct as distinct offences, according to the same mirroring logic: the elements of promising, offering and giving; and requesting, receiving, or accepting an offer or promise (of an undue advantage) are the same. They also cover situations involving an intermediary (“directly or indirectly”). Moreover, the drafters of the Convention considered that the consequences of corruption affecting the private sector have damageable effects that are of equal importance from the perspective of the public interest: the conduct of business and fairness of competition, consumer protection, public health and safety, the environment. Last but not least, the increasing, total or partial, privatization of public activities and services in many countries over the last decades leads to an increasing need to review the classical distinction between what is “public” and what is “private”, and thus between the legal treatment of the respective sectors. Evaluations conducted by the Group of States against Corruption (GRECO) showed for instance that it was not uncommon for countries to apply significantly lower levels of penalties to private sector bribery offences than in cases of bribery of public officials. Therefore, Articles 7 and 8 on active and passive bribery in the private sector are “hard” requirements, as in the case of public sector bribery offences. However, under the Council of Europe Convention (and also under the UNCAC), there is a major difference between the public and private sector bribery definitions, since for the purposes of the latter, the action or inaction of the bribe-taker takes the form of a breach of duties. As the

explanatory report to the Convention puts it: If, in the case of public officials, it was immaterial whether there had been a breach of [the bribed person’s] duties, given the general expectation of transparency, impartiality and loyalty in this regard, a breach of duty is required for private sector persons.

Also of particular importance, from the perspective of repression as well as prevention, is the requirement for the countries, under Article 18 of the Criminal Law Convention, to provide for a mechanism of corporate liability – which does not necessarily need to be based on penal law standards – for bribery, trading in influence, and money laundering offences (see also Chapter 16 on criminalization). This form of liability, which is not exclusive of lawsuits against the natural persons concerned, is applicable in two types of situations: a) where the offence was committed by a person with senior responsibilities or a power of representation of the legal person; b) where the offence is the result of a lack of supervision or control within the entity (i.e. some kind of gross negligence). The mechanism serves several purposes, including facilitating criminal action against legal entities created mainly for criminal purposes (shell companies, etc.) and for use in case the division of responsibilities and decision-making process are such that holding natural persons liable might be difficult. Therefore, it can be seen as a response to the context of growing economic and corporate service globalization. Interestingly, the Convention’s additional Protocol also covers bribery offences committed against (and by) arbitrators and jurors. Moreover, the *Civil Law Convention on Corruption* (which opened for signature in 1999 and entered into force in 2003) provides for compensation for damages resulting from corruption, invalidity of corrupt contracts, and whistleblower protection. Both Conventions have been ratified widely in the OSCE region, and GRECO closely monitors their implementation. As with the OECD Convention, monitoring reports from this mechanism are publicly available and contain information on signatory States that could be highly pertinent for private sector actors.

The *UN Convention against Corruption* (UNCAC) addresses not only corruption in private-to-public relationships (business relationships with public officials, including state-owned enterprises), but also private-to-private relationships (relationships among companies only). It contains a number of provisions that, while addressed to States, will have a direct impact on the corporate community. The overall goal of these provisions is to avert market distortions and combat unfair competition. Article 12 (1) of the Convention calls

### Box 13.1 Fighting corruption in international road transport: Global Anti-Corruption Initiative (GACI)

Driven by the need to reduce corruption and increase mobility across borders, the United Nations Global Compact and the International Road Transport Union (IRU), a global road transport organization, launched the Global Anti-Corruption Initiative (GACI) in 2013. The idea behind the Initiative is to conduct an analysis of anti-corruption along international trade routes and develop policy recommendations. The Initiative contributes to the implementation of the UN Global Compact's 10<sup>th</sup> Principle Against Corruption, which calls participants not only to avoid bribery, extortion and other forms of corruption, but also to "introduce anti-corruption policies and programs within their organizations and their business operations."

Through its activities implemented in 2014, the GACI conducted an analysis of anti-corruption in the transport and logistics industry along major international trade

routes in Eurasia, Africa, and Latin America. The analysis included distribution of questionnaires among road transport companies in order to identify the areas most vulnerable to extortion and bribery. Based on the findings of the survey, a report with recommendations on anti-corruption activities in the sphere of international road transport has been developed and shared with governments of participating States and a number of leading global forums.

GACI, as a private-sector-driven initiative, represents a good practice example of collective action that includes a multi-stakeholder dialogue and partnership with the view to finding sustainable anti-corruption solutions in the field of international road transport.

Source: IRU-UNGC Global Anti-Corruption Initiative. Available from [http://www.iru.org/en\\_gaci](http://www.iru.org/en_gaci)

on States Parties to "... take measures, in accordance with the fundamental principles of its domestic law, to prevent corruption involving the private sector, enhance accounting and auditing standards in the private sector and, where appropriate, provide effective, proportionate and dissuasive civil, administrative or criminal penalties for failure to comply with such measures." Other areas that are directly relevant to the private sector include: public procurement (Article 9); money laundering (Article 14); criminalization of offences of corruption (Articles 15-19, 21-25); liability of legal persons (Article 26); protection of witnesses, experts and victims (Article 32); protection of reporting persons (Article 33); consequences of acts of corruption (Article 34); co-operation with law enforcement authorities (Article 37); co-operation between national authorities and the private sector (Article 39); and bank secrecy (Article 40).

Beyond the development and enforcement of international treaties, the international community has also undertaken a range of supporting initiatives to address bribery in business transactions. The OECD played a leading role in this, notably through its *Guidelines for Multinational Enterprises*,<sup>5</sup> which provide guidance to companies on how to develop sound internal controls, ethics, and compliance or prevention programmes for the purpose of preventing and detecting foreign bribery. It further guides businesses on how to operate their business activities within the global context in line with internationally recognized standards. In 2010, the OECD Council issued the *Good*

*Practice Guidance on Internal Control, Ethics, and Compliance*.<sup>6</sup>

Other initiatives by international organizations include the *UN Global Compact*,<sup>7</sup> which would qualify as the largest voluntary corporate initiative to promote sustainable development and good corporate citizenship (see also section on Collective Action). The initiative implies that private sector actors also carry responsibility for eliminating corruption, and that public and private sector corruption cannot be addressed in isolation of each other. The initiative is based on 10 principles, of which the 10<sup>th</sup>, adopted in 2004,<sup>8</sup> proposes that "Businesses should work against corruption in all its forms, including extortion and bribery." The UNCAC was designated as the underlying legal instrument for this principle. In accordance with the UNCAC, the 10<sup>th</sup> Principle of the UN Global Compact calls for companies to work against corruption in all its forms, including extortion and bribery. The UN Global Compact and the United Nations Office on Drugs and Crime jointly developed an interactive e-learning tool for the private sector called "The fight against corruption" to further the sector's understanding of the UN Global Compact's 10<sup>th</sup> Principle against corruption and the UNCAC as it applies to the private sector.<sup>9</sup>

In addition, the G20 member countries have been increasingly vocal in their commitments against corruption. As part of their *G20 Anti-Corruption Action*

5 OECD, *Guidelines for Multinational Enterprises*, first issued in 1976 and updated in 2011 (5<sup>th</sup> version). Available from <http://www.oecd.org/daf/inv/mne/48004323.pdf>

6 Available from <http://www.oecd.org/daf/anti-bribery/44884389.pdf>

7 See <https://www.unglobalcompact.org/>

8 Available from [www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/principle10.html](http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/principle10.html)

9 See <http://thefightagainstcorruption.org/>



Photos taken at the Regional seminar on fostering co-operation in corruption prevention between Government and the private sector, organized by the OSCE/OCEEA in co-operation with the OECD ACN and with support from the Government of Moldova, Chisinau, 28-30 April 2015

*Plan*, the G20 leaders declared at their 2010 Seoul Summit that their countries would ‘lead by example’ and implement the anti-corruption instruments (OECD Anti-Bribery Convention and UNCAC) in all G20 countries as soon as possible in an effort to strengthen the public-private partnership for combating corruption.<sup>10</sup> Similar statements have since then been repeated in the subsequent G20 declarations, notably in St. Petersburg, Russia, in 2013 where the G20 leaders endorsed the non-binding *Guiding Principles on Enforcement of the Foreign Bribery Offence* and the *Guiding Principles to Combat Solicitation*.<sup>11</sup> The creation of the G20 Anti-Corruption Working Group, which is currently implementing the Action Plan 2015-16, is a further expression of commitment of G20 member countries to engage in this dialogue. In 2015, the leaders of the G20 endorsed the *G20 High-Level Principles on Integrity and Transparency in the Private Sector*, which aim at helping companies comply with global standards on ethics and anti-corruption.

With the adoption of the *2012 Dublin Ministerial Council Declaration on Good Governance*, the OSCE participating States have also acknowledged the importance of engaging and including the private sector in work to prevent and suppress corruption in order to achieve a fair and transparent economic and business environment. More precisely, they have recognized the importance of developing public-private partnerships to counter bribery of public officials, as well as of adopting and enforcing laws to criminalize bribery of domestic and foreign public officials.

## 13.2 Private sector measures against bribery

For private sector companies it is also important to engage in the fight against corruption as corruption scandals can cause significant reputational damages and carry with them great commercial and economic risks, including possible exclusion from business relations by state agencies such as public procurement. There are also legal risks connected with the mechanism of corporate liability. Regarding the latter, in several countries the ability to demonstrate in criminal proceedings that internal anti-corruption measures have been in place and that the legal entity did not endorse criminal

behaviour can contribute to exemption of own liability. From this perspective, the principle of corporate liability for corruption and other offences – as promoted for instance by Article 18 of the Council of Europe Criminal Law Convention on Corruption – is a strong incentive for the development of preventive approaches in the private sector, including the introduction of internal compliance programmes, and the review of contractual clauses and business policies with partners and representatives. High ethical standards and non-tolerance for bribery and other corruption related offences also demonstrate genuine interest in responsible corporate conduct vis-à-vis the society and the locations where its operations are placed and have a positive reputational impact.

### 13.2.1 Internal compliance programmes

Prevention mechanisms in the private sector usually involve internal compliance programmes aimed at preventing, detecting and sanctioning all forms of corruption and other financial crimes. Establishing such a programme is not an easy process, as there is no one-size-fits-all solution. Indeed, internal anti-corruption compliance programmes should ideally be tailor-made to the vulnerability profile of the company in relation to (1) the specific risks of the business sector in which the company is operating; and (2) the size of the company/organization.

In developing an internal anti-bribery compliance programme, companies refer to guidance provided by national law enforcement and other agencies, and such international instruments as the OECD *Good Practices on Internal Controls, Ethics, and Compliance*. Other useful guidance tools are *An Anti-Corruption Ethics and Compliance Programme for Business: A Practical Guide* (UNODC) and *Anti-Corruption Ethics and Compliance Handbook for Business* (OECD, UNODC, and the World Bank).<sup>12</sup>

Building on this guidance, an internal compliance system would normally be based on the following considerations and programmatic elements:

- risk assessment and periodic programme review;
- anti-corruption policies and procedures;
- due diligence of third parties;
- record keeping;
- internal control;
- advice and reporting channels;
- implementation and enforcement;

<sup>10</sup> G20 Anti-Corruption Action Plan, *G20 Agenda for Action on Combating Corruption, Promoting Market Integrity, and Supporting a Clean Business Environment*, Seoul, 2010. Available from [www.mofa.go.jp/policy/economy/g20\\_summit/2010-2/annex3.pdf](http://www.mofa.go.jp/policy/economy/g20_summit/2010-2/annex3.pdf)

<sup>11</sup> G20 Leaders' Declaration, para 106, September 2013, St. Petersburg, Russia. Available from [file:///C:/Users/1/Downloads/Saint\\_Petersburg\\_Declaration\\_ENG.pdf](file:///C:/Users/1/Downloads/Saint_Petersburg_Declaration_ENG.pdf)

<sup>12</sup> Available from [www.unodc.org/unodc/en/corruption/publications.html](http://www.unodc.org/unodc/en/corruption/publications.html)

### Box 13.2 The Russian Ministry of Labour and Social Security: recommendations on measures against corruption

In 2013 the Ministry of Labour and Social Security of Russia published the *Methodical Recommendations on the Development and Taking by Organizations of Measures for the Prevention and Countering of Corruption*. They were prepared together with the Russian Chamber of Commerce and Industry, as well as major national business associations, and are of a non-mandatory nature.

The Recommendations are based on international standards and best practices and are developed for use in organizations regardless of their form of ownership, legal form or industry. They propose the possible set of measures so that each company can create an adequate system of internal anti-corruption mechanisms.

In particular, the Recommendations:

- Define the main principles of countering corruption. These include the principles of proportionality of anti-corruption procedures to the corruption risks, personal example and involvement of management, effectiveness of anti-corruption procedures, constant control and regular monitoring, and involvement of employees;
- Set forth recommendations for the development, approval and adoption of an anti-corruption policy and other internal documents of the company;
- Recommend the creation of a dedicated anti-corruption unit (officer) that would be directly subordinate to the general manager and have the authority to conduct anti-corruption activities;
- Suggest best practices for corruption risk assessment, and detection and settlement of conflict of interests;
- Outline procedures for advising and training the company's employees on anti-corruption issues, including recommended training topics;
- Stress the necessity to implement and define the content of the special procedures for due diligence of the company's counterparts, including in the context of merger and acquisition transactions, as well as to distribute among counterparts anti-corruption procedures and standards of behaviour and to include anti-corruption provisions into agreements with them;
- Confirm the creation of feedback channels and anti-corruption hotlines as possible means of countering corruption;
- Clarify the content of "co-operation of the organisation with law-enforcement agencies" as the statutory means of countering corruption.

Source: adapted from the website [www.rosmintrud.ru/docs/mintrud/employment/26/](http://www.rosmintrud.ru/docs/mintrud/employment/26/)

- training, communication and education;
- participation (compliance programmes should be "owned" by the executive leadership, i.e. top management of a company; however, to become part of the overall corporate culture of a company, responsibility for such programmes should also be generated at all other levels of management and individual staff).

#### 13.2.2 Collective Action against corruption: business and multi-stakeholder initiatives

The term *Collective Action* describes a broad range of initiatives bringing together business actors in a joint effort to prevent and combat corruption. With anti-corruption regulation tightening and enforcement action under foreign bribery legislation increasing, Collective Action is being recognized by anti-corruption compliance practitioners the world over as an innovative and constructive way out of the bribery dilemma.

Collective Action can take many forms, depending on the particular challenge at hand. It may take the form of a set of basic principles to which companies globally – for example, the World Economic Forum's

*Partnering against Corruption Initiative* (see Box 13.3) – or from a specific sector – for example, the *Wolfsberg Group Anti-Money Laundering Principles for Private Banking and Anti-Corruption Guidance*<sup>13</sup> and subsequent industry standards - agree to. Evolving from this stage, or independently of such a basic set of principles, companies bidding for a tender or regularly bidding in a specific market may sign up to a no-bribery commitment in relation to that tender or market – examples include Islands of Integrity / Integrity Pacts. They may further agree to the use of a (social) monitor to oversee adherence to this commitment by participating companies.

Companies participating in the *Business 20* (B20) group support G20 efforts to counter corruption. The B20 convenes regularly in parallel to the G20 summits to express views from the international business community on the policy issues discussed by the G20 government leaders. The B20 focuses on such areas as:

- transparency in government procurement;
- sector based initiatives;
- private sector participation in reviews of the UNCAC and OECD Convention;

<sup>13</sup> For further information on the Wolfsberg Group and its Standards see [www.wolfsberg-principles.com/standards.html](http://www.wolfsberg-principles.com/standards.html)

### Box 13.3 Global cross-sector Collective Action: World Economic Forum Partnering against Corruption Initiative (PACI)

Hosted by the World Economic Forum and developed in partnership with Transparency International and the Basel Institute on Governance, PACI is a private-sector-driven initiative dedicated to help corporations set up and implement comprehensive internal anti-bribery and anti-corruption programmes. At the heart of the initiative is the need for companies to adopt a zero-tolerance policy towards bribery and corruption, and the recognition of the legal, reputational and financial risks posed by such acts to a private entity. Its objectives are to be achieved through the development of various tools, which include:

(1) the **PACI Principles for Countering Corruption: Practical guide** for developing internal anti-corruption programmes;

- (2) the **PACI Self-Evaluation Tool**, which is a comprehensive self-assessment tool to evaluate the effectiveness of internal anti-corruption programmes; and
- (3) the **External Verification Tool**, a voluntary framework for independent assessment of anti-corruption programmes.

The PACI Principles have been endorsed by nearly 100 leading multinational corporations from around the world, with a growing number of national PACI networks. PACI undertakes initiatives to address industry, regional, country, or global issues in anti-corruption and compliance.

Adapted from the website of PACI at <http://www.weforum.org/community/partnering-against-corruption-initiative-0>

### Box 13.4 The Business Anti-Corruption Portal

The aim of the Business Anti-Corruption Portal is to provide free of charge a practical business tool and support to SMEs to help them avoid bribery and extortion when doing business and investing in foreign markets. The Portal has been operational since 2006. It contains a variety of instruments and information such as:

- A section on international and regional anti-corruption conventions and treaties;
- Over 100 country profiles with business and corruption related information;
- An integrity system model on how to integrate anti-corruption policies and practices in company procedures including a sample Code of Conduct, key

procedures, guidance question list and a risk assessment tool;

- Due diligence tools;
- Presentation of anti-corruption initiatives and local contact information;
- Various business anti-corruption training modules, including e-learning programmes.

The Portal is supported by the European Union and governmental bodies of Austria, Denmark, Germany, Norway, Sweden and the United Kingdom.

Source: Adapted from the website of the Business Anti-Corruption Portal at [www.business-anti-corruption.com/](http://www.business-anti-corruption.com/)

- business programmes to encourage cross-fertilization within the private sector and with the public sector, with a specific focus on capacity building;
- the adoption of business codes of conduct with a specific focus on small and medium-sized enterprises (SMEs); and
- strengthening the legal and regulatory framework on anti-corruption.

Reacting to the call from the B20 companies for enhanced efforts to promote such collective action initiatives at the global, regional, sector, and local levels, a group of institutional partners<sup>14</sup> established an international hub on collective action, the *International Centre for Collective Action (ICCA)*,<sup>15</sup> with a view to promoting the generation and transfer of knowledge

about modalities, challenges and benefits of collective action and to initiating new and facilitating existing collective action initiatives.

Finally, *civil society organizations and multi-stakeholder initiatives* have also played a key role in promoting *ethical business conduct*. The global anti-corruption NGO Transparency International (TI) and its national chapters tackle corruption through a number of means, having recently focused on transparency in lobbying. TI has further published a number of principles and guidelines to inform discussions, promote dialogue, and assist private sector entities in developing their compliance programmes. TI's efforts also include, *inter alia*, the development of the *Business Principles for Countering Bribery* (2002)<sup>16</sup> and of the *Self-Evaluation Tool* (TI SET),<sup>17</sup> a checklist for companies to examine

<sup>14</sup> Its founding members include: Basel Institute on Governance, International Anti-Corruption Academy, OECD, TRACE International, Transparency International, UN Global Compact, World Economic Forum and the Universidad de San Andres in Argentina.

<sup>15</sup> For more information about ICCA see [www.collective-action.com/](http://www.collective-action.com/)

<sup>16</sup> Updated 2013 edition is available from [http://www.transparency.org/whatwedo/publication/business\\_principles\\_for\\_countering\\_bribery](http://www.transparency.org/whatwedo/publication/business_principles_for_countering_bribery)

<sup>17</sup> Available at [www.transparency.org/publications/publications/toolkits/ti\\_set](http://www.transparency.org/publications/publications/toolkits/ti_set)

### Box 13.5 International Chamber of Commerce (ICC) Anti-Corruption Clause

Having first issued anti-corruption rules 35 years ago, the ICC is a champion of business action to combat corruption. In 2012, it added to its box of anti-corruption tools the “*ICC anti-corruption clause*”. This clause, designed for inclusion in any contract, provides a contractual basis for partners to commit to complying with ICC’s voluntary Rules on Combating Corruption or to implement a corporate anti-corruption compliance programme. In the absence of compliance with the clause, after having been given the opportunity to take remedial action, the other party may suspend or terminate the contract at its discretion. Arbitral tribunals or other dispute resolution bodies can in a decision, in accordance with the dispute

resolution provisions of the contract, determine the contractual consequences of any alleged non-compliance with the clause. It thus represents an effort of companies to commit to highly binding, mutually enforceable standards in relation to anti-bribery compliance.

The clause is available to download from ICC website and is designed so that it can support both SMEs as well as multinational companies in their efforts to prevent their contractual relationships being affected by corruption.

*Source:* Adapted from ICC website at [www.iccwbo.org/Advocacy-Codes-and-Rules/Areas-of-work/Corporate-Responsibility-and-Anti-corruption/Business-Ethics-Documents/ICC-Anti-corruption-Clause/](http://www.iccwbo.org/Advocacy-Codes-and-Rules/Areas-of-work/Corporate-Responsibility-and-Anti-corruption/Business-Ethics-Documents/ICC-Anti-corruption-Clause/)

the design of their anti-bribery programme and assess its effectiveness. In addition, workshops are held to help companies develop and implement anti-corruption policies, to promote their effectiveness, and to publicly report their results.

## 13.3 Conclusions

The advent of global standards against corruption has led to a substantial strengthening of domestic legislation against domestic and foreign bribery in a growing number of jurisdictions. The regulatory development has been followed in the early 21<sup>st</sup> century by a considerable increase in enforcement action, and in particular a focus on corporate criminal liability for bribery and the liability of senior management for organizational failures to prevent and detect corruption.

The negative impacts of corrupt practices on poverty alleviation, economic and social development, and political stability are increasingly understood by the wider society. Consequently, a company seen as engaging in bribery must risk very adverse public reactions.

This has led to a growing body of literature and expertise about anti-corruption compliance programmes, which are now implemented by most large international companies and increasingly also by SMEs around the world. In addition, a number of international and domestic initiatives have developed to set standards for and enhance business practices, led both by international organizations as well as by business coalitions. This being said, this particular field of the fight against corruption is still quite young, and considerable challenges remain. Consequently, companies and their partners continue to learn and expand their practices and tools to combat corruption. Forums for exchange of experience between businesses as well as for multi-stakeholder engagements – the so-called Collective Action initiatives – are hoped to make an important contribution to the enhancement of public-private partnerships to overcome these challenges.

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## CHAPTER 14

# The Role of the Media

### CONTENTS

14.1	Regional initiatives and international instruments	160
14.2	The role of a free and independent media as a bulwark against corruption	161
14.2.1	Legal approaches	161
14.2.2	Independence	162
14.2.3	Self-regulatory mechanisms	162
14.2.4	Protection of journalistic sources	163
14.2.5	Restrictions	164
14.3	Investigative journalism	165
14.4	Media communication	166
	Selected Bibliography	167
<i>Box 14.1</i>	<i>The United Kingdom's National Union of Journalists' Code of Conduct</i>	163
<i>Box 14.2</i>	<i>Investigative journalism networks: examples</i>	166

## CHAPTER 14

# The Role of the Media

*The media is a part of civil society that is particularly capable of being a counter-force to corruption through its watchdog and informative functions. For the media and journalists to be able to fulfil these functions, access to information and freedom of opinion and expression are essential pre-requisites. Therefore, the guarantee and protection of these freedoms are vital to building an informed citizenry in the fight against corruption. Especially high-quality investigative journalism can play a key role in unearthing corruption cases and bringing them to public attention.*

*Corruption cannot thrive as easily in an open and transparent society, where the media and society at large have the right to “seek, receive, publish and disseminate information concerning corruption”, as also acknowledged by Article 13, in particular in paragraph (1) (d) of the UNCAC.<sup>1</sup> Public officials and representatives of the private sector, as well as persons with criminal intent, operate differently under the watchful eye of a vigilant media and public.*

*Investigative journalism in particular has contributed to revealing many large-scale and complex corruption cases. As the perpetrators of these crimes feel threatened by this work, many investigative journalists come under threat and violent attacks; some even lose their lives. There is therefore a strong need for all States to increase the protection of journalists from harassment, violence and murder, and bring their perpetrators to justice.*

*However, it is also important that the media seek to gather and disseminate information on corruption in a professional, accountable and ethical manner, abiding by agreed journalistic codes of practice, as it can reach a wide audience and have a strong influence on public opinion and action.*

*This Chapter will start by looking at the international legal framework related to freedom of information and expression in relation to the media. It will then review the prerequisites for a free and independent media: access to information legislation, independence, protection of journalistic sources, availability of self-regulatory mechanisms and enabling media regulation. The role of investigative journalism in discovering sophisticated and large-scale corruption cases will be paid special attention. Finally, the Chapter will discuss the importance for public institutions dealing with law enforcement to have an effective communication strategy with the media, as it can be a valuable contributor to corruption investigations and maintenance of public confidence.*

## 14.1 Regional initiatives and international instruments

Freedom of expression and freedom of the media are essential components of any democratic society. A free, independent and pluralistic media is vital to a free and open society and accountable systems of government.

Freedom of opinion and expression as well as freedom of the media are enshrined in a number of international texts. The *Universal Declaration of Human Rights*<sup>2</sup> (1948) comprises the right to freedom of opinion and expression and sets out that every individual is entitled to “seek, receive and impart information and ideas through any media and regardless of frontiers” (Article 19). This right may be subject to restrictions, but only if these are “determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society” (Article 29, para 2). Article 10 of

<sup>1</sup> UNODC, United Nations Convention against Corruption, *Reporting on Corruption: A Resource Tool for Governments and Journalists*, 2013, pp. 2-3. Available from [http://www.unodc.org/documents/corruption/Publications/2013/Resource\\_Tool\\_for\\_Governments\\_and\\_Journalists\\_COSP5\\_ebook.pdf](http://www.unodc.org/documents/corruption/Publications/2013/Resource_Tool_for_Governments_and_Journalists_COSP5_ebook.pdf)

<sup>2</sup> The text of the *Universal Declaration of Human Rights* is available from <http://www.un.org/en/universal-declaration-human-rights/index.html>



the *European Convention for the Protection of Human Rights and Fundamental Freedoms*<sup>3</sup> (1950) is largely phrased in the same way, with the addition that States may require licenses for broadcasting (para 1). The convention further states that the right to freedom of expression “carries with it duties and responsibilities” and that it may be subject to certain limitations necessary in a democratic society and prescribed by law (para 2). The drafters of the *International Covenant on Civil and Political Rights*<sup>4</sup> (ICCPR, 1966) have adopted a similar wording (Article 19). The *Helsinki Final Act* (1975) encompasses commitments of States pertaining (i) to fundamental human rights, including the freedom of expression, and (ii) to the principle of a free, independent and pluralistic media.<sup>5</sup>

As regards the OSCE region, the European Court of Human Rights (ECtHR) has played a central role in guaranteeing respect for the aforementioned fundamental rights by member States of the Council of Europe. The court has been concerned with numerous cases related to freedom of opinion and expression and has developed a jurisprudence favourable to the protection of these rights.<sup>6</sup>

The OSCE, too, has been a leading player in the field. On the basis of the commitments contained in the 1975 Helsinki Final Act, the Organization has promoted and strengthened the right to freedom of opinion and expression and the right to freedom of the press amongst its participating States through a series of

follow-up actions and provisions.<sup>7</sup> In this context, the OSCE Representative on Freedom of the Media (RFOM), established in 1997, is in charge of observing media developments in all 57 OSCE participating States and, in this function, “provides rapid response to violations of freedom of expression and free media in the OSCE region”.<sup>8</sup> The OSCE Representative on Freedom of the Media has also been instrumental in highlighting such challenges as ‘structural censorship’ (indirect pressure on the media from existing political and economic structures). Structural censorship, just like any other form of censorship, can render free media impotent. The Representative has emphasized that a legal guarantee of freedom of expression is an essential pre-requisite for any free media. It is a provision found in most constitutions; however, it is a guarantee that must exist in practice, not simply on paper. The OSCE/RFOM and OSCE field operations have also conducted a series of seminars and trainings on investigative journalism.

## 14.2 The role of a free and independent media as a bulwark against corruption

### 14.2.1 Legal approaches

The freedoms of opinion and expression are recognized as constitutional rights at the national level in the great majority of OSCE participating States. It is vital that countries also have well elaborated and thoroughly implemented access to information legislation (for example, Freedom of Information Acts). This aids investigative journalism, which in turn plays an important role in detecting and revealing corruption cases.

Lack of access to information acts, the inclusion of too many exceptions to the applicability of such acts, as well as administrative obstacles, impact negatively on journalists’ work and impinge on people’s right to be informed. Those requesting information should have the possibility to appeal any refusals to disclose to a body/bodies with full powers to investigate and resolve such complaints.

To ensure freedom of expression, a legal system must be independent of political influence and able to draw upon a firm constitutional jurisprudence that supports

<sup>3</sup> The text of the Convention is available from [http://www.echr.coe.int/Documents/Convention\\_ENG.pdf](http://www.echr.coe.int/Documents/Convention_ENG.pdf)

<sup>4</sup> The text of the ICCPR is available from <https://treaties.un.org/doc/Publication/UNTS/Volume%20999/volume-999-I-14668-English.pdf>

<sup>5</sup> Final Act of the Conference on Security and Co-operation in Europe, 1975.

<sup>6</sup> See *Freedom of expression in Europe: Case-law concerning Article 10 of the European Convention on Human Rights*, 2007, Strasbourg, Council of Europe Publishing. Available from [http://www.echr.coe.int/LibraryDocs/DG2/HRFILES/DG2-EN-HRFILES-18\(2007\).pdf](http://www.echr.coe.int/LibraryDocs/DG2/HRFILES/DG2-EN-HRFILES-18(2007).pdf)

<sup>7</sup> For an overview of the various commitments made by OSCE participating States in the subject area, please consult the website: [www.osce.org/fom/31232](http://www.osce.org/fom/31232)

<sup>8</sup> See <http://www.osce.org/fom/186381?download=true>

the concept of a free media. Judges can draw guidance from Article 19 of the ICCPR, which states that “Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice”, as well as from relevant provisions of the UNCAC and the European Convention on Human Rights (ECHR).

Two essential elements for freedom of expression and freedom of the media are media independence and the protection of journalistic sources.

### 14.2.2 Independence

A crucial prerequisite for effective freedom of expression and of the media is the existence of politically and economically independent media. The media’s ownership structure is seen as an important defining factor for its level of independence. A diversified ownership is thought to be more likely to offer a pluralistic journalistic landscape.

#### State-owned media and public service broadcasting

In very few States, the government is the largest media owner (often of the leading television and radio stations), a situation that can undermine the very concept of ensuring genuine independence of the media from the influences of the State.

#### Privately owned media

Privately owned media is controlled by society if ownership is diversified, transparent and owned by many, so that media can be truly pluralistic. However, private media ownership also carries with it the danger of mass media conglomerates.<sup>9</sup> A concentration of media ownership in too few hands can drown out dissenting voices and constitute a threat to democracy through its ability to manipulate the public opinion. To ensure transparency of ownership and media funding, States may introduce specific provisions within national legislations such as into media laws, anti-monopoly laws, and financial laws. Registration requirements may also ensure increased transparency; however, such media registers must only serve an informational role and registration must be fair and objective. Other tools that can be used are self-regulation and codes of ethics.

<sup>9</sup> See OSCE/RFOM, *The Impact of Media Concentration on Professional Journalism*, 2003, Vienna. Available from <http://www.osce.org/fom/13870>

### 14.2.3 Self-regulatory mechanisms

Alongside a strong legal framework guaranteeing effective freedom of expression and the media, self-regulatory mechanisms can be used to ensure and promote media ethics and accountability. Such mechanisms include *professional codes of conduct* as well as *press councils* and *ombudspersons* that need to be independent and inclusive.

Even though there is no single model regarding a *self-regulatory code of conduct*, there are certain key elements that it needs to contain, such as:

- i. honesty, fairness, impartiality and independence;
- ii. respect of the individual’s rights, including the right to privacy;
- iii. protection of confidential sources and information;
- iv. no acceptance of gifts or hospitality; and
- v. the right to access information.

The Office of the OSCE Representative on Freedom of the Media has published a practical guidebook<sup>10</sup> composed of questions and answers to further encourage the development of media self-regulation. The publication highlights various aspects of media self-regulation, including the role of codes of ethics and of media accountability systems.

UNESCO, with financial support from the European Union, has developed an online reference tool for media accountability in South-Eastern Europe and Turkey.<sup>11</sup> Other UNESCO online resources, such as *Professional Journalistic Standards and Code of Ethics*<sup>12</sup> and *International Standards and Foreign Practices on Journalism Regulation*<sup>13</sup> also offer helpful guidance.

Given that a code of ethics is an essential instrument of media self-regulation, it should be seen by journalists themselves as a starting point of reference, guiding them on their role and their rights and obligations, as well as how they best can perform their profession. A code of ethics not only serves journalists; it is also useful for publishers and owners of media outlets; and it has the effect of contributing to the accuracy, fairness and reliability of information, therefore also benefiting readers in general.<sup>14</sup>

<sup>10</sup> OSCE/RFOM, *The Online Media Self-Regulation Guidebook*, 2013, Vienna. Available from [www.osce.org/fom/99560](http://www.osce.org/fom/99560)

<sup>11</sup> See [www.unesco.org/new/en/communication-and-information/freedom-of-expression/professional-journalistic-standards-and-code-of-ethics/south-east-europe-and-turkey/](http://www.unesco.org/new/en/communication-and-information/freedom-of-expression/professional-journalistic-standards-and-code-of-ethics/south-east-europe-and-turkey/)

<sup>12</sup> See <http://www.unesco.org/new/en/communication-and-information/freedom-of-expression/professional-journalistic-standards-and-code-of-ethics/>

<sup>13</sup> See (in Russian) <http://unesdoc.unesco.org/images/0021/002118/211867r.pdf>

<sup>14</sup> See OSCE/FOM, *The Online Media Self-Regulation Guidebook*, 2013, Vienna.

### Box 14.1 The United Kingdom National Union of Journalists' Code of Conduct

An example of a long-established code is that created by the National Union of Journalists in the UK. First created in 1936, it has been regularly updated to reflect changes and advances in journalistic practices:

A journalist:

1. At all times upholds and defends the principle of media freedom, the right of freedom of expression and the right of the public to be informed.
2. Strives to ensure that information disseminated is honestly conveyed, accurate and fair.
3. Does her/his utmost to correct harmful inaccuracies.
4. Differentiates between fact and opinion.
5. Obtains material by honest, straightforward and open means, with the exception of investigations that are both overwhelmingly in the public interest and which involve evidence that cannot be obtained by straightforward means.
6. Does nothing to intrude into anybody's private life, grief or distress unless justified by overriding consideration of the public interest.
7. Protects the identity of sources who supply information in confidence and material gathered in the course of her/his work.
8. Resists threats or any other inducements to influence, distort or suppress information, and takes no unfair personal advantage of information gained in the course of her/his duties before the information is public knowledge.
9. Produces no material likely to lead to hatred or discrimination on the grounds of a person's age, gender, race, colour, creed, legal status, disability, marital status, or sexual orientation.
10. Does not by way of statement, voice or appearance endorse by advertisement any commercial product or service save for the promotion of her/his own work or of the medium by which she/he is employed.
11. A journalist shall normally seek the consent of an appropriate adult when interviewing or photographing a child for a story about her/his welfare.
12. Avoids plagiarism.

Source: [www.nuj.org.uk/about/nuj-code/](http://www.nuj.org.uk/about/nuj-code/)

*Press councils* established by the media can act as a self-regulatory mechanism. They can be constructed so as to provide an open forum for complaints against the media by the public, to chastise the media when it acts unprofessionally, and influence (to a degree) its behaviour.

A press council should be independent and composed of individuals widely respected for their non-partisan standing and their integrity in order to avoid subjectivity and political standings. These bodies should not have powers of legal sanction, which could enable them to become overbearing censors. Rather, they should have the prestige, credibility and integrity that give their reports strong moral force. A useful requirement is for the subject of a complaint to be required to publish, in full and unedited, the findings of the press council when a complaint against it has been made.<sup>15</sup>

Given that a fine line exists between responsible and unethical journalism, the context of an article or other piece is all-important. In such circumstances, the lighter touch and moral force of a press council is better suited to securing a responsible media than providing governments and courts with wide-ranging powers to curb it.

To provide publishers and journalists with freedom is also to burden them with difficult decisions regarding public responsibility. Through the responsible judgements

of editors and journalists, combined with consistent public support, a tradition and *culture of media freedom* develops. This culture is the key guarantor of media freedom and of the ability of the media to fully operate as a watchdog over public office holders. The tradition must provide for the media to be tough in its scrutiny of the work of those who enjoy public trust.

#### 14.2.4 Protection of journalistic sources

The ECtHR has stated that "The protection of journalistic sources is one of the basic conditions for press freedom. Without such protection, sources may be deterred from assisting the press in informing the public on matters of public interest." This, in turn, would greatly harm the work of journalists. Ordering the disclosure of journalistic sources is therefore only justified if there is an overriding requirement in the public interest.<sup>16</sup>

Adequately protecting journalistic sources is of particular interest in the anti-corruption context, as cases touched upon by the media are often politically sensitive; and sources (including whistleblowers) would refrain from revealing wrongdoings to journalists for fear of reprisal.

<sup>15</sup> For more on press councils see OSCE/RFOM, *The Online Media Self-Regulation Guidebook*, 2013, Vienna, p. 89-105.

<sup>16</sup> *Goodwin v. the United Kingdom* [GC], no. 17488/90, §39, ECtHR 1996.

## 14.2.5 Restrictions

Any form of restriction on the media must be consistent with international human rights law and regional instruments such as the European Convention on Human Rights.

Many restrictions imposed on media players are of an indirect nature. In some States, *criminal libel and defamation laws* constitute a hindrance to effective freedom of the press as they may be used by political or otherwise public figures to prevent journalists from reporting certain facts. The act of disclosing information about wrongful acts – even though true – may lead to an anti-insult indictment. Another tool used by some States to restrict the freedom of the press is *mandatory registration*. Licensing can be used to control the information market.

Restrictions on the right to freedom of expression relating to the rights or reputations of private individuals, matters of national security and bans designed to protect the public interest are appropriate only when such restrictions are in accordance with the law, are legitimate and necessary in a democratic society.

For States Parties to the ECHR, Article 10 (a qualified, not absolute, right) provides that:

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or the rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

### Defamation or libel legislation

Although many experts would accept that defamation or libel legislation restrictions are reasonable, most would agree that they must be narrowly interpreted.

Criminal libel and defamation claims can be used to intimidate or even to imprison and bankrupt journalists and media company owners. Worse still, those same laws can be misused to muzzle, bankrupt and imprison political opponents. The Parliamentary Assembly of the Council of Europe in its *Resolution 1577 (2007) Towards decriminalisation of defamation*<sup>17</sup> urges to exercise utmost restraint in applying anti-defamation laws and supports the decriminalization of defamation, particularly the abolishment of prison sentences in order not to corrode fundamental freedoms vital to democracy.

While legal and regulatory frameworks should provide appropriate protection for the reputations of the innocent, they should not create restrictions that may prevent the media from publishing matters simply because these could damage reputation of public office holders. To do so would undermine freedom of expression. A decision by the European Court on Human Rights has held that a politician: “inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large, and must display a greater degree of tolerance.”<sup>18</sup> Laws should also distinguish between honest and wilful/malicious mistakes in reporting, and allow for prompt apologies to count for such when defamatory publication is not intentional.

The OSCE Representative on Freedom of the Media has outlined as a major concern the misuse of criminal or civil libel and defamation laws by government officials. Criminal defamation cases often result in imprisonment of investigative journalists; civil cases, when there is no cap on damage awards, may lead to the closure of independent, and especially opposition, media. The use of libel and defamation can infringe on the corrective function of the media in reference to important government or business decisions, and can have a particularly hampering effect on journalists’ investigations of corruption.<sup>19</sup>

### Government influence through placing or withholding advertising

The media organizations generally depend in their activity on advertising revenues. As a consequence, major advertisers can exert enormous control over content. Political and business entities may also have a wide scope of reporters to write stories that serve their political and

<sup>17</sup> For details on *PACE Resolution 1577 (2007)*, see <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17588&lang=en>

<sup>18</sup> *Lingens v. Austria* (1986) 8 E.H.R. 407

<sup>19</sup> See OSCE/RFOM, *Ending the Chilling Effect - Working to Repeal Criminal Libel and Insult Laws*, 2014, Vienna. Available from <http://www.osce.org/fom/13573>



The role of free and independent media is vital element to fight corruption

business interests. In these types of situations, the media frequently fails to perform its watchdog role. Therefore, there should be clear rules regarding the placement of publicly funded advertisements.

#### **Control of the press through the registration of newspapers and journalists**

Licensing of newspapers may be used as a way of controlling the press. The main legitimate rationale for imposing a licensing requirement should be to ensure that a newspaper has a registered address where legal process can be served in the event its proprietors breach the law.

Requirements for the licensing of journalists can take many forms and they frequently represent a form of intimidation. In some countries, governments seek to regulate the licensing of media enterprises and their employees directly, while elsewhere there may be media trade unions that seek to force restrictive practices on their members. For these reasons, licensing practices should be reduced and simplified.

### **14.3 Investigative journalism**

High-quality investigative journalism can unearth sophisticated and large scale corruption cases with possible detrimental effects on a country's public institutions as well as economic and social development.

Investigative journalism can also help law enforcement and judicial authorities to initiate official investigations and case processing. It can shed light on loopholes and institutional weaknesses, allowing the executive and legislative powers to make amendments.

Investigative journalism often requires special training of journalist in areas such as investigative techniques, access and restrictions to public documents and sources, handling of human sources, ethical reporting, and safety measures.

Journalists investigating corruption offences often start by following-up on corruption leads or suspicions by searching through publicly available documents: public policy and planning documents, public budgets, public procurement documentation, public service salary scales, asset declarations, property records, and company business registers. They speak to different sources to establish any abnormality in the behaviour and lifestyles of political leadership and/or public service officials, such as non-commensurate wealth generation. The story should only be published when the journalist has good faith and reasonable belief in the accuracy of its content. This is important for maintaining public trust in the quality and reliability of media reporting, as well as avoiding defamation actions.

Such journalists often become vulnerable to physical and psychological threats, intimidation, harassment, and even kidnappings and killings by those trying to block their journalistic freedoms and public reporting

### Box 14.2 Investigative journalism networks: examples

“The **International Press Institute** is a global network of editors, media executives and leading journalists. We are dedicated to the furtherance and safeguarding of press freedom, the protection of freedom of opinion and expression, the promotion of the free flow of news and information, and the improvement of the practices of journalism.” See <http://www.freemedia.at/about-us.html>

“**SCOOP** is a network and support structure for investigative journalists. [...] Since 2003 SCOOP has supported several hundred investigations and facilitated national and international contacts between journalists to investigate across borders and share experiences.” See <http://i-scoop.org/scoop/>

work. Persons or groups involved in corrupt activities have a strong interest in not being exposed by media and would in many cases resort to illegitimate means to silence journalists. To minimize such risks, journalists’ organizations have developed codes and strategies to promote journalists’ safety.<sup>20</sup>

Access to information and freedom of media are of general public interest in a democracy; therefore, it is a government’s duty to ensure the safety of all its citizens, including journalists, by putting in place the necessary legal environment supported by effective law and order institutions.

In addition to journalistic media, there is an important public information and discussion channel – the Internet. The Internet and improved access to public records have created a new group of ‘citizen journalists’ or civil society enlightened activists sharing information related to corruption through mobile devices, blogs, social media, tweets, etc. This information is of varied quality and correctness, but can have a significant impact on the public mindset. High-quality investigative journalism can complement these information sources by giving the public well researched, analysed, validated and accurate information and reporting on corruption risks and wrongdoings.

## 14.4 Media communication

The media is capable of being of great benefit or great hindrance to an anti-corruption investigation. Managing media issues is, therefore, important. The media can assist in tracing witnesses, maintaining public confidence in anti-corruption investigations and in keeping the public, as well as those affected by a case, informed, involved and supportive of the anti-corruption work.

It might even be the provider of information. In such circumstances, journalists may be stakeholders and, perhaps, witnesses able to assist an investigation. The media may also become aware of new investigations at an early stage, and journalists (and photographers) may be present at a crime scene, a search, or an arrest.

For these reasons, it is important to have a media communication strategy guiding staff on how to manage the information exchange. Care should be taken to treat the media even-handedly when giving out information, not to favour a particular journalist or publication, thus ensuring equal and fair access to the information. In larger, more complex corruption related investigations, it is advisable to have a dedicated press officer who is experienced in: dealing with the media through press conferences and interviews, responding to enquiries, and issuing regular media updates. To assist the press officer in conducting these functions in an effective and credible manner, it is essential that he/she is regularly briefed by a senior investigator about key events and landmarks related to the investigation that are likely to attract media and public interest. These may include: searches, new evidence, new witnesses, charges, disciplinary hearings, decisions by the prosecutor/investigating judge, and dates of court hearings.

In addition to a specific media communication strategy related to the investigation of corruption cases, some States have a more general communication strategy aimed at enlisting social support for anti-corruption reforms. Such a strategy can help increase the understanding of various communities and the general public of their roles in identifying and reporting/denouncing corruption. At a later point in time, they may be helpful in assisting public authorities in collecting information on specific corruption cases.

<sup>20</sup> See, for example, the website of the International News Safety Institute at: [www.newssafety.org](http://www.newssafety.org)

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# CHAPTER 15

# Judiciary

## CONTENTS

15.1	International instruments and commitments	170
15.2	Causes and forms of corruption in the judiciary	171
15.3	Indicators of corruption	172
15.4	The role of resources	172
15.4.1	<b>Judicial and court personnel salaries</b>	173
15.4.2	<b>Infrastructure</b>	173
15.5	Ensuring the judiciary's independence	173
15.5.1	<b>Judicial selection and appointment</b>	173
15.5.2	<b>Judicial advancement and tenure</b>	174
15.5.3	<b>Impartial case assignment, management, and adjudication practices</b>	174
15.6	Providing adequate oversight	175
15.6.1	<b>Codes of conduct</b>	175
15.6.2	<b>Complaint and disciplinary process</b>	176
15.6.3	<b>The role of the public and media</b>	176
15.7	Conclusions	177
	Selected Bibliography	178

## CHAPTER 15

# Judiciary

*Preventing and punishing corruption within the judiciary is of vital importance for maintaining the rule of law and providing access to justice. Corruption within the judiciary affects the rights of parties in cases; but more importantly, it undermines the foundation of a legal system and results in a high level of corruption throughout a country's government and economy.<sup>1</sup>*

*Corruption can influence any level of a country's judiciary, from the municipal courts to the judicial council.<sup>2</sup> It can take many forms; but there are just as many legislative and programmatic safeguards that the government and the judicial system can enact to combat it.*

*This Chapter identifies the problem, and discusses causes and indicators of judicial corruption. Then the Chapter examines the role of resources. Funding for the judiciary, including salaries for judicial officers and funding for court infrastructure, is discussed in the context of corruption prevention. It also examines the balance between judicial independence and oversight and the relevance of both to successfully tackling corruption.*

## 15.1 International instruments and commitments

The United Nations Convention against Corruption (UNCAC) in Article 11 requires States Parties to put in place measures that strengthen integrity and prevent opportunities for corruption in the judiciary: "Bearing in mind the independence of the judiciary and its crucial role in combating corruption, each State Party shall, in



accordance with the fundamental principles of its legal system and without prejudice to judicial independence, take measures to strengthen integrity and to prevent opportunities for corruption among members of the judiciary. Such measures may include rules with respect to the conduct of members of the judiciary."<sup>3</sup>

The United Nations Office on Drugs and Crime (UNODC) has developed the *Implementation Guide and Evaluative Framework for Article 11*, primarily intended to be used by the judiciary and other government officials to conduct an internal analysis of the State's implementation of Article 11 of the UNCAC.<sup>4</sup> It includes a summary of the main international instruments as well as UNODC tools related to judicial independence, integrity and accountability,<sup>5</sup> such as the United Nations *Basic Principles on the Independence of Judiciary*, the *Bangalore Principles of Judicial Conduct*, the *UNODC Resource Guide on Strengthening Judicial Integrity and Capacity*, and others.

<sup>1</sup> Due to these concerns, the Council of Europe's Group of States against Corruption (GRECO) devoted part of its Fourth Evaluation Round (launched in 2012) to the prevention of judicial and prosecutorial corruption. The various aspects addressed in the present Chapter fall within the scope of GRECO's evaluations.

<sup>2</sup> For a definition of a judicial council, see OSCE/ODIHR, *Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia* from Expert meeting in Kyiv, 23-25 June 2010, provision 2. Available from <http://www.osce.org/odihr/KyivRec?download=true>

<sup>3</sup> UNCAC text is available from <https://www.unodc.org/unodc/en/treaties/CAC/>

<sup>4</sup> See [https://www.unodc.org/documents/corruption/Publications/2014/Implementation\\_Guide\\_and\\_Evaluative\\_Framework\\_for\\_Article\\_11\\_-\\_English.pdf](https://www.unodc.org/documents/corruption/Publications/2014/Implementation_Guide_and_Evaluative_Framework_for_Article_11_-_English.pdf)

<sup>5</sup> *Ibid.*, pp. 5-8

The Organization for Security and Co-operation in Europe (OSCE) commitments also highlight the pivotal role of impartiality of the judiciary in the functioning of democratic States. In particular, the Document of the Copenhagen Meeting of the Conference on the Human Dimension of the Conference on Security and Co-operation in Europe (CSCE) underlined that “the independence of judges and the impartial operation of the public judicial service” are among “those elements of justice which are essential to the full expression of the inherent dignity and of the equal and inalienable rights of all human beings.”<sup>6</sup> The Document of the Moscow Meeting of the Conference on the Human Dimension of the CSCE reaffirmed the commitment by the participating States to “ensure that the independence of the judiciary is guaranteed and enshrined in the constitution or the law of the country and is respected in practice, paying particular attention to the Basic Principles on the Independence of the Judiciary, which, inter alia, provide for [...] prohibiting improper influence on judges [...]”<sup>7</sup>

## 15.2 Causes and forms of corruption in the judiciary

Judicial corruption, as corruption in general, is a complex phenomenon. It is important to differentiate between proximate causes, which directly trigger the problem or provide opportunities for corruption, and underlying causes, which exist at the structural level and explain the problem as a whole.

Such factors as low wages of judges and court staff, lack of public access to information, inadequate professional competence or unclear legislation fall into the category of proximate causes. On the other hand, poor separation of powers, weak institutions, lack of effective monitoring of the exercise of judicial discretionary powers, and lax law enforcement are some of the underlying causes of judicial corruption.

Corruptive attempts to influence the judiciary can originate from a number of different actors, including members of the executive at various levels. Organized crime plays a destructive role in judicial corruption, either through direct involvement, or the involvement

of third parties.<sup>8</sup> In addition to such powerful groups or parties, ordinary citizens seeking to influence the outcome of a particular case are also often directly responsible for bribery.

Corruption within the judiciary can take a number of different forms, such as misappropriation of public funds and property by judges and court personnel for their own use, or purportedly nepotistic or politicized judicial appointments.

However, judicial corruption goes beyond wasting government funds or appointments resulting from business or political patronage: this type of corruption encourages inconsistent application of the law to hand down court decisions favouring a particular party. It therefore threatens to undermine the right to a fair trial, impartiality in judicial decision-making, and equal law enforcement. For example, judges and court personnel may solicit bribes, extort favours, or ask forgiveness for debts in return for delaying a case, deciding in one party’s favour, granting access to documents to which the other party has no access, destroying evidence, or otherwise exercising preferential treatment of a particular party through abuse of power. Judges may also be biased in favour of the government for the sake of advancing in their careers or increasing their chances of being awarded benefits or bonuses.

Therefore, any action to curb corrupt practices in the judiciary requires an informed and multifaceted approach.



<sup>6</sup> CSCE, *Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE*, 1990, provisions 5 and 5.12.

<sup>7</sup> CSCE, *Document of the Moscow Meeting of the Conference on the Human Dimension of the CSCE*, 1991, provision 19.2.

<sup>8</sup> See, for example, European Commission Centre for the Study of Democracy, *Examining the Links Between Organised Crime and Corruption*, 2010. Available from [http://www.europarl.europa.eu/meetdocs/2009\\_2014/documents/libe/dv/report\\_csd/\\_report\\_csd\\_en.pdf](http://www.europarl.europa.eu/meetdocs/2009_2014/documents/libe/dv/report_csd/_report_csd_en.pdf)

## 15.3 Indicators of corruption

In the fight for public sector integrity, governments, NGOs and international organizations have developed a number of assessment tools to measure corruption. For example, Transparency International (TI)'s *Global Corruption Barometer 2013*<sup>9</sup> contains information about reported bribes paid to the judiciary and perceived levels of corruption in the judiciary in various countries. The UNODC publishes assessments of justice sector integrity at a national level.<sup>10</sup>

Indicators used in such tools attempt to assess corruption from two perspectives: a) public perception and b) vulnerabilities of control mechanisms geared to enforce judicial accountability and promote integrity. Such mechanisms include disciplinary mechanisms, income and asset disclosure requirements, and supervision by inspecting bodies.

While individual perceptions may be seen as subjective, when expressed by representative samples of the population or specific groups surveyed, they become a valuable source of knowledge of the extent and character of corruption in the judiciary.

The analysis of the functioning of control mechanisms, on the contrary, does not rely as much on statistical tools and is more similar to institutional audit in its approach. Problems that may come to light in this context lie with relevant legislative and regulatory frameworks (e.g., vague criteria to identify punishable conduct for the purposes of disciplinary proceedings, or vesting the power to initiate disciplinary proceedings in the adjudicating body) as well as unlawful practices (e.g., tampering with the computerized court system for random case allocation).

Indicators often intend to measure how efficiently a judiciary is functioning, and whether outcomes of cases are founded on consistent legal reasoning. Some such indicators may include delays in passing down judgments, suppressing evidence, not summoning particular witnesses, or appearances of cronyism.

Statistics regarding the frequency with which the executive fails to implement, or even overrides, judicial decisions are also useful, as they demonstrate whether the judiciary's independence is respected. Another useful indicator is the number of disciplinary cases brought and decided against judges. Few disciplinary

cases may suggest a culture of impunity. However, no indicator can clearly point to the existence of corruption unless put into a larger context. For instance, few disciplinary cases against judges may also be indicative of a well-performing judiciary.

In connection to these indicators, ways to gather information that can shed light on different avenues for corruption within a judiciary, include:

- Reviewing complaints filed regarding specific issues, such as misplacement of case files, the assignment of a case to a particular judge, or misconduct by judges;
- Examining the outcomes of criminal cases against judges involving corruption related charges;
- Reviewing unusually high or low conviction rates and rates of not guilty verdicts, or examining decisions allowing alternative, less harsh punishments, such as house arrest for serious crimes;
- Reviewing the number of cases decided in favour of the government;
- Assessing the number and circumstances of instances of judicial recusal due to conflict of interest or bias, in comparison to expected rates of recusal for similarly situated judges or courts;
- Comparing judicial salaries to the salaries of similarly situated government officials and legal professionals (in particular, prosecutors);
- Analysing the systems of rewarding judges, including with benefits and bonuses as parts of their income, and which authorities decide about them.

## 15.4 The role of resources

Adequately funded judicial infrastructure and salaries are key factors for preventing judicial corruption.<sup>11</sup> Insufficient funding of the judiciary increases the risks of bribery and embezzlement. In addition, if a government cannot afford to maintain adequate security for courthouses and judges while handling high-profile, dangerous cases, judges and lawyers may capitulate to threats. Similarly, an insufficiently funded court system may be unable to process (corruption) cases in a timely and thorough manner.

<sup>9</sup> Available from <http://www.transparency.org/gcb2013>

<sup>10</sup> For examples of such assessments, under "Criminal justice integrity", see <https://www.unodc.org/unodc/en/corruption/publications.html>

<sup>11</sup> See OSCE/ODIHR, *Kyiv Recommendations*, provision 13; CoE, Committee of Ministers, Recommendation Rec(2010)12 on judges: independence, efficiency, and responsibilities, provisions 33-38.



### 15.4.1 Judicial and court personnel salaries

International standards widely recognize the importance of providing adequate judicial salaries and benefits.<sup>12</sup> Judges' salaries ought to be sufficient to allow them to be independent of undue influence. Judicial salaries and pensions should be reasonable in comparison to those received by other similarly experienced professionals. However, judges should not be beholden to the executive via receipt of benefits such as housing or bonuses. Not only should judicial salaries be adequate, they should be fixed against administrative interference meant to manipulate or influence case outcomes.

### 15.4.2 Infrastructure

Providing for adequate court infrastructure is as critical as funding judicial salaries. The judiciary's budget should allow courts to process cases in a timely manner. Lawmakers should consult with the judicial council when creating the judiciary's budget.<sup>13</sup> In addition to obtaining the necessary funding, it is critical that these funds not just be distributed among the country's top-level courts, but that lower level courts and their staff are fully funded as well.

The judiciary's budget should also allow for a sufficient number of judges and courts, so that the judiciary is staffed to handle the workload it receives. Similarly, judges and court personnel ought to have the training and education necessary to perform their tasks. In addition to adequate staffing and resources, the government should guarantee the safety of judges. Safety measures could include the presence of security guards

at courthouses and personal police protection for judges who have been subject to threats. Court personnel, such as bailiffs, may also need protection.

## 15.5 Ensuring the judiciary's independence

The OSCE participating States have committed to protecting the judiciary's independence, both from the government and from private actors.<sup>14</sup> This independence should be codified in a country's legislation, and protected in practice. Outside influence can take a myriad of forms. It may be straightforward, with government officials or parties to a case directing judges on how to rule in a specific matter. It may also take less direct forms. To protect against interference, governments must ensure fairness and transparency of the systems for selecting, appointing, promoting, evaluating and disciplining judges, as well as standardize their case assignment systems. Trial procedures themselves must reflect the rule of law, with established processes reliably and consistently followed. There should also be safeguards in place such as sentencing guidelines, protection for criminal defendants and their counsel, and guarantees for parties' equal rights to access information and present cases.<sup>15</sup>

### 15.5.1 Judicial selection and appointment

Exact methods of judicial selection and appointment vary by country and by court, and no hierarchy exists among them. However, across countries and court levels, two good practices can serve as a reference.

First, it is preferable to have judicial selection and appointment decisions (including election of court chairs) performed by the judiciary itself, or by an independent body comprised of a substantial number of judges. This should include judges from various court levels, not just the highest courts.<sup>16</sup> While the recruitment and selection process should be transparent, voting on candidates should be done via secret ballot.<sup>17</sup> Control

<sup>12</sup> UN High Commissioner for Human Rights, *Basic Principles on the Independence of the Judiciary*, 1985, provision 11; CoE, *European Charter on the Statute for Judges*, 8-10 July 1998, provision 6; International Bar Association, *Code of Minimum Standards of Judicial Independence*, 1982, provision 15 (b).

<sup>13</sup> OSCE/ODIHR, *Kyiv Recommendations*, provision 6.

<sup>14</sup> OSCE Human Dimension Commitments, Vol. 1, para 2.4.2; CSCE *Document of the Copenhagen Meeting of Conference on the Human Dimension of the CSCE*, 1990, provision 5.12.

<sup>15</sup> *Basic Principles on the Independence of the Judiciary*, provisions 5-6, 10-14; *Bangalore Principles of Judicial Conduct*, 2002, Value 5.2-5, available at: [http://www.unodc.org/pdf/crime/corruption/judicial\\_group/Bangalore\\_principles.pdf](http://www.unodc.org/pdf/crime/corruption/judicial_group/Bangalore_principles.pdf)

<sup>16</sup> This includes selection of a court chairperson. OSCE/ODIHR, *Kyiv Recommendations*, provisions 16 and 7.

<sup>17</sup> On recruitment process see OSCE/ODIHR, *Kyiv Recommendations*, provisions 21-23.

of the selection and appointment body should not rest solely in the hands of one person, as has been pointed out by the Council of Europe's Venice Commission.<sup>18</sup> Selection and appointment processes that are led by the executive or the legislature without significant judicial involvement are the most vulnerable to corruption.<sup>19</sup>

Second, countries should establish and adhere to specific selection and appointment criteria to minimize the risk that judges are hired based on their susceptibility to outside influence. The criteria should emphasize neutrality, integrity, and independence.<sup>20</sup> Ideally, rules or laws governing judicial selection and appointment will emphasize that hiring decisions be based on judges' qualifications and their ability to make impartial decisions. Selection may also be based on psychological evaluations of judges' capacity to work in teams and handle stressful situations and complicated fact patterns.<sup>21</sup> The selection process should be based on quantifiable criteria, such as the quality of one's education and years of experience. Judicial selection and appointment guidelines should convey that decisions on the selection or appointment of judges must not be based on political party affiliation.

### 15.5.2 Judicial advancement and tenure

Following appointment, a judge's career path must be merit-based and protected from undue interference. To minimize political influence on decisions regarding judicial careers, advancement and tenure decisions should be subject to clear, objective, neutral criteria. Promotion decisions should be regulated in rules or a specific law, and be based on "objective factors, in particular ability, integrity, and experience."<sup>22</sup> These factors include knowledge of the law; ability to conduct trials; capacity to write reasoned decisions; ability to cope with the work load; ability to decide; openness to new technologies; organizational skills; ability to mediate; and respect for parties. If promotion relies on the assessment of these qualifications, then it should be made by independent parties, not the judicial council. For example, such evaluations may be performed by local judges. Their decisions should clearly track a series

of criteria.<sup>23</sup> Judges' substantive rulings should not be examined, though they may be judged for objectivity, clarity, and thoroughness. Lastly, there should be an appeals process for judges who are denied promotions.<sup>24</sup>

It is challenging to develop objective advancement criteria. Some statistics may be instructive in making advancement determinations; though decisions should not be made solely by weighing statistical factors.

Periodic exams, testing judges' knowledge, should not be imposed on judges as a job retention requirement.<sup>25</sup> Such practices can be used by the executive to exert undue influence. These exams may turn judges' initial terms into "probationary periods," testing their loyalty.

It is preferable for governments to guarantee judges lifelong tenure. Permanent appointments should only be terminated in cases of serious breaches of disciplinary or criminal provisions established by law, or where the judge can no longer perform judicial functions. Court chairpersons should be appointed for a fixed term, to be renewed only once. As with selection and appointment, tenure and advancement decisions must be made by either the judiciary or an independent agency. Ideally, multiple types of legal professionals will sit on the decision-making body, and a substantial number, perhaps at least half, will be judges.<sup>26</sup>

### 15.5.3 Impartial case assignment, management, and adjudication practices

As with judicial selection, appointment, and tenure decisions, the actual handling of cases must assure neutrality. This includes assigning cases to judges without considerations of the judge's likely decision in the matter. One common strategy, managed by a court chairperson or his or her staff (but without any substantive input by the chairperson)<sup>27</sup> is rotating the assignment of cases through judges, in alphabetical order or via a randomized electronic system.

Improving case management and filing systems is a straightforward way to combat corruption. Simple projects can have a very real effect on reducing opportunities for corruption by lawyers and court personnel, and generally improving case processing.

18 CoE, Venice Commission, Opinion 663/2012 on the Organization and Administration of Courts, p. 7. Available from [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2012\)001-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2012)001-e)

19 European Charter on the Statute for Judges, provision 1.3.

20 *Basic Principles on the Independence of the Judiciary*, provision 10.

21 UNODC, *Resource Guide for Strengthening Judicial Integrity and Capacity*, 2011, p. 9. Available from [https://www.unodc.org/documents/treaties/UNCAC/Publications/ResourceGuideonStrengtheningJudicialIntegrityandCapacity/11-85709\\_ebook.pdf](https://www.unodc.org/documents/treaties/UNCAC/Publications/ResourceGuideonStrengtheningJudicialIntegrityandCapacity/11-85709_ebook.pdf)

22 *Basic Principles on the Independence of the Judiciary*, provision 13; OSCE/ODIHR, *Kyiv Recommendations*, provision 29.

23 OSCE/ODIHR, *Kyiv Recommendations*, provisions 27, 30; UNODC, *Resource Guide for Strengthening Judicial Integrity and Capacity*, p. 13.

24 European Charter on the Statute for Judges, provision 4.1; OSCE/ODIHR, *Kyiv Recommendations*, provision 28.

25 OSCE/ODIHR, *Kyiv Recommendations*, provision 28.

26 CoE, Committee of Ministers, Recommendation Rec(2010)12, provisions 46, 49-50; OSCE/ODIHR, *Kyiv Recommendations*, provisions 7, 15.

27 OSCE/ODIHR, *Kyiv Recommendations*, provision 12.

Computerized case management systems and well-organized filing rooms can remove human fallibility from case management to some degree. But eventually every case must be heard, and the arbiter must be neutral. Judges are obliged to treat parties and lawyers equally, and are bound not to differentiate based on social or economic status, ethnicity, political influence or any other factor. Ideally, this requirement is codified in a country's judicial code.

The CoE recommends that judges withdraw from a case or decline to hear a case when to do otherwise could result in bias or a conflict of interest.<sup>28</sup> The Council also stresses the importance of delivering judicial decisions in a timely manner.<sup>29</sup> Judicial decisions should be written and explained in adequate detail, depending on their complexity. They should be published,<sup>30</sup> and then they should not be changed, except via a lawful appeals process.

## 15.6 Providing adequate oversight

Safeguarding the judiciary's independence is key to ensuring its neutrality. At the same time, to prevent and punish corruption, it is essential to ensure oversight of the judiciary (especially judges in leadership positions, such as court chairpersons),<sup>31</sup> staff, lawyers, and parties to cases. Governments must therefore strike a balance between protecting the judiciary and ensuring that there are mechanisms to hold judges accountable. This includes providing for the transparency of the judicial process. The judiciary, with assistance from the government, should encourage and support the creation of clear and specific codes of conduct for judges. Ideally, the creation of such codes will involve input from judges' associations or judicial self-administration bodies. The professional and ethical standards in these codes should be enforced via a complaint process whereby anyone can report a suspected violation of the code. Separately, a disciplinary process should be put in place to address serious and or repeated violations.

### 15.6.1 Codes of conduct

Judicial codes of conduct should provide specific guidance on judicial responsibilities and conduct. One useful approach to this issue has been to have two separate sets of standards, codifying judicial conduct. The first set of standards would be issued by judges' associations, and would be enforceable via a reprimand or expulsion from these associations. The second standard would be codified in legislation on the judiciary, and would be enforceable by the judiciary's disciplinary proceeding. Both types of Codes should incorporate conduct standards derived from international and regional best practices and standards.

The Bangalore Principles go even further by providing several additional useful safeguards (see also Chapter 1 (1.2.11 D)). For example, they call on judges to educate themselves on how their financial interests, and those of their families, may relate to cases before them. Judges may not knowingly permit their staff to receive gifts. Under the Bangalore Principles, judges are advised to avoid the mere appearance of partiality, including in the conduct of their personal and professional relationships.<sup>32</sup> In addition to limiting political involvement by judges, it is the general practice of European countries to ban judges from any remunerative work, except for teaching or producing scientific research. Nevertheless, while prohibited from political involvement, judges should be permitted to organize and oversee themselves, and advocate for the judiciary.<sup>33</sup>

A code of conduct can also specify under which circumstances a judge should recuse himself or herself from a case (alternatively, in some countries this provision is included in a Penal Procedure Code). Under the Bangalore Principles, recusal is necessary when a judge is biased or prejudiced regarding the matter before him or her, or would appear so to the outside observer. This prejudice may arise from personal knowledge of a party or facts; if the judge previously served as a lawyer or witness in the case; or if the judge or judge's family has an economic interest in the outcome of the case.<sup>34</sup>

For judicial codes drafted and enforced by a country's judiciary, disciplinary sanctions should be included in the code, and should be proportionate.<sup>35</sup> Possible sanctions include removing a judge from a case; suspending the judge; imposing an administrative

<sup>28</sup> See, for example, CoE, Committee of Ministers, Recommendation Rec(2010)12, provision 61.

<sup>29</sup> CoE, Opinion no. 3 of the Consultative Council of European Judges on the principles and rules governing judges' professional conduct, in particular ethics, incompatible behaviour and impartiality (2002), para 26.

<sup>30</sup> OSCE/ODIHR, *Kyiv Recommendations*, provision 32.

<sup>31</sup> *Ibid.*, provisions 11-16.

<sup>32</sup> Bangalore Principles, Value 4.1, 4.7, 4.15. See also European Court of Human Rights (ECtHR), *Pohoska v. Poland*, Judgment of 10 January 2012, paras 35-38.

<sup>33</sup> *Basic Principles on the Independence of the Judiciary*, provisions 8-9; European Charter on the Statute for Judges, provision 1.7.

<sup>34</sup> *Bangalore Principles*, Value 2.5.

<sup>35</sup> CoE, Committee of Ministers, Recommendation Rec(2010)12, provision 69.

sanction, such as a salary reduction; and reprimand. Careful drafting of the relevant legal provisions is necessary to balance the need for oversight against the possibility of misuse. Regulations should clearly explain what sanctions are possible for what violations. Codes of conduct enforceable via the judiciary's disciplinary process should specify the possible disciplinary sanctions for each listed offence.<sup>36</sup> Nevertheless, there should be limits to the code. For instance, judges ought not to be subject to disciplinary action for an honest mistake short of negligence, or for taking an unpopular position.<sup>37</sup>

While discipline should be imposed on judges only in instances of "gross and inexcusable" misconduct,<sup>38</sup> judiciaries and judicial associations should codify ethical standards beyond those that may result in legal action against a judge.

Just as judges should be subject to an ethics code, so should lawyers, prosecutors, and any other personnel involved in the functioning of a country's judicial system.<sup>39</sup> Ethics Codes for judicial and court personnel must not only be well-drafted, but must be disseminated and explained as well.

### 15.6.2 Complaint and disciplinary process

While judges who violate judges' associations' ethical standards may be expelled from the association, judges who violate the requirements of the judiciary's code of ethics may be subject to disciplinary proceedings. Judges should also be subject to criminal liability for more serious infractions, such as bribery or abuse of office. At the same time, international organizations strongly recommend that, with a number of exceptions, judges be immune from civil liability regarding actions taken in the good faith conduct of their jobs, and should never be sanctioned for the content of their rulings or verdicts.<sup>40</sup>

While disregarding frivolous complaints, countries should act on reasonable complaints against judges to ensure that judges actually comply with ethical

standards. International standards dictate that these complaints be consistently and thoroughly investigated, with the investigation resulting in a court action as necessary.<sup>41</sup>

Various bodies may investigate and hear cases against judges, depending on the court level and the country. The CoE's Consultative Council of European Judges recommends charging the judiciary's independent oversight body, not a court, with the judicial discipline process.<sup>42</sup> Also critical to maintaining independence and integrity is ensuring that judicial disciplinary bodies are not susceptible to cronyism. For that reason, judicial disciplinary bodies should include some non-judge members.<sup>43</sup>

Disciplinary tribunals should guarantee judges a fair trial and the right to challenge the decision and sanction against them. This includes the right to respond to charges levelled against him or her. Final decisions regarding judicial discipline should be published.<sup>44</sup> By adhering to the basic requirements of due process and transparency, countries can attempt to balance the potentially conflicting concerns of judicial independence and accountability.

### 15.6.3 The role of the public and media

Transparency is one of the most important factors in preventing and identifying judicial corruption. In many countries, the media plays an important role in uncovering instances of corruption in the judiciary. Thus, court proceedings should be open to the public and media, with only limited exceptions, as in the case of family law proceedings, situations involving minors, state secrets, or matters of national security.<sup>45</sup>

To access court proceedings, the public and media should be informed about when and where they will occur. Suggested methods for disseminating court schedules include daily updates on bulletin boards at courts and public access computer terminals at court building lobbies. The Kyiv Recommendations call for judiciaries to actively encourage access by journalists, and to employ press secretaries or media officers.<sup>46</sup>

<sup>36</sup> See Opinion no. 3 of the Consultative Council of European Judges on the principles and rules governing judges' professional conduct, in particular ethics, incompatible behaviour and impartiality, paras 73 and 49; *European Charter on the Statute for Judges*, provision 5.1.

<sup>37</sup> International Commission of Jurists, *International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors*, 2007, p. 55.

<sup>38</sup> OSCE/ODIHR, *Kyiv Recommendations*, provision 25.

<sup>39</sup> UNODC, *Resource Guide on Strengthening Judicial Integrity and Capacity*, p. 30 et seq.

<sup>40</sup> Transparency International, *Global Corruption Report, Corruption in Judicial Systems*, p. xxvi; OSCE/ODIHR, *Kyiv Recommendations*, provision 25.

<sup>41</sup> *International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors*, p. 59.

<sup>42</sup> Opinion no. 3 of the Consultative Council of European Judges on the principles and rules governing judges' professional conduct, in particular ethics, incompatible behaviour and impartiality, para 71.

<sup>43</sup> OSCE/ODIHR, *Kyiv Recommendations*, provision 9.

<sup>44</sup> CoE, Committee of Ministers, Recommendation Rec(2010)12, provision 69; OSCE/ODIHR, *Kyiv Recommendations*, provisions 26, 32.

<sup>45</sup> UNODC, *Resource Guide for Strengthening Judicial Integrity and Capacity*, 2011, p. 86.

<sup>46</sup> OSCE/ODIHR, *Kyiv Recommendations*, provision 33.

It should be noted that judges must strike a balance between encouraging transparency and maintaining impartiality and the appearance thereof, for instance by avoiding making biased comments regarding cases they are handling.<sup>47</sup> To that end, judges themselves may speak to the press regarding specific projects or committees that they are involved in, but should not discuss cases.

Public access and judicial transparency also depend on the timely publication of court decisions, and the organization of these decisions by subject matter, legal issues involved, and the competent judges' names. In addition to ensuring public access to judicial decisions, court personnel should also be aware that, if required by law, they are obliged to provide anyone, and not just parties to a case, with a requested decision. Which court decisions are published varies by country; international organizations such as the OSCE and World Bank encourage publication of at least all higher court decisions, since they may have a broader impact on the rights of citizens.<sup>48</sup> Court decisions may be required by law to be published regularly in an official gazette (made accessible to the public); it is also ideal for decisions to be posted online via the judiciary's website.

Beyond media access to courtrooms, the public plays a role in preventing corruption in other ways. Courts may seek public feedback via surveys, and should encourage complaints by the public regarding any misconduct by judges or judicial personnel. NGOs may protect transparency by monitoring court cases and publishing independent reports on the state of the judiciary. In some countries "court user committees" have been established at the local level, consisting of various government employees and private citizens who use the court system. These committees provide a formal setting for members of the community to discuss problems within the judiciary, voicing complaints, raising awareness, and suggesting solutions.<sup>49</sup>

## 15.7 Conclusions

Protection against corruption in the judiciary is critical to ensuring that the judiciary functions well. In a democratic system of government, the judiciary must be an equal partner to the executive and legislature. It must play the role of ensuring that all parts of society are accountable under the law. At the same time, the judiciary itself must be transparent and accountable for its actions, while retaining its independence at all times.

The fight against judicial corruption has a much broader aim than simply ensuring the success of one branch of power. The judiciary is the final, and perhaps most important, safeguard against corruption within the entire country. A well-funded, independent, and accountable judiciary is key to preventing and punishing corruption within other parts of the government. Fair and reasoned outcomes of cases may deter or stop corruption by persons outside the judiciary.

In addition to having mechanisms for identifying and quantifying corruption, countries ought to have in place a system to punish corruptive deeds. This system should be based on an independently and impartially implemented legal framework. Moreover, the judiciary must be sufficiently funded, along with enforcement measures, to reduce the risk of judicial staff and judges resorting to, and their vulnerability to, corruption.

<sup>47</sup> See Opinion no. 3 of the Consultative Council of European Judges on the principles and rules governing judges' professional conduct, in particular ethics, incompatible behaviour and impartiality, para 49.

<sup>48</sup> World Bank, *Access to Information and Transparency in the Judiciary*, 2010, p. 24; OSCE, *Report of the OSCE Representative on Freedom of the Media on Turkey and Internet Censorship*, 2009, p. 19.

<sup>49</sup> UNODC, *Criminal Justice Reform in Post-Conflict States*, 2011, p. 49. Available from [https://www.unodc.org/documents/justice-and-prison-reform/11-83015\\_Ebook.pdf](https://www.unodc.org/documents/justice-and-prison-reform/11-83015_Ebook.pdf)

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## CHAPTER 16

# Criminalization of Corruption

### CONTENTS

16.1	International standards	180
16.2	Bribery offences	185
16.3	Other corruption offences	189
16.4	Liability of legal persons	190
16.5	Jurisdiction	192
16.6	Defences	192
16.7	Statute of limitations period	192
16.8	Penalties and sanctions	193
16.9	Immunities and jurisdictional privileges	194
16.10	Conclusions and recommendations	196
	Selected Bibliography	197
<i>Box 16.1</i>	<i>National examples – bribery offence</i>	<i>187</i>
<i>Box 16.2</i>	<i>The United Kingdom Bribery Act 2010 offence of “failing to prevent bribery” (Section 7)</i>	<i>191</i>
<i>Table 16.1</i>	<i>International framework on criminalization of bribery and corruption: active and passive bribery of national and foreign public officials</i>	<i>181</i>

## CHAPTER 16

# Criminalization of Corruption

*The criminalization of corruption-related offences is at the heart of any effective anti-corruption strategy. A comprehensive criminalization regime serves two purposes: first, it provides the means to hold those who engage in such activities to account, and secondly, it acts as a deterrent to corruption.*

*Whilst it is a matter for each State to decide on its corruption-related criminalization framework, consideration should be given to the international instruments, initiatives and guidance which have been drawn up and agreed upon, and which together form what can be described as an ‘international standard.’ The United Nations Convention against Corruption (UNCAC) contains a comprehensive set of criminalization provisions intended to counter bribery and other corruption-related conduct. It also contains important complimentary provisions addressed at law enforcement institutions. The States Parties to the UNCAC have undertaken to commit themselves to reviewing their existing laws, institutions and practices, and, where such laws or authorities do not exist, to put them in place to ensure that they meet the minimum standards as agreed upon under Chapter III of the UNCAC, dedicated to the criminalization of corruption offences. In addition to the UNCAC, there are other important conventions that are relevant for the OSCE participating States, such as the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Anti-Bribery Convention) and the Council of Europe Criminal Law Convention on Corruption. It is, of course, open to each State to extend their legislation beyond these international instruments.*

*In this Chapter, the main components of a criminalization framework will be reviewed.*

## 16.1 International standards

The UNCAC framework for criminalization covers bribery as well as other corruption-related offences. Besides dealing with bribery (active and passive) of national and foreign public officials, as well as officials of public international organizations, it goes further to include conduct such as the embezzlement of property, trading in influence, illicit enrichment, the concealment and laundering of the proceeds of corruption, obstruction of justice, and abuse of functions. It contains both mandatory and discretionary provisions and covers both public and private sector corruption.

The OECD Anti-Bribery Convention is centred on the (active) bribery of a foreign public official in international business transactions, sometimes also known as the supply side of bribery. At the same time, the Council of Europe (CoE) Criminal Law Convention on Corruption focuses on criminalization and includes the active and passive bribery of a wide range of public officials, active and passive bribery in the private sector when committed intentionally in the course of business activities, and the offence of trading in influence. An overview of these three instruments is provided in Table 16.1.

**Table 16.1** International framework on criminalization of bribery and corruption: active and passive bribery of national and foreign public officials

ACTIVE BRIBERY (the promising, offering or giving) = CONDUCT OF THE BRIBER		
UNCAC	OECD Anti-Bribery Convention	CoE Criminal Law Convention on Corruption
<p><b>National Public Official, Article 15 (a):</b> Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:</p> <p>(a) The promise, offering or giving, to a public official, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties;</p> <p><b>Foreign Public Official and Official of Public International Organization, Article 16 (1):</b> Each State Party shall adopt such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally, the promise, offering or giving to a foreign public official or an official of a public international organization, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties, in order to obtain or retain business or other undue advantage in relation to the conduct of international business.</p>	<p><b>National Public Official:</b> not addressed</p> <p><b>Foreign Public Official, Article 1:</b> Each Party shall take such measures as may be necessary to establish that it is a criminal offence under its law for any person intentionally to offer, promise or give any undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign public official, for that official or for a third party, in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business.</p>	<p><b>National Public Official, Article 2:</b> Each Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law, when committed intentionally, the promising, offering or giving by any person, directly or indirectly, of any undue advantage to any of its public officials, for himself or herself or for anyone else, for him or her to act or refrain from acting in the exercise of his or her functions.</p> <p>The Convention also extends it to active bribery of members of domestic public assemblies (Article 4).</p> <p><b>Foreign Public Official, Article 5:</b> Each Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law the conduct referred to in Articles 2 (active) and 3 (passive), when involving a public official of any other State.</p> <p>The Convention also extends it to active bribery of members of foreign public assemblies (Article 6), officials of international organizations (Article 9), international parliamentary assemblies (Article 10) and holders of judicial office or officials of any international court whose jurisdiction is accepted by the Party (Article 12).</p>
PASSIVE BRIBERY (solicitation or acceptance) = CONDUCT OF THE BRIBEE/PUBLIC OFFICIAL		
UNCAC	OECD Anti-Bribery Convention	CoE Criminal Law Convention on Corruption
<p><b>National Public Official, Article 15 (b):</b> Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:</p> <p>(b) The solicitation or acceptance by a public official, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties.</p> <p><b>Foreign Public Official and Official of Public International Organization, Article 16 (2):</b> 2. Each State Party shall consider adopting such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally, the solicitation or acceptance by a foreign public official or an official of a public international organization, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties.</p>	<p><b>Section VII of the 2009 Anti-Bribery Recommendation</b> Urges all countries to raise awareness of their public officials on their domestic bribery and solicitation laws with a view to halting the solicitation and acceptance of small facilitation payments.</p>	<p><b>National Public Official, Article 3:</b> Each Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law, when committed intentionally, the request or receipt by any of its public officials, directly or indirectly, of any undue advantage, for himself or herself or for anyone else, or the acceptance of an offer or a promise of such an advantage, to act or refrain from acting in the exercise of his or her functions.</p> <p>The Convention also extends it to passive bribery of members of domestic public assemblies (Article 4).</p> <p><b>Foreign Public Official, Article 5:</b> Each Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law the conduct referred to in Articles 2 (active) and 3 (passive), when involving a public official of any other State.</p> <p>The Convention also extends it to passive bribery of members of foreign public assemblies (Article 6), officials of international organizations (Article 9), international parliamentary assemblies (Article 10) and holders of judicial office or officials of any international court whose jurisdiction is accepted by the Party (Article 12).</p>

**Table 16.1 International framework on criminalization of bribery and corruption: active and passive bribery of national and foreign public officials**

NATIONAL PUBLIC OFFICIAL		
UNCAC	OECD Anti-Bribery Convention	CoE Criminal Law Convention on Corruption
<p><b>Article 2 (a):</b> “Public official” shall mean:</p> <p>(i) executive, administrative or judicial office of a State Party, whether appointed or elected, whether permanent or temporary, whether paid or unpaid, irrespective of that person's seniority;</p> <p>(ii) any other person who performs a public function, including for a public agency or public enterprise, or provides a public service, as defined in the domestic law of the State Party and as applied in the pertinent area of law of that State Party;</p> <p>(iii) any other person defined as a “public official” in the domestic law of a State Party. However, for the purpose of some specific measures contained in chapter II of this Convention, “public official” may mean any person who performs a public function or provides a public service as defined in the domestic law of the State Party and as applied in the pertinent area of law of that State Party.</p>	<p>No definition for national public official.</p>	<p><b>Article 1:</b> “public official” shall be understood by reference to the definition of “official”, “public officer”, “mayor”, “minister” or “judge” in the national law of the State in which the person in question performs that function and as applied in its criminal law.</p>
FOREIGN PUBLIC OFFICIAL		
UNCAC	OECD Anti-Bribery Convention	CoE Criminal Law Convention on Corruption
<p><b>Article 2 (b):</b> “Foreign public official” shall mean any person holding a legislative, executive, administrative or judicial office of a foreign country, whether appointed or elected; and any person exercising a public function for a foreign country, including for a public agency or public enterprise;</p> <p>(c) “Official of a public international organization” shall mean an international civil servant or any person who is authorized by such an organization to act on behalf of that organization.</p>	<p><b>Article 1 (4) (a):</b> “Foreign public official” means any person holding a legislative, administrative or judicial office of a foreign country, whether appointed or elected; any person exercising a public function for a foreign country, including for a public agency or public enterprise; and any official or agent of a public international organisation.</p>	<p>It does not draw a distinction between national and foreign public official (same definition as domestic public official).</p>
OFFICIAL OF PUBLIC INTERNATIONAL ORGANIZATIONS		
UNCAC	OECD Anti-Bribery Convention	CoE Criminal Law Convention on Corruption
<p><b>Article 2 (c):</b> “Official of a public international organization” shall mean an international civil servant or any person who is authorized by such an organization to act on behalf of that organization.</p>	<p>See above definition of “foreign public official”, which includes “any official or agent of a public international organisation.”</p> <p><b>Paragraph 17 OECD Commentaries:</b> “Public international organisation” includes any international organisation formed by states, governments, or other public international organisations, whatever the form of organisation and scope of competence, including, for example, a regional economic integration organisation such as the European Communities.</p>	<p><b>Paragraph 58 of the Explanatory Report:</b> ...“any official or other contracted employee within the meaning of the staff regulations, of any public international or supranational organisation or body of which the Party is a member, and any person, whether seconded or not, carrying out functions corresponding to those performed by such officials or agents.”</p>

**Table 16.1** International framework on criminalization of bribery and corruption: active and passive bribery of national and foreign public officials

SANCTIONS		
UNCAC	OECD Anti-Bribery Convention	CoE Criminal Law Convention on Corruption
<p><b>Article 30:</b></p> <p>1. Each State Party shall make the commission of an offence established in accordance with this Convention liable to sanctions that take into account the gravity of that offence.</p> <p>2. Each State Party shall take such measures as may be necessary to establish or maintain, in accordance with its legal system and constitutional principles, an appropriate balance between any immunities or jurisdictional privileges accorded to its public officials for the performance of their functions and the possibility, when necessary, of effectively investigating, prosecuting and adjudicating offences established in accordance with this Convention.</p> <p>3. Each State Party shall endeavour to ensure that any discretionary legal powers under its domestic law relating to the prosecution of persons for offences established in accordance with this Convention are exercised to maximize the effectiveness of law enforcement measures in respect of those offences and with due regard to the need to deter the commission of such offences.</p> <p>4. In the case of offences established in accordance with this Convention, each State Party shall take appropriate measures, in accordance with its domestic law and with due regard to the rights of the defence, to seek to ensure that conditions imposed in connection with decisions on release pending trial or appeal take into consideration the need to ensure the presence of the defendant at subsequent criminal proceedings.</p> <p>5. Each State Party shall take into account the gravity of the offences concerned when considering the eventuality of early release or parole of persons convicted of such offences.</p> <p>6. Each State Party, to the extent consistent with the fundamental principles of its legal system, shall consider establishing procedures through which a public official accused of an offence established in accordance with this Convention may, where appropriate, be removed, suspended or reassigned by the appropriate authority, bearing in mind respect for the principle of the presumption of innocence.</p>	<p><b>Article 3:</b></p> <p>1. The bribery of a foreign public official shall be punishable by effective, proportionate and dissuasive criminal penalties. The range of penalties shall be comparable to that applicable to the bribery of the Party's own public officials and shall, in the case of natural persons, include deprivation of liberty sufficient to enable effective mutual legal assistance and extradition.</p> <p>2. In the event that, under the legal system of a Party, criminal responsibility is not applicable to legal persons, that Party shall ensure that legal persons shall be subject to effective, proportionate and dissuasive non-criminal sanctions, including monetary sanctions, for bribery of foreign public officials.</p> <p>3. Each Party shall take such measures as may be necessary to provide that the bribe and the proceeds of the bribery of a foreign public official, or property the value of which corresponds to that of such proceeds, are subject to seizure and confiscation or that monetary sanctions of comparable effect are applicable.</p> <p>4. Each Party shall consider the imposition of additional civil or administrative sanctions upon a person subject to sanctions for the bribery of a foreign public official.</p>	<p><b>Article 19:</b></p> <p>1. Having regard to the serious nature of the criminal offences established in accordance with this Convention, each Party shall provide, in respect of those criminal offences established in accordance with Articles 2 to 14, effective, proportionate and dissuasive sanctions and measures, including, when committed by natural persons, penalties involving deprivation of liberty which can give rise to extradition.</p> <p>2. Each Party shall ensure that legal persons held liable in accordance with Article 18, paragraphs 1 and 2, shall be subject to effective, proportionate and dissuasive criminal or non-criminal sanctions, including monetary sanctions.</p> <p>3. Each Party shall adopt such legislative and other measures as may be necessary to enable it to confiscate or otherwise deprive the instrumentalities and proceeds of criminal offences established in accordance with this Convention, or property the value of which corresponds to such proceeds.</p>

**Table 16.1 International framework on criminalization of bribery and corruption: active and passive bribery of national and foreign public officials**

SANCTIONS		
UNCAC	OECD Anti-Bribery Convention	CoE Criminal Law Convention on Corruption
<p>7. Where warranted by the gravity of the offence, each State Party, to the extent consistent with the fundamental principles of its legal system, shall consider establishing procedures for the disqualification, by court order or any other appropriate means, for a period of time determined by its domestic law, of persons convicted of offences established in accordance with this Convention from:</p> <p>(a) Holding public office; and</p> <p>(b) Holding office in an enterprise owned in whole or in part by the State.</p> <p>8. Paragraph 1 of this article shall be without prejudice to the exercise of disciplinary powers by the competent authorities against civil servants.</p> <p>9. Nothing contained in this Convention shall effect the principle that the description of the offences established in accordance with this Convention and of the applicable legal defences or other legal principles controlling the lawfulness of conduct is reserved to the domestic law of a State Party and that such offences shall be prosecuted and punished in accordance with that law.</p> <p>10. States Parties shall endeavour to promote the reintegration into society of persons convicted of offences established in accordance with this Convention.</p> <p><b>Legal Person: Article 26 (4)</b> Each State Party shall, in particular, ensure that legal persons held liable in accordance with this article are subject to effective, proportionate and dissuasive criminal or non-criminal sanctions, including monetary sanctions.</p>		
IMMUNITIES AND JURISDICTIONAL PRIVILEGES		
UNCAC	OECD Anti-Bribery Convention	CoE Criminal Law Convention on Corruption
<p><b>Article 30 (2):</b> Each State Party shall take such measures as may be necessary to establish or maintain, in accordance with its legal system and constitutional principles, an appropriate balance between any immunities or jurisdictional privileges accorded to its public officials for the performance of their functions and the possibility, when necessary, of effectively investigating, prosecuting and adjudicating offences established in accordance with this Convention.</p>	<p>Does not address immunities/ jurisdictional privileges.</p>	<p>The provisions of this Convention shall be without prejudice to the provisions of any Treaty, Protocol or Statute, as well as their implementing texts, as regards the withdrawal of immunity.</p> <p><b>The Council of Europe’s Resolution (97) 24 sets out 20 Guiding Principles for the Fight against Corruption</b>, which include “to limit immunity from investigation, prosecution or adjudication of corruption offences to the degree necessary in a democratic society.”</p>

Each of the Conventions is accompanied by technical guides or explanatory reports to assist legislators and policy makers in their task of implementing the Conventions and to meet the internationally agreed standard. The OECD has published *Corruption: A Glossary of International Standards in Criminal Law*,<sup>1</sup> *Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions*<sup>2</sup> and *Commentaries on the OECD Anti-Bribery Convention*,<sup>3</sup> and the UNODC has published the *UNCAC Legislative Guide for the Implementation of the United Nations Convention against Corruption*<sup>4</sup> and the *Technical Guide to the UNCAC*, as well as *Travaux Préparatoires of the negotiations for the elaboration of the UNCAC*.<sup>5</sup> In 2015, the UNODC published a thematic study *State of implementation of the United Nations Convention against Corruption Criminalization, Law Enforcement and International Cooperation*, summarizing the outcome of the first cycle of country reviews under the UNCAC peer review mechanism.<sup>6</sup>

Apart from the three Conventions mentioned above, other initiatives and bodies, such as the joint World Bank/UNODC Stolen Asset Recovery (StAR) Initiative<sup>7</sup> and the Financial Action Task Force (FATF),<sup>8</sup> have also contributed to this effort and have published country or thematic assessments and various guides and studies which assist policy makers and legislators.

## 16.2 Bribery offences

The offence of bribery of a public official covers *active* bribery, which is the crime committed by a briber who *promises, offers or gives a bribe to an official*; and *passive* bribery, which is the crime committed by an official who *solicits or receives a bribe*.<sup>9</sup>

In addition, bribery is subdivided into the offence of *domestic* bribery when a person bribes an official of his/her own country, and *foreign* bribery when a person bribes an official of a foreign country or a public international organization.

Therefore, any criminalization of bribery should include as a minimum the following provisions:

1. Active bribery offence of national public officials
2. Passive bribery offence of national public officials
3. Active bribery of foreign public officials and officials of public international organizations
4. Passive bribery of foreign public officials and officials of public international organizations

The UNCAC establishes the criminalization requirements of bribery of domestic and foreign public officials under Articles 15 and 16.

The key elements of bribery offences that should ideally be reflected in national law are explained briefly below.

### • Intention

The international conventions require that corruption offences are committed 'intentionally'. However, the precise definition of 'intentionally' depends, to an extent, on whether a country has a common law or civil law legal system. For instance, common law countries regard intent in relation to corruption as the giving of the advantage and an intent as to the consequence of the giving (i.e. that the official does an act or makes an omission as a result of the advantage being given). However, in some jurisdictions 'intentionally' covers both direct intention and recklessness or negligence.

### • Public official

The definition of a 'public official' under domestic law must be as wide as possible if it is to bring all those holding public office, elected or non-elected, paid or unpaid, within the scope of the criminal law.

As an indication of the scope that a national law should aspire to, the OECD Anti-Bribery Convention, Article 1 (4), defines foreign public officials as: "any person holding a legislative, administrative or judicial office of a foreign country, whether appointed or elected; any person exercising a public function for a foreign country, including for a public agency or public enterprise; and any official or agent of a public international organisation." The OECD Commentaries (paras 13-16) provide a definition of 'public agency' and 'public enterprise', and is of assistance to legislators and policy makers.

The UNCAC contains somewhat broader definitions of domestic 'public official' in Article 2, which includes also

1 Available from [www.oecd.org/daf/anti-bribery/41194428.pdf](http://www.oecd.org/daf/anti-bribery/41194428.pdf)

2 Available from <http://acts.oecd.org/Instruments/ShowInstrumentView.aspx?InstrumentID=258&Lang=en>

3 Available from [www.oecd.org/daf/anti-bribery/ConvCombatBribery\\_ENG.pdf](http://www.oecd.org/daf/anti-bribery/ConvCombatBribery_ENG.pdf)

4 Available from [www.unodc.org/unodc/en/treaties/CAC/legislative-guide.html](http://www.unodc.org/unodc/en/treaties/CAC/legislative-guide.html)

5 Available from <https://www.unodc.org/unodc/en/corruption/index.html>

6 See [https://www.unodc.org/unodc/en/corruption/tools\\_and\\_publications/state\\_of\\_uncac\\_implementation.html](https://www.unodc.org/unodc/en/corruption/tools_and_publications/state_of_uncac_implementation.html)

7 See <http://star.worldbank.org/star/>

8 See [www.fatf-gafi.org/](http://www.fatf-gafi.org/)

9 Based on the Council of Europe Criminal Law Convention on Corruption definition.

## UNCAC on bribery of public officials

### *Article 15. Bribery of national public officials*

Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:

- a) The promise, offering or giving, to a public official, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties;
- a) The solicitation or acceptance by a public official, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties.

### *Article 16. Bribery of foreign public officials and officials of public international organizations*

- 1) Each State Party shall adopt such legislative and other measures as may be necessary to establish as a criminal

offence, when committed intentionally, the promise, offering or giving to a foreign public official or an official of a public international organization, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties, in order to obtain or retain business or another undue advantage in relation to the conduct of international business.

- 2) Each State Party shall consider adopting such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally, the solicitation or acceptance by a foreign public official or an official of a public international organization, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties.

Source: [www.unodc.org/unodc/en/treaties/CAC/](http://www.unodc.org/unodc/en/treaties/CAC/)

persons holding executive offices:<sup>10</sup> “whether permanent or temporary, whether paid or unpaid, irrespective of [their] seniority”, as well as persons performing public services.

#### • **Promising, offering or giving**

All three Conventions set out the modes of active bribery as ‘promising, offering or giving’ as the agreed upon international standard. For the purposes of the OECD Anti-Bribery Convention, as mentioned above, this is the only applicable standard in relation to bribery of a foreign public official.

For an effective criminalization regime, the promising, offering or giving of a bribe must be criminalized as complete offences, and it is insufficient for them to be covered as an attempt at bribery. Therefore, legislators should consider incorporating the three key modes into the bribery offence to avoid subsequent arguments over interpretation.

One area of caution is where the domestic law requires the bribe to be accepted by the public official or there is a requirement for a meeting of minds for the full offence of bribery (including foreign bribery) to be committed. The OECD Phase 1 and Phase 2 evaluations (reports on the application of Anti-Bribery Convention) have already highlighted the difficulties which a number of countries have had in creating a substantive bribery

offence which is completed when just a promise or offer is made.

The expectation of the international conventions is broader and anticipates that substantive criminality will reflect not just the giving of a bribe, but also the offer or a promise even where there has been no acceptance.

#### • **Solicitation or acceptance**

In the UNCAC, passive bribery embraces two aspects, ‘solicitation or acceptance’ of a bribe. Like active bribery, the two modes are the minimum agreed international standards and States are required to criminalize both modes in so far as national public officials are concerned. In the case of foreign public officials, States shall consider criminalizing such acts.

Similar to the considerations for active bribery, a State would do well to incorporate both modes in order to ensure that no legal loopholes are created, rather than adopting one or the other from the relevant provision.

The CoE Convention also refers, in addition, to the element of ‘receiving’. It means that keeping the advantage or gift at least for some time so that the official who, having not requested it, immediately returns the gift to the sender, would not be committing an offence.

#### • **Directly or indirectly**

Any provision must cover the direct or indirect, promising, offering or giving or solicitation or acceptance of bribery. The intention is to cover

<sup>10</sup> Understood to encompass the military branch, where appropriate (see *Report of the Ad Hoc Committee for the Negotiation of the Convention against Corruption on the work of its first to seventh sessions, 2003, A/58/422/Add.1, para. 2).*

## OECD Anti-Bribery Convention on bribery of foreign public officials

### *Article 1. The Offence of Bribery of Foreign Officials*

1. Each Party shall take such measures as may be necessary to establish that it is a criminal offence under its law for any person intentionally to offer, promise or give any undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign public official, for that official or for a third party, in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business.
2. Each Party shall take any measures necessary to establish that complicity in, including incitement, aiding and abetting, or authorization of an act of bribery of a foreign public official shall be a criminal offence. Attempt and conspiracy to bribe a foreign public official shall be criminal offences to the same extent as attempt and conspiracy to bribe a public official of that Party.
3. The offences set out in paragraphs 1 and 2 above are hereinafter referred to as “bribery of a foreign public official”.
4. For the purpose of this Convention:
  - a. “foreign public official” means any person holding a legislative, administrative or judicial office of a foreign country, whether appointed or elected; any person exercising a public function for a foreign country, including for a public agency or public enterprise; and any official or agent of a public international organization;
  - b. “foreign country” includes all levels and subdivisions of government, from national to local;
  - c. “act or refrain from acting in relation to the performance of official duties” includes any use of the public official’s position, whether or not within the official’s authorized competence.

Source: for more details on the Convention and relevant Commentaries please see [www.oecd.org/daf/anti-bribery/ConvCombatBribery\\_ENG.pdf](http://www.oecd.org/daf/anti-bribery/ConvCombatBribery_ENG.pdf)

### Box 16.1 National examples – bribery offence

In Luxembourg, the offence of bribery traditionally required the prior existence of a corruption pact concluded before the official performed or abstained from the act in question. Any steps taken unsuccessfully to create such a ‘pact’ were only capable of prosecution as an attempt. Thus, even the giving of a bribe might not amount to the substantive offence. A new offence of bribery *ex post facto* has been introduced (Article 249 of the Luxembourg Criminal Code) and it is now an offence where an unlawful corruption pact has been concluded after a public official has performed or abstained from an act. Therefore, payment of a bribe alone will establish the bribery offence, even in the absence of a prior agreement between the parties.

French law has a similar requirement of a corruption pact. Active bribery is defined as an offer or a promise, whether

it has been accepted or not. However, in examining the bribery of a French public official, the courts in France adopted the notion of a corruption pact by demanding evidence of a meeting of minds between briber and recipient. What is required is not proof of a contract, but rather that the briber knows that the purpose of his/her proposal is to obtain an act or an omission and that the bribed party is aware that he/she will receive an undue advantage in doing that act or making that omission. This is a creation of case law, rather than a statutory one.

Source: Polaine, M., *Criminalizing Bribery of National and Foreign Public Officials* paper given at the ADB/OECD Anti-Corruption Initiative for Asia and the Pacific Training Seminar, Pakistan, 14-17 February 2005. Available from [www.oecd.org/site/adboecdanti-corruptioninitiative/regionalseminars/35167663.pdf](http://www.oecd.org/site/adboecdanti-corruptioninitiative/regionalseminars/35167663.pdf)

situations where the bribe may be promised, offered or given through a third party and equally where it may be solicited or accepted through a third party. The OECD Anti-Bribery Convention addresses ‘directly or indirectly’ in Article 1 (1) by stating: “whether directly or through intermediaries”. The intent of the Convention is as set out in paragraph 6 of the OECD Commentaries: “The conduct described in paragraph 1 is an offence whether the offer or promise is made or the pecuniary or other advantage is given on that person’s own behalf or on behalf of any other natural person or legal entity.”

As corruption becomes more sophisticated, and transnational in nature, the use of intermediaries is a reality that needs to be addressed. The active bribe must be criminalized when an intermediary is used and, similarly, the public official who solicits or accepts an

undue advantage through the offices of an intermediary must also be brought within the scope of the bribery offence.<sup>11</sup>

#### • Third party beneficiaries

Equally, the undue advantage, whether for the active or passive offence, may be for the official himself/herself or for another.<sup>12</sup> As sophistication grows, the advantage may well not even go through the hands of the public official, but may go directly to the third party (perhaps the spouse, an associate or a legal entity).<sup>13</sup> Policy makers and legislators will need to be careful that such activity

11 A useful reference on this issue is the October 2009 OECD *Typologies on the Role of Intermediaries in International Business Transactions*. Available from <http://www.oecd.org/daf/anti-bribery/43879503.pdf>

12 Polaine, M., *Criminalizing Bribery of National and Foreign Public Officials* paper given at the ADB/OECD Anti-Corruption Initiative for Asia and the Pacific Training Seminar, Pakistan, 14-17 February 2005, p.7. Available from [www.oecd.org/site/adboecdanti-corruptioninitiative/regionalseminars/35167663.pdf](http://www.oecd.org/site/adboecdanti-corruptioninitiative/regionalseminars/35167663.pdf)

13 Ibid.

is also criminalized for both active and passive bribery (domestic and foreign).

Policy makers must take into account that two scenarios need to be addressed:

- (i) The advantage which goes directly to the third party beneficiary without passing through the hands of the public official;
- (ii) The advantage that goes through the hands of a public official but to, and for the benefit of, the third party beneficiary.<sup>14</sup>

- **Undue advantage**

To a lay person, the notion of bribery includes the giving and receiving of money. Whilst that may well be true in some instances, corruption is not limited to cash payments. This is reflected in Article 1 of the OECD Anti-Bribery Convention which uses the term “any undue pecuniary or other advantage”, while the UNCAC refers to “undue advantage”.

The term ‘undue’ as used in both Conventions is somewhat vague, and the UNODC *Legislative Guide* in paragraph 196 explains that “The offence must cover instances where no gift or other tangible item is offered. So, an undue advantage may be something tangible or intangible, whether pecuniary or non-pecuniary.”

The OECD *Corruption: A Glossary of International Standards in Criminal Law* (p. 34-35) addresses the term “undue advantage” in the following terms:

“The international conventions describe a bribe as an undue advantage. Thus, not all advantages are prohibited; only those that are undue. For instance, under the OECD Convention, it is not an offence if the advantage was permitted or required by the written law or regulation of the country of the foreign public official, including case law (Commentary 8). In addition, the OECD Convention confirms that an offence is committed irrespective of, among other things, the value of the advantage, its results, perception of local custom, the tolerance of such payments by local authorities, or the alleged necessity of the payment in order to obtain or retain business or other improper advantage (Commentary 7).”

The CoE Convention, alternatively, states that ‘undue’ for the purposes of the Convention should be interpreted as something the recipient is not lawfully entitled to accept or receive.

<sup>14</sup> Ibid., p.8.

Therefore, ‘undue’ refers to something to which the recipient was not entitled to in the first place, and includes both pecuniary and non-pecuniary, and intangible advantages.

- **The official act or refraining from acting due to a bribe**

The bribe requirement is that the act of the public official/foreign public official relates to the performance of his/her official duties. In other words, the expected act or omission must be in his/her official capacity. The OECD Anti-Bribery Convention, Article 1 (4) (c) defines it as follows: “act or refrain from acting in relation to the performance of official duties” includes any use of the public official’s position, whether or not within the official’s authorised competence.”

Legislators must take care to ensure that the wording used to reflect “in order that the official act or refrain from acting” covers all situations, including that of an official being given money in order to do something he or she would/would not have otherwise done, regardless of whether this actually took place.

- **In order to obtain or retain business or other undue advantage in relation to the conduct of international business**

For the purposes of criminalizing active bribery of foreign public officials and officials of public international organizations, the international standard as reflected in both UNCAC and the OECD Anti-Bribery Convention is to limit its scope to “obtain or retain business or other improper advantage ... in the conduct of international business.”

As the active bribery of foreign public officials is linked to international business, the criminalization provision must include ‘an undue advantage’ to cover situations where, for example, a company obtains an operating permit for a factory in circumstances where it clearly fails to meet the statutory requirements usually required for such a grant. In short, obtaining an advantage to which there is clearly no entitlement.<sup>15</sup>

Bribery of foreign public officials will often involve individuals or corporations who may prefer to pay a public official to speed up a process, for example, a licence or release of goods at the docks. Such payments are commonly referred to as ‘facilitation payments’.

There is a divergence in views in relation to facilitation payments. Some countries regard facilitation payments

<sup>15</sup> Ibid.

as falling outside the scope of bribery and do not criminalize it; other countries, in contrast, take the opposite view and regard such payments as bribes that should be criminalized.

While the OECD Anti-Bribery Convention does not require Parties to criminalize such payments, Paragraph 9 of the OECD Commentaries recognizes their ‘corrosive’ effect. Section VI of the 2009 Anti-Bribery Recommendation states: “In view of the corrosive effect of small facilitation payments, particularly on sustainable economic development and the rule of law [...] Member countries should: (i) undertake to periodically review their policies and approach on small facilitation payments in order to effectively combat the phenomenon; (ii) encourage companies to prohibit or discourage the use of small facilitation payments...”

The term ‘facilitation payment’ is not included in the UNCAC, and the concept to which the term refers is not recognized by it.

As it was indicated earlier, the CoE Criminal Law Convention treats domestic and foreign public officials on an equal footing, and the bribery offences are not limited to the context of international business transactions. This Convention also provides for no exception when it comes to facilitation payments, and the Group of States against Corruption (GRECO) has made it clear in the Third Evaluation Round that such payments should, in principle, be prohibited.

### 16.3 Other corruption offences

As already stated above, bribery is one of a number of offences that fall under a broader notion of corruption; corruption can also involve other criminal offences such as embezzlement, misappropriation of property, trading in influence, abuse of function, illicit enrichment, laundering of proceeds of crime, concealment, obstruction of justice and participatory acts. These have been defined by the UNCAC (Articles 17–27) and, in the case of trading in influence, laundering the proceeds from corruption offences, and participatory acts, more narrowly by the Council of Europe Criminal Law Convention on Corruption (Articles 12–15).

In trying to set the international standard, the UNCAC obliges the States Parties to criminalize the following conducts:<sup>16</sup>

- *Embezzlement, misappropriation or other diversion of property, funds, securities* or any other item of value by a public official for his/her benefit or the benefit of others (Article 17);
- *Laundering of proceeds of crime* (Article 23) which includes conversion or transfer and concealment or disguise of the nature, source, location, disposition, movement or ownership of such proceeds. Further, subject to the basic concepts of their legal system, States Parties must also criminalize acquisition, possession or use of proceeds of crime as well as participation in, association with or conspiracy to commit or assist in the commission of any of the offences mandated by Article 23. These offences must apply to proceeds generated by a wide range of predicate offences;
- *Obstruction of justice* (Article 25). The following actions must be established as criminal offences:
  - (a) Use of physical force, threats or intimidation or the promise, offering or giving of an undue advantage either to induce false testimony or to interfere in the giving of testimony or the production of evidence in proceedings;
  - (b) Use of physical force, threats or intimidation to interfere with the exercise of official duties by a justice or law enforcement official;
- *Participation* in any capacity such as an accomplice, assistant or instigator in an offence established in accordance with the Convention (Article 27, para. 1). The intention is to incorporate different degrees of participation, but not to create an obligation for States Parties to include all of those degrees in their domestic legislation.

States Parties are further asked to consider criminalizing the following corruption-related offences:

- *Trading in influence* (Article 18);
- *Abuse of functions* (Article 19), that is the performance of, or failure to perform, an act in violation of the law by a public official so that he or she can obtain an undue advantage;
- *Illicit enrichment* (Article 20); that is a significant increase in assets of a public official that cannot reasonably be explained as being the result of his or her lawful income;
- *Active and passive bribery in the private sector* (Article 21);
- *Embezzlement of property in the private sector* (Article 22), by a person who directs or works in a private sector entity, of property, private funds, securities or any other thing of value entrusted to him or her by virtue of his or her position, during the course of economic, financial or commercial activities;

<sup>16</sup> Vlassis, D., *The basics and the essence of the United Nations Convention against Corruption (UNCAC): status and structure, specific provisions of the UNCAC regarding preventive measures, criminalization, law enforcement and asset recovery* paper of 20 September 2012 (unpublished).

- *Concealment or continued retention of property* (Article 24), where the person knows that the property is the result of any of the offences established in the Convention;
- *Any attempt to commit*, or preparation for, an offence established in accordance with the Convention (Article 27 (2), (3)).<sup>17</sup>

Illicit enrichment is an interesting legal tool in the fight against corruption and is defined, in Article 20 of the UNCAC, as a significant increase in the assets of a public official that he or she cannot reasonably explain in relation to his or her lawful income. There are now some 48 jurisdictions that have to date adopted a specific offence of illicit enrichment, some, such as India and Argentina, dating back nearly 50 years. The movement towards enacting the offence has gathered momentum in recent years with a number of key international conventions seeking to position the offence of illicit enrichment as one of choice for those jurisdictions that are serious in tackling corruption.

Although difficult negotiations in the lead up to the UNCAC demonstrated the constitutionally and legally challenging nature of the offence, such as the impact upon the presumption of innocence for example, they also underlined the determination in numerous countries to penalize such offences.

In the UNCAC, Article 20 is non-mandatory, a symptom, largely, of Western European and North American objections in the Inter-American Convention against Corruption (IACAC), adopted by the Organization of American States in 1996, where illicit enrichment was drafted as a mandatory offence. Nevertheless, illicit enrichment is an illustration of how some States Parties are using legal tools to overcome corruption challenges.

Article 20 of the UNCAC recognizes that in some jurisdictions, the offence of illicit enrichment, in which the defendant has to provide a reasonable explanation for the significant increase in his or her assets, may represent a challenge to established constitutional rights, particularly in relation to the presumption of innocence until proven guilty under the law. The presumption of innocence is invoked because the crime of illicit enrichment hinges upon a presumption that accumulated wealth, acquired in circumstances where there is no reasonable explanation, is corruptly acquired, unless the contrary is proved. Therefore, it is important for national legislators to take into consideration, when drafting and enacting an offence of illicit enrichment, the

potential conflicts with human rights considerations, in particular in relation to the notion of a fair trial and due process rights.

There are a number of recent publications on illicit enrichment, *On the Take: Criminalizing Illicit Enrichment to Fight Corruption* by Muzila L., Morales M., Mathias M. and Berger T.,<sup>18</sup> and the U4 Anti-Corruption Resource Centre *The accumulation of unexplained wealth by public officials: Making the offence of illicit enrichment enforceable*<sup>19</sup> that provided useful overviews of the offence and its challenges.

## 16.4 Liability of legal persons

The offence of bribery and other corruption-related offences may be committed by both a natural or legal person. However, it is very often the legal person which drives, and benefits from, corrupt activity. No anti-corruption strategy is complete unless some attempt is made to create a regime of appropriate liability for the actions of legal persons. International standards require countries to create liability of legal persons for corruption-related offences and impose adequate criminal, civil or administrative sanctions against such entities, and this is reflected in each of the anti-corruption conventions.

The *Travaux Préparatoires* to the OECD Convention illustrates the importance of corporate liability. It describes how, in the process of creating the OECD Convention, it was addressed at the very beginning of the drafting process, recognizing the fact that corporate responsibility is crucially important in the context of combating transnational commercial bribery.<sup>20</sup>

Although creating liability for a legal person may pose many challenges, States must create legal provisions that establish “effective, proportionate and dissuasive criminal or non-criminal sanctions, including monetary sanctions” against legal persons.<sup>21</sup> A legal person can be held liable in a number of ways: criminal, civil or administrative. Legislators and policy makers will need to carefully consider the manner in which legal persons can be held accountable within their own domestic legislative framework.

<sup>18</sup> Published by World Bank in 2012. Available from the website for the StAR Initiative: <https://star.worldbank.org/star/publication/take-criminalizing-illicit-enrichment-fight-corruption>

<sup>19</sup> Available from [www.u4.no/publications/the-accumulation-of-unexplained-wealth-by-public-officials-making-the-offence-of-illicit-enrichment-enforceable/](http://www.u4.no/publications/the-accumulation-of-unexplained-wealth-by-public-officials-making-the-offence-of-illicit-enrichment-enforceable/)

<sup>20</sup> See *OECD Convention on Bribery: a Commentary*, 1997, p.5. Available from <http://www.oecd.org/daf/anti-bribery/39200754.pdf>

<sup>21</sup> See Article 26 of UNCAC and Article 2 of the OECD Anti-Bribery Convention.

<sup>17</sup> Ibid.

### Box 16.2 The United Kingdom Bribery Act 2010 offence of “failing to prevent bribery” (Section 7):

The offence of “failing to prevent bribery” is set out in section 7 of the Act and creates a new strict liability offence of “failing to prevent bribery” even if there was no corrupt intent. This is designed to make companies, whether they are large or small, culpable for bribery committed on their behalf, be it by their directors, senior managers or anyone else in a position to make or receive a bribe in exchange for an advantage to that business. The only defence will be for a company to show that it had in place ‘adequate procedures’ to prevent bribery and corruption.

The offence has wide jurisdiction as it includes a United Kingdom commercial organization (incorporated or acting as a partnership in the United Kingdom carries on business in the United Kingdom or elsewhere), any other body corporate/partnership (wherever incorporated) which carries on a business, or part of a business, in any part of the United Kingdom. The company will be held liable where someone associated with the organization is found to have bribed another person with the intention of obtaining or retaining business or an advantage in the conduct of business. Such persons ‘associated’ with the organization could include employees, agents, sub-contractors and joint-venture arrangements (amongst others). The bribery could take place anywhere in the world.

The offence has altered the corporate landscape, and one that was heavily debated in the United Kingdom prior to the entry into force of the Act in 2011. Following consultations with the commercial sector, civil society organizations such as Transparency International (United Kingdom), and other relevant stakeholders, the Government issued a set of guidelines of best practices on what would amount to ‘adequate procedures’. The Guidelines are founded on six main principles:

1. Proportionate procedures (relates to the nature, scale and complexity of the activities).
2. Top-level commitment (to prevent bribery and foster a culture within the organization of non-tolerance to bribery).
3. Risk assessment (company must assess the nature and extent of its exposure to potential external and internal risks, such as country, sectoral, transaction, business opportunity and business partnership risks). Therefore, for those companies engaged in high risk industries such as defence and aerospace, extractive industries and construction and/or operating in countries low down on the corruption index, the onus would be higher.
4. Due diligence (who will perform services on behalf of the organization).
5. Communication, including training (ensure that the bribery prevention policies and procedures are embedded and understood throughout the organization).
6. Monitoring and review (companies will need to put in place systems to monitor and evaluate the effectiveness of their bribery prevention procedures and adapt, where necessary).

The Guidelines do not provide a complete defence to the corporate; it remains the responsibility of the commercial organization to ensure that its conduct is regulated, and where malpractice is uncovered, to self-report to the Serious Fraud Office.

The Serious Fraud Office has already issued guidelines on self-reporting by businesses who uncover bribery; the practice of self-reporting was developed prior to the Bribery Act 2010.

*Source:* The United Kingdom Bribery Act, section 7. Available from [www.legislation.gov.uk/ukpga/2010/23/section/7](http://www.legislation.gov.uk/ukpga/2010/23/section/7)

The OECD Anti-Bribery Convention states in Article 2 (Responsibility of Legal Persons) that: “Each Party shall take such measures as may be necessary, in accordance with its legal principles, to establish the liability of legal persons for the bribery of a foreign public official.”

However, in Article 3 (Sanctions), it recognizes that there has to be some margin of appreciation as all States will exercise liability over its legal persons in a different manner, and so it states:

“In the event that, under the legal system of a Party, criminal responsibility is not applicable to legal persons, that Party shall ensure that legal persons shall be subject to effective, proportionate and dissuasive non-criminal sanctions, including monetary sanctions, for bribery of foreign public officials.”

The OECD Working Group on Bribery in International Business Transactions has provided the following guidance<sup>22</sup> for corporate liability:

- (a) The level of authority of the person whose conduct triggers the liability of the legal person should be flexible and reflect the wide variety of decision-making systems in legal persons. In other words, liability may be triggered by the conduct of someone who does not have the highest level of managerial authority in certain cases.
- (b) Alternatively, liability is triggered when a person with the highest level managerial authority (i) offers, promises or gives a bribe to an official; (ii) directs or authorizes a lower level person to offer, promise

<sup>22</sup> See OECD, *Good Practice Guidance on Implementing Specific Articles of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, 2009, available from [www.oecd.org/daf/anti-bribery/oecdantibriberyconvention.htm](http://www.oecd.org/daf/anti-bribery/oecdantibriberyconvention.htm)

or give a bribe to an official; or (iii) fails to prevent a lower level person from bribing an official, including through a failure to supervise him/her through a failure to implement adequate internal controls, ethics and compliance programmes or measures.

## 16.5 Jurisdiction

In adopting comprehensive laws to criminalize corruption, both the OECD and UNCAC require that States take a broad interpretation to the issue of jurisdiction so that, in essence, that State is able to establish jurisdiction over any individual or legal person when an offence is committed in whole or in part in its territory as well as in some circumstances extra-territorially.<sup>23</sup> The OECD Anti-Bribery Convention, recognizing that ‘jurisdiction’ may become an excuse by some as a reason not to act, encourages a broad interpretation of the territorial requirement, by stating, in Commentary 25, that “the territorial basis for jurisdiction shall be interpreted broadly so that an extensive physical connection to the bribery act is not required.”

The jurisdictional provisions of domestic law have a central importance both to criminalization and to the wider issues of international co-operation, in particular, extradition.

The traditional approach taken by many States relied on territorial jurisdiction and is no longer adequate to combat transnational crime, nor indeed is it sufficient to achieve compliance with the jurisdictional requirements of many of the international instruments that address the various forms of cross-border criminality. The OECD Anti-Bribery Convention, which strives to create a sort of functional equivalence, has promoted the effectiveness of nationality jurisdiction over territorial jurisdiction – so jurisdiction follows the individual and/or the legal person wherever they are in world. It can claim to have met with some success with a number of countries adopting nationality as the basis for jurisdictional decisions. The United States of America, Japan and the United Kingdom, to name a few, have adopted nationality jurisdiction on the basis of the OECD Working Group on Bribery (WGB) advice.

In considering its jurisdictional provisions and also its compliance with international instruments, a State should have in mind that it will also be necessary to establish jurisdiction for cases of participation, association or conspiracy to commit, attempts to commit and aiding, abetting, facilitating and counselling the commission of the offence.

## 16.6 Defences

One of the many considerations for policy makers and legislators is that of the nature and range of defences to be put in place. The defences available must be considered carefully so that they do not risk undermining the country’s anti-corruption efforts.

For example, the WGB, the peer review mechanism that ensures compliance with the demands of the OECD Anti-Bribery Convention, has objected to applying effective regret to foreign bribery offences as such (while the effective regret defence for domestic bribery is acceptable if meets certain standards). In this context it addressed, for instance, the defence in Italian law of *concussione*, which may be pleaded in either a domestic or foreign bribery case.<sup>24</sup>

What is clear therefore is that a balance must be struck between having a meaningful response to bribery and other corruption offences and the rights of an individual.

## 16.7 Statute of limitations period

Some countries impose a limitation on the time that an investigation may take and on the time during which a case may be brought to court. By their nature, investigations into, and prosecutions of, corruption may last over a protracted period especially if, for example, Mutual Legal Assistance (MLA) requests have to be made and executed. An adequate time period must be allowed for both the investigative and prosecutorial stages.<sup>25</sup> Article 29 on statute of limitations of the UNCAC also requests that States Parties establish

<sup>23</sup> See Article 42 of the UNCAC and Article 4 (1) of the OECD Anti-Bribery Convention.

<sup>24</sup> See OECD, *Phase 2 Review of Italy*, 2004, §§ 128–140, pp. 33–34, available from <http://www.oecd.org/daf/anti-bribery/anti-briberyconvention/33995536.pdf>; see also various country examples in OECD, *Anti-Corruption Reforms in Eastern Europe and Central Asia: Progress and Challenges 2009-2013*, 2013, pp. 76-78, available from <http://www.oecd.org/corruption/acn/istanbulactionplan/anti-corruption-reforms-eastern-europe-central-asia-2013.htm>

<sup>25</sup> See OECD, *Phase 3 Report on Implementing the OECD Anti-Bribery Convention in Italy*, 2011. Available from <http://www.oecd.org/daf/anti-bribery/anti-briberyconvention/Italyphase3reportEN.pdf>

“a long statute of limitations period to commence proceedings for any offence established in accordance with [the] Convention” and a longer limitations period, or suspension of the statute of limitations, where the alleged offender has evaded the administration of justice.

A 2010 survey<sup>26</sup> by Transparency International examined the impact of the statute of limitations on corruption cases in EU countries. Of the countries reviewed, the survey report found that in a number of jurisdictions, the statute of limitations was far too short and posed real difficulties in the investigation and prosecution of corruption cases. Overall, most countries did not suspend the statute to permit for international co-operation, i.e. MLA, although some steps have been taken to increase the time period. Furthermore, the very nature of financial investigations connected to corruption cases is complex and time consuming. In addition, the immunity provisions in a number of countries are problematic as the statute of limitations may well be exhausted before the official leaves public office.

While the survey report acknowledges that there are other factors that may hinder an effective investigation and prosecution such as lack of resources and expertise of law enforcement and judiciary, the statute of limitations regime was certainly a contributing factor. The survey report encourages policy makers to review the statute of limitations regime in their countries in relation to corruption offences and makes the following recommendations:

- the gravity of corruption crimes needs to be adequately reflected in domestic law;
- limitation periods for serious corruption offences should be 10 years or longer;
- the calculation of statutes of limitations should reflect the specificities of corruption cases;
- the regime should ensure extensions for cross-border cases;
- there should be no impunity for politicians and members of the government;
- there should be no statutes of limitations after a decision of first instance;
- a systematic collection of statistics about relevance of statutes of limitations for impunity should be put in place.

<sup>26</sup> See Transparency International, *Timed Out: Statutes of Limitation and Prosecuting Corruption in EU Countries*, 2010. Available from [http://www.transparency.ee/cm/files/statutes\\_of\\_limitation\\_web\\_0.pdf](http://www.transparency.ee/cm/files/statutes_of_limitation_web_0.pdf)

## 16.8 Penalties and sanctions

Underpinning the criminal provisions is the need to deter bribery in both the public and private sector through sanctions that reflect society’s disapproval of such conduct. The sanctions must, therefore, be capable of having a deterrent value through adequate penalties, monetary and non-monetary. In addition bribery and corruption are acquisitive crimes, the proceeds of which must be subject to confiscation<sup>27</sup> to prevent the ‘enjoyment of the fruits of criminal activity’. The sanctions regime must apply equally to natural and/or legal persons.

The level of sentencing is for each State to determine in accordance with its legal practice, provided it meets the international standard of ‘*effective, proportionate and dissuasive*’ reflected in all the anti-corruption instruments (UNCAC, OECD Anti-Bribery Convention and the Council of Europe Criminal Law Convention on Corruption).

In the case of natural persons, the requirement is to have available imprisonment, for both briber and the bribee (whether a public official or a private individual). Under the UNCAC, the requirement is that the sanctions are proportionate in relation to the gravity of the offence (Article 30 (1)). Additionally, in the case of public officials, the UNCAC invites States to consider suspension, removal or disqualification from public office. As the *Explanatory Report* on the Criminal Law Convention on Corruption of the Council of Europe makes clear, the fact that the offence attracts imprisonment, does “not mean that a prison sentence must be imposed every time that a person is found guilty of having committed a corruption offence established in accordance with this Convention but that the Criminal Code should provide for the possibility of imposing prison sentences of a certain level in such cases.”<sup>28</sup>

In relation to legal persons, the sanctions will need to be in line with domestic legal principles; therefore, where a country does not recognize criminal responsibility for the legal person, it cannot impose criminal sanctions, but it can impose non-criminal sanctions (which may be monetary sanctions such as fines and disgorgement of profits), and consider additional civil or administrative sanctions. Article 3 (2) of the OECD Anti-Bribery Convention states:

<sup>27</sup> For detailed discussion on confiscation, see Chapter 20 of the Handbook.

<sup>28</sup> See Council of Europe, *Explanatory Report on the Criminal Law Convention on Corruption*, 2009, § 89. Available from <http://conventions.coe.int/Treaty/en/Reports/Html/173.htm>

“In the event that, under the legal system of a Party, criminal responsibility is not applicable to legal persons, that Party shall ensure that legal persons shall be subject to effective, proportionate and dissuasive non-criminal sanctions, including monetary sanctions, for bribery of foreign public officials.”

Paragraph 24 of the Commentaries to the Anti-Bribery Convention states:

“Among the civil or administrative sanctions, other than non-criminal fines, which might be imposed upon legal persons for an act of bribery of a foreign public official are: exclusion from entitlement to public benefits or aid; temporary or permanent disqualification from participation in public procurement or from the practice of other commercial activities; placing under judicial supervision; and a judicial winding-up order.”

Whatever sanction regime is adopted by a State in relation to a legal entity, it must be “effective, proportionate and dissuasive” (Article 26 (4) of the UNCAC).

Debarment from future procurement or project bids is a particularly useful sanction which can be applied in addition to criminal punishment (see Article 34 of the UNCAC) and one that has been adopted by the World Bank as well as other development banks in relation to a corporate found ‘guilty’ of bribery/corruption in the context of its mandates. It maintains a list of those debarred as *World Bank Listing of Ineligible Firms & Individuals*.<sup>29</sup>

As bribery is an acquisitive offence, the penalties should, at a minimum, include conviction based confiscation, although States may wish to consider non-conviction based confiscation (civil forfeiture/confiscation *in rem*), or other forms of legal deprivation of instrumentalities and proceeds of corruption.<sup>30</sup>

## 16.9 Immunities and jurisdictional privileges

The issue of immunities and jurisdictional privileges is inextricably linked to public officials. A significant number of countries in Europe and Central Asia have adopted protective provisions, up to and including absolute immunity, in the national constitutions

prohibiting any civil or criminal suit against the Head of State, Ministers, Members of Parliament, and other public officials.

The question of the immunity of state officials (foreign and national) is a complex one and remains the subject of international and national debate. International conventions such as the UNCAC, whilst recognizing the imperative of immunity nonetheless encourage States to conduct a balancing exercise between such grant of immunities and jurisdictional privileges and the need for “effectively investigating, prosecuting and adjudicating offences established in accordance with this Convention” (Article 30 (2) of the UNCAC).

At the international level, diplomatic immunity (originally closely linked to the concept of state immunity) has been codified in the Vienna Convention on Diplomatic Relations (1961) and governs the immunity and privileges of officials, including those of international organizations, such as the United Nations. Immunity under the Convention does not belong to the individual but to the State or international organization, and is therefore capable of being waived by the State/international organization.

Immunity protection has a legitimate and political purpose in that it allows the office-holder to perform his/her official functions, and:

- to ensure that the elected representatives of the people can speak in the legislature without fear of criminal or civil sanctions (including claims for defamation);
- to protect elected representatives from being arbitrarily detained and prevented from attending the legislature; and
- to act as a shield against malicious and politically-motivated prosecutions.

Immunity should, therefore, be seen as intended to protect the democratic process and not to establish a class of individuals who are above and beyond the reach of the law. However, they should be capable of being lifted to enable any investigation and/or prosecution into criminal conduct. The difficulty for a State is trying to have in place some mechanism for ensuring that the lifting of immunity is not simply to enable unmeritorious politically motivated criminal prosecution to take place.

Within national systems, the immunity framework has two aspects:

<sup>29</sup> See [www.worldbank.org/debarr](http://www.worldbank.org/debarr)

<sup>30</sup> For a more detailed discussion on confiscation, see Chapter 20 of the Handbook.

1. ‘inviolability’ (similar to that found at the international level) for certain categories of state officials who may not be detained, arrested, or prosecuted without the agreement of a relevant body;
2. ‘non-liability’ (or ‘functional immunity’, as termed in some jurisdictions), for members of legislatures in parliamentary proceedings concerning opinions expressed during their term of office.

- **‘Inviolability’ principle**

This varies extensively from country to country and region to region. The main groups that fall under this principle are Heads of State and, in many States, Members of Parliament. In monarchical countries such as Belgium, Denmark, the Netherlands and the United Kingdom, the reigning monarch enjoys absolute immunity.

In other States where a President is Head of State, most if not all countries provide for immunity from prosecution during the term of office. The immunity is set out in the national constitutions and often provides for the impeachment of a president, though this may be only for high treason or violation of the constitution. Corruption may or may not provide grounds for impeachment.

The lack of protection through immunity (*ratione personae* and *materiae*) against criminal proceedings after a president leaves office is a valuable tool to hold those in high office to account. However, the main challenge is often the delay in commencing proceedings against a former president and in some States, the added filter of prosecution being sanctioned by the executive and/or legislature.

In many States, members of parliament and high-level officials enjoy immunity on the same principle as that of Head of State (‘inviolability’) which may prevent criminal investigation and/or prosecution.

This basis of immunity is increasingly contested and has been the subject of much debate both nationally and internationally. It has, in some countries, led to the legal reform and changing of legislative practice, so that restrictions are imposed on the scope of inviolability.

There is a divergence of approach in the granting of such immunities that has been the subject of detailed examination by other organizations, for example, the Inter-Parliamentary Unit,<sup>31</sup> and in research papers by the Association of Secretaries General of Parliaments (the

consultative body of the Inter-Parliamentary Union),<sup>32</sup> and in relation to EU Member States, from 2001.<sup>33</sup>

There are several mature democracies, for example, Belgium, the Netherlands, and Switzerland and common law jurisdictions generally (e.g., the United Kingdom) where MPs have no inviolability from criminal prosecution. In other countries, they only have immunity with regard to trivial offences (in Finland, only for offences with a maximum punishment of six months in prison). Yet, in other States where such immunity is granted, it may be possible to lift it but requires the authorization of the whole Parliament (e.g., Romania, Estonia), except in the case of arrests in *flagrante delicto* (e.g., Belgium, Croatia, and Denmark).

As far back as in its 1996 report,<sup>34</sup> the Council of Europe’s Venice Commission stated that “while the necessary compliance with the principle of separation of powers and the expression of the common will render it expedient to lay down specific rules for the protection of parliamentarians, it would be inconsistent with the principles of parliamentary democracy to make members immune from punishment for offences committed. The immunity thus instituted must, of course, not be such as to obstruct the course of justice.”

- **‘Non-liability’ principle**

In most, if not all countries, parliamentarians are not liable for opinions expressed in the exercise of their functions (‘non-liability immunity’), and it is usually absolute. The principle that parliamentarians should not be liable to prosecution for anything they say in the consideration of a parliamentary matter is generally accepted. Other groups that enjoy such immunity include judges and prosecutors.

- **Procedures for waiving immunity**

The difficulty for a State is devising a mechanism that allows the lifting of immunity but not so as to enable unmeritorious politically motivated criminal prosecutions to take place. A second related difficulty is that rules of procedure for withdrawing immunity often engage the political rather than prosecutorial agencies.

Procedures for waiving immunity can vary widely. Indeed, in many countries, there is no procedure provided at all, whilst in others the procedures for lifting

<sup>32</sup> See <http://www.asgp.co/>

<sup>33</sup> See European Centre for Parliamentary Research and Documentation, *Rules on Parliamentary Immunity in the European Parliament and the Member States of the European Union*, 2001. Available from [www.agora-parl.org/node/3444](http://www.agora-parl.org/node/3444)

<sup>34</sup> See Council of Europe, *Report on the Regime of Parliamentary Immunity*, 1996, available from [www.venice.coe.int/webforms/documents/?pdf=CDL-INF\(1996\)007-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-INF(1996)007-e)

<sup>31</sup> See [www.ipu.org/parline](http://www.ipu.org/parline)

immunity are so complicated or time-consuming that requests may be discouraged.

GRECO has emphasized that the process of lifting immunities should be clear, objective, swift and transparent.<sup>35</sup>

An equally important question to be considered in drafting any legislation on immunity is the need to have a time limit for inviolability. In some countries, the principle is only relevant for the length of the parliamentary session or tenure in office, whilst in others life-long immunities are provided. In some instances, immunity is automatically restored if re-elected to office.

Certainly, lifelong immunities of inviolability are indefensible. The privilege must be given up upon leaving office, in all cases involving criminality. Upon leaving office, the official must be held accountable for any criminal conduct that he/she may have been involved in during the time in office. The rationale is simply this that it cannot be the mandate of the electorate that state officials abuse their position to commit acts of criminality and then hide behind the cloak of immunity.

## 16.10 Conclusions and recommendations

States should draft their criminalization provisions related to corruption offences taking into account the framework of instruments, initiatives and guidance which, together, have formed what can be described as an 'international standard', namely:

- Offences of both active and passive bribery for national public officials must be created, as must the active and passive offence in respect of foreign public officials and officials of public international organizations. In relation to foreign bribery, the bribe must, at the minimum, be for the purposes of "*obtaining or retaining business... in the conduct of international business*" (see OECD Anti-Bribery Convention and UNCAC); however, a State may have a wider active foreign bribery offence if it so decides.
- The definition of a 'public official' should be as wide as possible; the international best practice is the 'functional' test that is to say, what is the function being performed by the individual rather than the 'public office' she/he holds.

- Often a bribe will be promised, offered or given through a third party/intermediary, or, equally solicited or accepted through a third party/intermediary (which may be a natural or a legal person). The offence creating provision must be wide enough to include such conduct.
- International standards require States to create liability of the legal person. States will need to decide as a matter of legal policy (and in line with their domestic legal principles) as to the manner in which such corporate entities should be held liable: criminal liability, strict liability, imputed or deemed liability or administrative/civil liability.
- The level of sentencing must take into account the gravity of the offence and be '*effective, proportionate and dissuasive*'; the sanctions must address the natural and legal person and the range of sentencing options should include imprisonment, monetary and non-monetary penalties, confiscation, suspension, removal or disqualification from public office and debarment as well as disciplinary measures.

Other important points to consider:

- States should criminalize the widest possible range of corruption offences to enable more efficient prosecutorial and investigative action. Guidance can be sought both from the UNCAC and the Council of Europe Criminal Law Convention on Corruption. The UNCAC contains both mandatory and optional criminalization provisions for offences such as embezzlement and misappropriation of property, trading in influence, abuse of function, illicit enrichment, laundering of proceeds of crime, concealment, obstruction of justice and participatory acts. The Council of Europe Criminal Law Convention on Corruption asks States to criminalize acts such as trading in influence, money laundering of proceeds from corruption offences, and participation in the offence.
- States should also consider criminalizing passive foreign bribery to ensure that there are no legal loopholes.
- Anti-corruption investigations/prosecutions are usually lengthy and often require evidence to be obtained from other jurisdiction(s). Therefore, a realistic and workable period for the statute of limitations should be in place, preferably where there is one for it to commence when the offence is unearthed and not when it was committed. It should also take into account the existing immunity provisions for elected public officials to ensure that the time period sufficiently covers their time in office.

<sup>35</sup> Council of Europe, GRECO, *Lessons Learnt from the Three Evaluation Rounds (2000-2010)*, p. 46. Available from [http://www.coe.int/t/dghl/monitoring/greco/general/Compendium\\_Thematic\\_Articles\\_EN.pdf](http://www.coe.int/t/dghl/monitoring/greco/general/Compendium_Thematic_Articles_EN.pdf)

- Consideration should be given to the fact that some general criminal law defences or those that specifically cover bribery and other corruption-related offences may have the effect of undermining a State’s anti-corruption efforts: for example, effective regret and facilitation payments. Policy must seek to strike a balance between the individual and the wider interests of the community.
- Immunities and jurisdictional privileges should be kept to a minimum, and where they are necessary, there should be a procedure for waiving immunity.
- When considering amending and developing anti-corruption legislation, useful guidance can be found from a growing body of knowledge and lessons learnt in the context of the UNCAC Technical and Legislative Guides and the Mechanism for the Review of Implementation of the Convention.

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## CHAPTER 17

# Human Rights Issues in Anti-Corruption Investigations

### CONTENTS

17.1	Limitations on rights	200
17.2	Special investigation techniques and human rights	200
17.2.1	<b>Interception of communications</b>	201
17.2.2	<b>Surveillance</b>	202
17.2.3	<b>The use of undercover officers and agents</b>	202
17.2.4	<b>Searches</b>	203
17.3	Protection of witnesses and reporting persons	203
17.4	Human rights during arrest and detention	204
17.4.1	<b>Right to liberty</b>	204
17.4.2	<b>Human rights during detention</b>	204
17.5	Right to a fair trial	205
17.5.1	<b>Presumption of innocence</b>	206
17.5.2	<b>The right not to incriminate oneself and to silence</b>	206
	Selected Bibliography	206

## CHAPTER 17

# Human Rights Issues in Anti-Corruption Investigations

*Respect for human rights is an essential part of any investigation. The application of human rights, enshrined in national and international law and in commitments made by OSCE participating States, is essential to preventing the conviction of those whose guilt is not proved beyond reasonable doubt, and is the foundation for a judicial system based on the rule of law.*

*Key rights that need to be considered in any investigation include the right to life; the right to freedom from torture and other cruel, inhuman or degrading treatment or punishment; prohibition against discrimination; freedom from arbitrary arrest or detention; the right to a fair trial; respect for privacy and family life.*

*The particular challenges presented by the investigation and proving of corruption, and the use of special investigative techniques, often put authorities in a position of having to balance individual rights with the interest of society in the investigation and solving of crimes. This puts a particular responsibility on officials to ensure that they stay within the limits of what constitutes human rights compliant behaviour. This Chapter will focus on selected fundamental rights that are of particular relevance to investigations in corruption cases, including the right to privacy.*

## 17.1 Limitations on rights

While some rights, in particular the right to freedom from torture and ill-treatment, are absolute, and therefore cannot be restricted under any circumstances, other rights may be limited, though only under certain narrowly defined circumstances. International human rights instruments<sup>1</sup> and jurisprudence from national

and regional courts specify the conditions under which rights may be limited. In general, these conditions are:

- a. The limitation must have legal basis (*principle of legality*).  
Any restriction on human rights must be “prescribed” by law. It implies that the law must be adequately accessible and that interference must be foreseeable.
- b. The limitation must protect or promote an aim deemed legitimate in international law (*principle of legitimacy*).  
A number of human rights standards list aims that would be considered legitimate in relation to specific rights. These aims include public order, public health, public morals, national security, public safety and the rights and freedoms of others.<sup>2</sup>
- c. The limitation must be reasonable, necessary, proportionate and non-discriminatory (*principle of necessity*).

Rights may not be limited for convenience or expediency. The authorities must show that the harm could not have been prevented by other means, or a less far-reaching limitation of the right involved. The restriction must be directly related to the sought outcome, and must not destroy the very essence of the right. In addition, limitations on rights may never be implemented in a discriminatory way.

## 17.2 Special investigation techniques and human rights

Because special investigation techniques by their nature may lead to limitations on certain rights, in particular the right to privacy, their use must be subject to safeguards

<sup>1</sup> See, for example, International Covenant on Civil and Political Rights (ICCPR), Article 19 (3) on freedom of expression and Centre for Civil and Political Rights (CCPR), General Comment No. 34: Freedoms of opinion and expression (Article 19), 2011; ICCPR, Article 17, and CCPR, General Comment No. 16: The right to respect of privacy, family, home and correspondence, and protection of honour and reputation (Article 17), 1988; European Convention on Human Rights (ECHR), Articles 5, 8-11, 15.

<sup>2</sup> See ICCPR, Articles 12 (3), 13, 14 (1), 18 (3), 19 (3), 21 and 22 (2); International Covenant on Economic, Social and Cultural Rights (ICESCR), Article 8 (1) (a) and 8 (1) (c); see also CCPR, General Comment No. 34, 2011, and CCPR, General Comment No. 16, 1988.

## International Covenant on Civil and Political Rights (ICCPR)

### Article 17

1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.
2. Everyone has the right to the protection of the law against such interference or attacks.

## European Convention on Human Rights (ECHR)

### Article 8. Right to respect for private and family life

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interest of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

and oversight. The UNCAC specifies in Article 50 (1) that special investigative techniques may be used to combat corruption effectively; therefore, “each State Party shall, to the extent permitted by the basic principles of its domestic legal system and in accordance with the conditions prescribed by its domestic law,” take such measures to allow for the appropriate use by its competent authorities of special investigative techniques and to allow for the admissibility in court of evidence derived therefrom.

The use of special investigative techniques must thus be appropriate, in line with national laws defined in compliance with international human rights standards, and only be executed by competent authorities. The UNCAC expects States Parties to determine such competent authorities, train them and introduce oversight mechanisms for judges and prosecutors. Any case of improper use of special investigative techniques amounting to a criminal offence should be handled by the criminal justice system.

In order for the limitation to be acceptable under international human rights law, the second condition, as found in section 17.1 b above, must also be fulfilled. Bodies such as the European Court of Human Rights (ECtHR) and the United Nations Human Rights Committee provide guidance on what limitations of rights are acceptable and the safeguards needed to prevent arbitrary use of powers.

Special investigative techniques should be only used in case of a serious crime, proportionally to the matter under investigation, and less intrusive means should be preferred if they allow the same objective to be achieved.<sup>3</sup>

Gathering intelligence in the investigation of corruption involves the collection of information and personal data, which should be processed and protected in line with the domestic and international law, including human rights law.<sup>4</sup>

### 17.2.1 Interception of communications

Interception of communications – telephone, digital information or mail, for example – interferes with the right to privacy not only of the person(s) for whom there is a reasonable suspicion that they are involved in criminal activities, but also of third parties who are not under investigation. The Human Rights Committee, the main body tasked with overseeing the ICCPR, has stated that, in relation to interference with privacy, “... relevant legislation must specify in detail the precise circumstances in which such interferences may be permitted. A decision to make use of such authorized interference must be made only by the authority designated under the law, and on a case-by-case basis.”<sup>5</sup>

<sup>3</sup> See Council of Europe, Recommendation Rec(2005)10 of the Committee of Ministers to member states on “special investigation technics”, available from <https://wcd.coe.int/ViewDoc.jsp?id=849269>; OSCE/ODIHR, *Human Rights in Counter-Terrorism Investigations*, 2013, p. 32, available from <http://www.osce.org/odihr/108930?download=true>

<sup>4</sup> OSCE/ODIHR, *Human Rights in Counter-Terrorism Investigations*, 2013, p. 31 - a set of principles on data processing in compliance with international human rights standards; See also Council of Europe, Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, 1981, Article 5 – Quality of data, available from <http://www.coe.int/en/web/conventions/full-list/-/conventions/rms/0900001680078b37>

<sup>5</sup> See CCPR, General Comment No. 16, 1988, para. 8.



The ECtHR has held that interception of communications by a public authority constitutes an interference with the individual's right to respect for his or her correspondence and private life as guaranteed in Article 8 of the European Convention on Human Rights.<sup>6</sup> It must therefore be provided for in law and necessary, for the specific reasons listed in Article 8 (2), as well as reasonable, proportional, and non-discriminatory.

In addition, national legislation providing for such interference must "be sufficiently clear in its terms to give citizens an adequate indication as to the circumstances in which and the conditions on which public authorities are empowered to resort to this secret and potentially dangerous interference with the right to respect for private life and correspondence."<sup>7</sup> Where the law provides for discretion by the authorities, this discretion should be clearly defined. The law should therefore include:<sup>8</sup>

- a definition of the categories of people whose telephones may be tapped by judicial order;
- the nature of the offences which may give rise to such an order;
- a limit on the duration of telephone tapping;
- a procedure for drawing up summary reports containing intercepted communications;
- the precautions to be taken in order to communicate the recordings intact and in their entirety for possible inspection by the judge and defence;
- the circumstances, including a time limit, in which

<sup>6</sup> *Klass and others v. Germany*, ECtHR judgment of 6 September 1978, Series A, no. 28.

<sup>7</sup> *Malone v. United Kingdom*, ECtHR judgment of 2 August 1984, para. 67.

<sup>8</sup> *Kruslin v. France*, ECtHR judgment of 24 April 1990, Series A, no. 167 A; *Huvig v. France*, ECtHR judgment of 24 April 1990; *Valenzuela Contreras v. Spain*, ECtHR judgment of 30 July 1998.

recordings may or must be erased or the tapes destroyed, in particular where an accused has been discharged by an investigating judge or acquitted by a court.

### 17.2.2 Surveillance

Surveillance is likely to constitute a limitation on the right to privacy and raises many of the same human rights issues as those described in the previous section. The act of obtaining private information about the individuals being monitored or third parties, usually without their knowledge, renders them unable to grant or withhold consent to the recording of information. In addition to a limitation on the right to privacy, this may impact on the right to refuse to incriminate oneself. Where surveillance is intrusive, for example when it takes place in someone's home or vehicle, there is even greater cause for ensuring that safeguards are in place to prevent abuse of authority. There is also a risk that unchecked surveillance may negatively affect the right to freedom of expression.

### 17.2.3 The use of undercover officers and agents

Undercover officers and agents may be critical in collecting information in investigations into corruption cases. Their use must be subject to clear restrictions and safeguards.

A particular concern in this context relates to entrapment. Entrapment occurs when state agents exert influence on an individual to incite the commission of an offence that would otherwise not have been committed, in order to provide evidence and institute a prosecution. The ECtHR has held that entrapment constitutes a violation of the right to a fair trial, that domestic law should not allow for the use of evidence obtained by entrapment, and that even the public interest in fighting organized crime cannot justify conviction based on evidence obtained by police incitement.<sup>9</sup>

The test to establish whether entrapment has occurred consists of (1) a substantive element of whether the state agents remained within the limits of "essentially passive" behaviour or went beyond them; and (2) a procedural element of whether the applicant was able to raise the issue of entrapment effectively during the domestic

<sup>9</sup> *Khudobin v. Russia*, ECtHR judgment of 26 October 2006, paras 133-135; *Teixeira de Castro v. Portugal*, ECtHR judgment of 9 June 1998, para. 36; *Ramanauskas v. Lithuania*, ECHR judgment of 5 February 2008, paras 49-54.

## UNCAC

### *Article 32. Protection of witnesses, experts and victims*

1. Each State Party shall take appropriate measures in accordance with its domestic legal system and within its means to provide effective protection from potential retaliation or intimidation for witnesses and experts who give testimony concerning offences established in accordance with this Convention and, as appropriate, for their relatives and other persons close to them.
2. The measures envisaged in paragraph 1 of this article may include, inter alia, without prejudice to the rights of the defendant, including the right to due process:
  - (a) Establishing procedures for the physical protection of such persons, such as, to the extent necessary and feasible, relocating them and permitting, where appropriate, non-disclosure or limitations on the disclosure of information concerning the identity and whereabouts of such persons;

- (b) Providing evidentiary rules to permit witnesses and experts to give testimony in a manner that ensures the safety of such persons, such as permitting testimony to be given through the use of communications technology such as video or other adequate means.
- [...]

### *Article 33. Protection of reporting persons*

Each State Party shall consider incorporating into its domestic legal system appropriate measures to provide protection against any unjustified treatment for any person who reports in good faith and on reasonable grounds to the competent authorities any facts concerning offences established in accordance with this Convention.

proceedings, and how the domestic courts had dealt with this.<sup>10</sup> In terms of what constitutes behaviour not amounting to entrapment, the ECtHR has found that when “on balance, the police may be said to have ‘joined’ the criminal activity rather than to have initiated it”, their actions fall within the acceptable scope of undercover police work.<sup>11</sup>

Undercover activities are also used sometimes for other purposes, for instance to perform integrity tests and to assess the resistance of personnel and working routines to risks of corruption. The safeguards mentioned above remain of course applicable to avoid that information gathered is used additionally against the employees who have not “passed the test”.

### 17.2.4 Searches

Entering private premises and seizing private property constitute limitations on human rights. OSCE commitments make explicit that any searches and seizures of persons, private premises and property must take place in accordance with law and standards that are judicially enforceable.<sup>12</sup> In order to conform to international human rights standards, legislation must specify in detail the precise circumstances in which such interference is permitted. The decision to search must lie only with the authority designated by law.<sup>13</sup> National legislation authorizing the police to enter and

search premises and to seize items as evidence should therefore set down limits to this power.

If a law fails to specify limitations on powers to search, this may constitute a violation of the right to privacy. Similarly, although a search may follow procedure and pursue the legitimate aim of furthering the interest of public safety, if the excessively broad terms of the search orders do not provide safeguards to protect professional privilege, the court may find a violation of the right to privacy. There must be a reasonable relationship of proportionality between the means employed and the aim sought.

## 17.3 Protection of witnesses and reporting persons

The UNCAC requires the States Parties to take appropriate measures within their means to protect witnesses (as well as experts and victims – in so far as they act as witnesses) and reporting persons (‘whistleblowers’) in corruption cases. Among the measures a State can implement are witness protection programmes and evidence-taking techniques that ensure the safety of witnesses such as the use of shields, disguises or voice distortion; the use of a witness’s pre-trial statement instead of in-court testimony; videotaping from a remote location; etc.

<sup>10</sup> *Bannikova v. Russia*, ECHR judgment of 4 November 2010.

<sup>11</sup> *Miliniene v. Lithuania*, ECHR judgment of 24 June 2008, para. 38.

<sup>12</sup> See OSCE, 1991 Moscow Document, para. 24.

<sup>13</sup> CCPR, General Comment No. 16, 1988, para. 8.

## ICCPR

### Article 9

1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.
  2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.
- [...]

## European Convention on Human Rights

### Article 5

1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:  
[...]  
(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
- [...]

## 17.4 Human rights during arrest and detention

### 17.4.1 Right to liberty

Everyone has the right to liberty and security.<sup>14</sup> International human rights standards specify that no one may be deprived of his or her liberty except in accordance with procedure prescribed by law. Human rights standards consider the deprivation of liberty to be a serious measure, which should be the exception rather than the rule. Arbitrary arrest or detention is prohibited under international law.

In addition, the Human Rights Committee has stated that the ‘arbitrariness’ criteria provided for in the ICCPR is not to be equated with ‘against the law’, “... but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law. ... [T]his means that remand in custody pursuant to lawful arrest must not only be lawful but reasonable<sup>15</sup> in the circumstances. Remand in custody must further be necessary in all the circumstances, for example, to prevent flight, interference with evidence or the recurrence of crime.”<sup>16</sup> In line with basic human rights principles, the decision to detain an individual must never be discriminatory.

The circumstances in which an individual may be detained include conviction by a competent court; noncompliance with a lawful order of a court or to secure the fulfillment of a legally prescribed order; to bring an

individual before a court on suspicion of an offence or to prevent commission of an offence or flight; the detention of a minor for educational purposes; for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants, and to prevent his or her effecting an unauthorized entry into the country or of a person against whom action is being taken with a view to deportation or extradition.<sup>17</sup> This list is considered to be exhaustive and “must be interpreted strictly”.<sup>18</sup> International standards also provide the right to be informed at the time of arrest of the reasons for the arrest and detention, and to be promptly informed of any charges, in a language one understands; the right of prompt access to judicial proceedings to determine the legality of the detention; and to trial within a reasonable time or release pending trial; and the right to compensation in the case of arrest or detention in violation of these provisions.<sup>19</sup> OSCE commitments are also explicit in this regard.<sup>20</sup>

### 17.4.2 Human rights during detention

OSCE commitments and international human rights law provide for the protection of human rights of individuals in detention. National law should also provide for such protection. While the full content of these rights is beyond the scope of this publication, those involved in investigations must be aware of relevant international instruments as well as safeguards contained in national legislation defined in line with international human

<sup>14</sup> ICCPR, Article 9 (1); ECHR, Article 5 (1).

<sup>15</sup> “Reasonable” includes criteria of “reasonable suspicion”. See for example *Kandzhov v. Bulgaria*, no. 68294/01, ECtHR judgement of 6 November 2008; *Stepuleac v. Moldova*, no. 8207/06, ECtHR judgement of 6 November 2007.

<sup>16</sup> Communication No. 458/1991, *Womah Mukong v. Cameroon* (Views adopted on 21 July 1994), UN Doc. CCPR/C/51/D/458/1991 (1994), para. 9.8.

<sup>17</sup> ECHR, Article 5 (1).

<sup>18</sup> *Bouamar v. Belguim*, ECtHR judgment of 29 February 1988, Series A, no. 129, para. 43.

<sup>19</sup> See ICCPR, Article 9; and ECHR Article 5 (2-4).

<sup>20</sup> See, for example, OSCE, 1989 Vienna Document; 1991 Copenhagen Document; 1991 Moscow Document.

## ICCPR

### Article 14.

1. ...everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. ...
  2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.
- [...]

## ECHR

### Article 6. Right to a fair trial

1. In the determination...of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. ...
  2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
- [...]

rights standards.<sup>21</sup> Key international human rights instruments include:

- The International Covenant on Civil and Political Rights (ICCPR);
- The UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT);
- The Body of Principles for the Protection of All Persons under any Form of Detention or Imprisonment (1988);
- The Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions (1989);
- The Code of Conduct for Law Enforcement Officials (1979);
- *In relation to juvenile detainees*: UN Convention on the Rights of the Child; UN Rules for the Protection of Juveniles Deprived of their Liberty (1990); UN Standard Minimum Rules for the Administration of Juvenile Justice (1985) (“Beijing Rules”).

These instruments contain important safeguards for persons deprived of their liberty, including:

- The right to be informed, at the time of arrest, of the reasons for arrest and detention and to be promptly informed of any charges against oneself, in a language one understands;
- The right to legal counsel of one’s choice from the outset of arrest and detention;
- The right to access to medical care;
- The right to notify appropriate persons of one’s choice of detention from the outset of arrest and detention;
- The right to be promptly informed about one’s rights, according to domestic law at the commencement of the deprivation of liberty;
- The right to freedom from torture and ill-treatment;

- The right to be promptly brought before a judge and the right to a trial within a reasonable time or to release pending trial;
- The right to have lawfulness of detention decided speedily by a court.



European Court of Human Rights building in Strasbourg, France

## 17.5 Right to a fair trial

The right to a fair trial is enshrined in commitments made by OSCE participating States and in international and regional human rights instruments.<sup>22</sup> It encompasses a wide range of rights, including those listed in the previous section (section 17.4.2). While a full discussion of the right to a fair trial is beyond the scope of this Guide, it is important to note that any consideration of the fairness of a trial includes an assessment of rights not only during the trial itself, but at all stages of investigation. This section provides information on the presumption of innocence and the right not to incriminate oneself/silence, as these are of particular

<sup>21</sup> For detailed information on this topic see, for example: United Nations, *Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers*, 2003. Available from [www.ohchr.org/Documents/Publications/training9Titleen.pdf](http://www.ohchr.org/Documents/Publications/training9Titleen.pdf)

<sup>22</sup> See OSCE, 1989 Vienna Document, para. 13.9; 1990 Copenhagen Document, paras 5 and 12; Ljubljana 2005 (Decision No.5/12 on upholding human rights and rule of law in criminal justice systems); OSCE/ODIHR, *Legal Digest of International Fair Trial Rights*, 2012, available from <http://www.osce.org/odihr/94214?download=true>

relevance to anti-corruption investigations and to the special investigative techniques considered above.<sup>23</sup>

In addition to the rights already discussed, key rights at trial include:

- The presumption of innocence;
- The right not to be compelled to testify or confess guilt;
- The right to equality before the law and courts;
- The right to trial by a competent, independent and impartial tribunal established by law;
- The right to a public hearing;
- The right to defend oneself in person or through counsel;
- The right to call and examine witnesses;
- The right to an interpreter and to translation;
- The right to a public judgment;
- The right to appeal.<sup>24</sup>

### 17.5.1 Presumption of innocence

The presumption of innocence is a fundamental principle of criminal justice in democratic societies. The Human Rights Committee has stated that the presumption of innocence means that “the burden of proof of the charge is on the prosecution and the accused has the benefit of doubt. No guilt can be presumed until the charge has been proved beyond reasonable doubt. It is, therefore, a duty for all public authorities to refrain from prejudging the outcome of a trial.”<sup>25</sup>

<sup>23</sup> For detailed information on this topic see, for example, United Nations, *Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers*, 2003.

<sup>24</sup> See relevant chapters of the OSCE/ODIHR, *Legal Digest of International Fair Trial Rights*, 2012.

<sup>25</sup> Human Rights Committee, General Comment No. 13: Equality before the courts and the right to a fair and public hearing by an independent court established by law (Article 14), 1984, para. 7.

A violation of the right to a fair trial may also occur when judicial officials make public statements indicating the applicant’s guilt prior to conviction. The presumption of innocence may be infringed not only by a judge or court, but also by other public authorities.<sup>26</sup>

### 17.5.2 The right not to incriminate oneself and to silence

The ICCPR provides that no one charged with a criminal offence should be compelled to incriminate him or herself.<sup>27</sup> In complex corruption cases where information may not be readily available or accessible, it is particularly important to ensure that this right is respected during early stages of the investigation and in the context of covert investigations.

The ECtHR has found that, “...there can be no doubt that the right to remain silent under police questioning and the privilege against self-incrimination are generally recognized international standards which lie at the heart of the notion of a fair procedure under Article 6.”<sup>28</sup> The right to silence applies not only to direct confessions, but to any statement which may later be used by the prosecution in criminal proceedings.<sup>29</sup>

A court may reject a claim that, in securing a conviction in a complex fraud case, the public interest justifies the admission of evidence obtained under a statute that makes it compulsory to answer questions. The ECtHR has held that “the public interest cannot be invoked to justify the use of answers compulsorily obtained in a non-judicial investigation to incriminate the accused during the trial proceedings.”<sup>30</sup>

<sup>26</sup> *Butkevičius v. Lithuania*, ECtHR judgment of 26 March 2002, para. 49.

<sup>27</sup> ICCPR, Article 14 (3) (g).

<sup>28</sup> *John Murray v. UK*, ECtHR judgment of 8 February 1996, para. 45.

<sup>29</sup> *Aleksandr Zaichenko v. Russia*, ECtHR judgment of 18 February 2010, paras 52-60.

<sup>30</sup> *Saunders v. UK*, ECtHR judgment of 17 December 1996, para.74.

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## CHAPTER 18

# Mutual Legal Assistance

### CONTENTS

18.1 Regional and international framework	208
18.2 Scope of assistance	209
18.3 Formal requests	210
18.4 Challenges of seeking MLA in corruption cases	211
18.5 European Evidence Warrant	212
18.6 Judicial and law enforcement networks	213
18.7 Conclusions	215
Selected Bibliography	215

## CHAPTER 18

# Mutual Legal Assistance

*Mutual Legal Assistance (MLA) is the formal process of gathering evidence for criminal proceedings located in another State through co-operation between States. It is a very important tool in effectively combating crime with transnational dimensions, including corruption. Hence, intergovernmental bodies have been working for some time on how to overcome legislative differences and practical difficulties in MLA co-operation, and thus there are a number of regional and international treaties and Conventions that include MLA provisions. As a reflection of the importance of MLA in the context of the Organization for Security and Co-operation in Europe (OSCE), all its participating States have confirmed, as of December 2012, their high-level political commitments towards strengthened international co-operation in combating corruption and money laundering.<sup>1</sup>*

*This Chapter outlines the regional and international legal framework on MLA with a focus on the UN Convention against Corruption (UNCAC) as it is the most universally agreed to anti-corruption co-operation framework between States, and it contains detailed provisions on MLA measures in investigations, prosecutions and judicial proceedings stemming from corruption offences. More specifically, the Chapter discusses both formal and informal requests for co-operation, the associated challenges as well as possible solutions to them.*

*Furthermore, the European Evidence Warrant (EEW) for obtaining objects, documents and data for use in criminal proceedings for European Union (EU) Member States is also highlighted as an interesting example of how concretely inter-state co-operation through mutual recognition of judicial decisions can be expedited.*

## 18.1 Regional and international framework

Crime is getting increasingly international, and therefore law enforcement bodies need to gather information and evidence rapidly from across borders. Corruption is nowadays recognized as an international, and not just a domestic, phenomenon. The crime of corruption usually entails the use of bank accounts and, in many cases, complex financial structures to move money or assets, which not only complicates the investigation, but also requires an urgent response. Against this background, both formal legal assistance (MLA) and informal legal assistance through exchange of information and law enforcement co-operation channels play an important role in combatting corruption.

The UN Commission on Crime Prevention and Criminal Justice,<sup>2</sup> as the main policy-making body of the UN in the field of crime prevention and criminal justice, has been dealing with issues related to MLA, and more generally international co-operation in criminal matters, for many years. In addition, with respect to the specific crime of corruption, the Open-ended intergovernmental expert meetings to enhance international cooperation under the UNCAC<sup>3</sup> has provided guidance and advice on the challenges of international co-operation. The UN has prepared a Model Treaty on Mutual Assistance in Criminal Matters, “as a useful framework that could be of assistance to States interested in negotiating and concluding bilateral agreements aimed at improving co-operation in matters of crime prevention and criminal justice.”<sup>4</sup>

<sup>1</sup> See OSCE, *Declaration on Strengthening Good Governance and Combating Corruption, Money-Laundering and the Financing of Terrorism* (MC.DOC/2/12). Available from: <http://www.osce.org/cio/97968>

<sup>2</sup> See <https://www.unodc.org/unodc/commissions/CCPC/>

<sup>3</sup> See <https://www.unodc.org/unodc/en/treaties/CAC/em-internationalcooperation.html>

<sup>4</sup> See Para 1, Model Treaty on Mutual Assistance in Criminal Matters, adopted in 1990, amended by the UN GA Res. 53/112, 9 December 1998. Available from [https://www.unodc.org/pdf/model\\_treaty\\_mutual\\_assistance\\_criminal\\_matters.pdf](https://www.unodc.org/pdf/model_treaty_mutual_assistance_criminal_matters.pdf)

The term ‘criminal proceedings’, in the context of MLA, includes any stage of the judicial process, which may differ from country to country: investigation, prosecution and court proceedings. The international Conventions in this area (e.g., the Council of Europe (CoE) 1959 European Convention on Mutual Assistance in Criminal Matters) have set a clear prerequisite, namely that States should agree to offer each other “the widest measure of mutual assistance” in investigating crimes, procuring evidence, and in prosecuting criminal suspects.<sup>5</sup>

MLA usually operates through agreements that provide a legal basis for inter-state co-operation, or on the basis of reciprocity or comity. Although the EU has attempted to set standards within Europe on international co-operation in the context of criminal matters,<sup>6</sup> there is no truly universal instrument or treaty which governs international co-operation, the building blocks include:

- bilateral treaties;
- multilateral arrangements (usually region-wide);
- international agreements (for example, UN conventions);
- reciprocity, comity or *ad hoc* agreements; and
- domestic legislation allowing for international co-operation in criminal cases.

MLA may also be obtained through one of the traditional models namely, through ‘letters rogatory’ on the basis of reciprocity and processed through diplomatic channels. However, apart from being a slow process, such letters rogatory are limited to court-to-court assistance and thus may not be available in the investigative or early stages of the prosecution if criminal charges have not yet been brought.<sup>7</sup>

Treaties and Conventions with MLA provisions of particular interest to the OSCE participating States when addressing transnational anti-corruption aspects include:

- UN Convention against Transnational Organized Crime (UNTOC) (Article 18);
- UN Convention against Corruption (UNCAC) (Articles 46, 54-55);

- CoE Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime of 1990 (Articles 7-35), the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism of 2005 (Articles 15-47);
- CoE Convention on Cybercrime (Articles 25-35);
- CoE Criminal Law Convention on Corruption (Articles 25-31);
- Inter-American Convention against Corruption (Article XIV);
- Organisation for Economic Co-operation and Development (OECD) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (Article 9) and the 2009 Recommendation on Further Combating Bribery of Foreign Public Officials (Section XIII).

In addition, Conventions dealing *ad hoc* with mutual legal assistance have been drawn up within the framework of:

- CoE (European Convention on Mutual Assistance in Criminal Matters 1959 and its two Additional Protocols of 1978 and 2001);
- EU (Convention of 2000 on Mutual Assistance in Criminal Matters between the Member States of the EU and its Protocol of 2001);
- The Commonwealth of Nations (Commonwealth) (The Commonwealth Scheme for Mutual Assistance in Criminal Matters of 1986, as amended in 1990, 1999 and 2010); and
- Organisation of American States (OAS) (Inter-American Convention on the Taking of Evidence Abroad of 1975 and Additional Protocol of 1984; and Inter-American Convention on Mutual Assistance in Criminal Matters of 1992 and Optional Protocol of 1993).

## 18.2 Scope of assistance

Since corruption and economic crimes have become increasingly transnational in nature, there is a clear need to create a permissive system for international co-operation, providing the “the widest measure of mutual assistance”. Increased access to electronic transactions, liberalized capital and financial markets, the ease of travel and more opportunities for offenders to move between jurisdictions to avoid detection and prosecution, are the major challenges prosecutions worldwide face nowadays.

<sup>5</sup> See Article 1 (1), CoE’s 1959 European Convention on Mutual Assistance in Criminal Matters. Available from <http://www.coe.int/fr/web/conventions/full-list/-/conventions/rms/09000016800656ce>

<sup>6</sup> See EU, Convention on Mutual Assistance in Criminal Matters between the Member States of the EU (2000). Available from [http://europa.eu/legislation\\_summaries/justice\\_freedom\\_security/judicial\\_cooperation\\_in\\_criminal\\_matters/l33108\\_en.htm](http://europa.eu/legislation_summaries/justice_freedom_security/judicial_cooperation_in_criminal_matters/l33108_en.htm)

<sup>7</sup> See Stephenson K. et al., *Barriers to Asset Recovery: An Analysis of the Key Barriers and Recommendations for Action*, 2011, STAR Initiative, p. 53. Available from <http://star.worldbank.org/star/sites/star/files/Barriers%20to%20Asset%20Recovery.pdf>

### Article 46 (3) of the UNCAC provides that MLA may be requested for any of the following purposes:

- a) Taking evidence or statements from persons;
- b) Effecting service of judicial documents;
- c) Executing searches and seizures, and freezing;
- d) Examining objects and sites;
- e) Providing information, evidentiary items and expert evaluations;
- f) Providing originals or certified copies of relevant documents and records, including government, bank, financial, corporate or business records;
- g) Identifying or tracing proceeds of crime, property, instrumentalities or other things for evidentiary purposes;
- h) Facilitating the voluntary appearance of persons in the requesting State Party;
- i) Any other type of assistance that is not contrary to the domestic law of the requested State Party;
- j) Identifying, freezing and tracing proceeds of crime in accordance with the provisions of chapter V of this Convention;
- k) The recovery of assets, in accordance with the provisions of chapter V of this Convention.

The need for an enhanced co-operation is addressed in many international instruments (as stated in Section 18.1 above) and, in particular, by the UNCAC, which contains a number of provisions on MLA as a part of international co-operation in criminal matters (Article 43 (1)), mutual legal assistance (Article 46) and asset recovery (Articles 54-55).

At a formal level, MLA is usually required where coercive measures are necessary, or where evidence has to have a particular form in order to be admissible in the criminal proceedings of the requesting State. However, prosecutors and investigators sometimes seek MLA without first exploring more informal and streamlined options that could, in fact, meet their need. In many cases, such an informal approach may result to be more effective, especially when the requesting State is at the early stage of investigation and is not yet gathering formal evidence.

Options for such an informal approach may include the following:

- Police-to-police communication as a way of acquiring information. In addition to direct communication between police agencies, International Criminal Police Organization (INTERPOL) consistently assists its members in their investigations (see Section 18.6);
- Other agency-to-agency communication;
- Embassy/consular communication. Diplomatic and consular missions could be used for obtaining information, evidence or, for example, taking witness statements by investigators (upon consent of the host State and the witness);
- Where the documentation required is in the public domain of the requested State, it may often be obtained administratively.

Alternatively, formal MLA request will be needed, for example, for:

- Obtaining testimony from a non-voluntary witness;
- Interviewing a person as a suspect;
- Executing searches and seizures, and freezing of assets;
- Obtaining information on bank accounts, Internet records and the content of emails.

The extent to which States are willing to assist with a formal MLA request, depends on many factors, which includes a State's commitments under relevant bilateral and multilateral treaties, their domestic laws, relations between the requested and the requesting States, and the reciprocity principle, i.e. the ability of parties to provide equivalent assistance.

## 18.3 Formal requests

With regard to offences of corruption, States Parties to the UNCAC are asked to provide each other with MLA in investigations, prosecutions and judicial proceedings.<sup>8</sup> Article 46 (3) of the UNCAC contains a comprehensive, although not exhaustive, list of the types of assistance that may be requested in a formal MLA process.

The decision to assist a requesting State to gather evidence, located in the requested State, remains with the requested State. Nevertheless, States should provide MLA "to the fullest extent possible under relevant laws, treaties, agreements and arrangements of the requested State Party..."<sup>9</sup> States Parties to the UNCAC cannot refuse MLA on grounds of dual criminality when the

<sup>8</sup> See Article 46 (1), UNCAC.

<sup>9</sup> See Article 46 (2), UNCAC.

### Paragraph 15 of Article 46 of the UNCAC (a short checklist of what the formal request must include):

- The identity of the authority making the request;
- The subject matter and nature of the investigation, prosecution or judicial proceeding to which the request relates and the name and functions of the authority conducting the investigation, prosecution or judicial proceeding;
- A summary of the relevant facts, except in relation to requests for the purpose of service of judicial documents;
- A description of the assistance sought and details of any particular procedure that the requesting State Party wishes to be followed;
- Where possible, the identity, location and nationality of any person concerned; and
- The purpose for which the evidence, information or action is sought.

request does not involve coercive action.<sup>10</sup> In the context of corruption cases, some of the grounds for the refusal to MLA requests, such as bank secrecy<sup>11</sup> or with respect to offences considered to involve fiscal matters,<sup>12</sup> are prohibited or seriously curtailed.

In addition, the competent authorities of a State Party may transmit information relating to criminal matters even without prior request where they believe that such information could assist the authority in another State Party in undertaking or successfully concluding inquiries and criminal proceedings or could result in a request formulated by the latter.<sup>13</sup> The aim of such provisions is to encourage States Parties to the UNCAC to exchange information on criminal matters voluntarily and proactively.

The only general obligation imposed upon a receiving State Party under the UNCAC is to ensure the confidentiality of the information transmitted and to comply with any restrictions on its use, unless the data received is of an exculpatory nature. In this case, the receiving State Party is free to disclose this information to the suspect or accused in its domestic proceedings.<sup>14</sup>

#### The form of the MLA request

There is no universally agreed format of a request for MLA, however, the formal requirements are set out in the relevant treaty. It should be a stand-alone document, compiled by the requesting authority, in a specific format and contain all the necessary information in accordance with the relevant treaty or domestic legislation. Incomplete requests may either lead to a request for additional information or to a refusal causing delay and or impediments in providing assistance.

#### Specificity – Avoiding ‘Fishing Expeditions’

The central authorities in many countries receive a lot of imprecise MLA requests. Any such request should contain an emphasis that the evidence sought for the investigation or prosecution is relevant. Further, the requested evidence must be sufficiently identified. There should be a clear description of why or how the requested evidence will contribute to the on-going investigation or prosecution. In this respect, ‘fishing expeditions’ are not permitted as all requests for assistance should be specific.

One common example of a ‘fishing expedition’ is a request for banking information. Any MLA request should provide an indication of sufficient information for the relevant bank and/or bank account to be identified. The type of data requested from those accounts, i.e. bank opening forms, wire transfers, ATM withdrawals etc., as well as the time period should be indicated in the MLA request as well.

## 18.4 Challenges of seeking MLA in corruption cases

Particular problems may be encountered when requesting MLA in the following corruption cases:

#### • High-level official

MLA may not be provided, “national interests” or privileges and immunities provisions may be cited, if the investigation involves a high-level official or an influential businessman from the public or private sector in the requested State.

Though this is a serious challenge, an attempt can be made to overcome it by getting to know better the political, legal and even cultural systems in the requested State.

<sup>10</sup> See Article 46 (9) (b), UNCAC.

<sup>11</sup> See Article 46 (8), UNCAC.

<sup>12</sup> See Article 46 (22), UNCAC.

<sup>13</sup> See Article 46 (4), (5), UNCAC.

<sup>14</sup> See Article 46 (5) of UNCAC.



Robert Wallner (left), Liechtenstein's Prosecutor General, and Oliver Stolpe (right), Senior Advisor, Stolen Asset Recovery Initiative at an OSCE seminar on international co-operation in identifying, restraining and recovering stolen assets, Vienna, 3 September 2012

- **Right of appeal**

Although it can cause a lengthy delay, some States allow the subject of a request for MLA to be notified about the issuance of such a request and appeal against the sharing of evidence with the requesting authority. In some countries, for instance, in Liechtenstein and Switzerland, appeals are available in relation to the disclosure of information with regard to requests for banking information. In addition, certain institutions (e.g., banks) may also have similar rights of appeal.

- **Search and/or seizure**

Search and seizure are generally powerful weapons for prosecutors and investigators, yet often face some practical challenges. Similarly, as all inquiries that are made in the MLA request involving some level of coercion, they require a careful assessment and a well-constructed argument that address any potential legal challenges in the requested State. It is not enough to simply request a search without offering a clear explanation as to why it is believed that it will result in obtaining relevant information or evidence.

- **Requests for freezing and confiscation**

The law on the confiscation of assets, the proceeds of crime and in particular corruption, remain undeveloped in many countries. As different States have various conditions for ordering interim freezing or restraint orders on assets that are subjects of the request, the requesting authority should aim to provide as much information as possible about the link between the suspect's alleged criminal activity and the assets under consideration.

The UNCAC provides considerable assistance to those seeking MLA in the context of asset recovery: Article 31 of the Convention prescribes domestic freezing and confiscation regime, while Chapter V on Asset recovery contains Article 54 and 55, which provide the mechanisms for recovery of property through international co-operation in seizure, freezing and confiscation.<sup>15</sup>

- **Sensitive aspects of the investigation**

It may be that certain information in the letter of request is highly sensitive in nature, while the system for obtaining MLA is inherently insecure. This could be exploited by criminals or corrupt officials. Therefore, a great amount of care should be taken with respect to the sensitive information. Both the UNTOC (Article 18 (20)) and the UNCAC (Article 46 (20)) address this matter by requiring compliance with confidentiality obligations.

The issue of sensitivity also applies to the concerns requested States may have, and obligations with regard to a duty of care that may exist when transmitting sensitive information to a requesting State.

Recognizing the challenges MLA requests pose for many authorities, the United Nations Office on Drugs and Crime (UNODC) has developed an *MLA Request Writer Tool*, to which justice system practitioners may request access.<sup>16</sup>

## 18.5 European Evidence Warrant (EEW)

The EEW replaced the system of mutual assistance in criminal matters between the EU Member States for obtaining objects, documents and data for use in criminal proceedings. The EEW came into force in 2009 (Framework Decision 2008/978/JHA)<sup>17</sup> and Member States were required to give effect to the EEW by January 2011.

The EEW only deals with judicial co-operation and does not extend to co-operation between “police, customs, border and administrative co-operation”; these remain in the realm of MLA through treaties and Conventions or simply informal assistance.

<sup>15</sup> For more details, see Chapter 20 on Anti-money laundering and the confiscation and recovery of assets.

<sup>16</sup> See UNODC, *Mutual Legal Assistance Request Writer Tool*, available from <http://www.unodc.org/mla/index.html>

<sup>17</sup> See EU, *Council Framework Decision on the European evidence warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters* (2008/978/JHA), available from <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:350:0072:0092:EN:PDF>

The underlying rationale of the EEW is to expedite regional co-operation through “mutual recognition” of judicial decisions, with the ultimate aim of enforcing judicial decisions of one EU Member State in another EU Member State. For the purposes of MLA, the EEW replaces a request for assistance and puts it on the footing of a judicial order. The EEW is issued “to obtain any objects, documents and data for use in proceedings in criminal matters... This may include for example objects, documents or data from a third party, from a search of premises including the private premises of the suspect, historical data on the use of any services including financial transactions, historical records of statements, interviews and hearings, and other records, including the results of special investigative techniques”.<sup>18</sup>

The main aim of the Framework Decision is to overcome the differences in legal systems of the EU Member States by the way of the ‘approximation’ of offences, procedure, etc. To that end, the adoption of both the EEW and the European Arrest Warrant (EAW) has contributed to the identification of offences that could be ‘approximated’. Corruption is one of such offences. In addition, Article 13 of the aforementioned Decision also limits the grounds for the refusal of the execution in order to promote a higher level of co-operation. The practical application of the EEW in the Member States is closely monitored by the European Council in accordance with Article 20.

In addition to the introduction of the EEW, there has been an increasing recognition of the need for EU Member States not only to exchange information, including intelligence, but to do so rapidly. Council Decision 2007/845/2007<sup>19</sup> requires Member States to set up national Asset Recovery Offices to allow for direct communication and prompt exchange of information.

## 18.6 Judicial and law enforcement networks

One of the main challenges for practitioners (law enforcement, prosecutors and judiciary) has been the continuing lack of a proper understanding of the requirements of the MLA framework, which has led to requests either being rejected or not fully complied

with in the requested State. Consequently, networks to facilitate co-operation amongst States were created. The networks discussed below<sup>20</sup> are bright examples of the mechanisms that have been established to enhance international co-operation in criminal matters, and specifically in relation to corruption and asset recovery.

### Financial Intelligence Units and the Egmont process

As corruption usually involves the movement of a substantial amount of money or assets, strategies to prevent and combat such transactions have become the subject of a great focus in the last 15 years. Financial intelligence units (FIUs) constitute an important component of this work. An FIU is a central national agency responsible for receiving, analyzing, and transmitting disclosures on suspicious transactions to the competent authorities, such as investigators or prosecutors. The FIUs also constitute an important mechanism for sharing of informal, but secure financial data on suspects, bank accounts and money transfers. It is also a valuable potential source of international co-operation with a particular emphasis on the fight against money laundering and the financing of terrorism. This channel of co-operation amongst FIUs is an informal network known as the Egmont Group of FIUs. The Egmont Group of FIUs meets regularly to find ways to promote the development of FIUs and to enhance



Participants during a workshop jointly co-organized by the OSCE/OCEEA, UNODC and EAG on cross-border co-operation against corruption and money laundering involving officials from OSCE participating States in Central Asia, South Caucasus and Eastern Europe, Vienna, 2 October 2014

<sup>18</sup> Ibid., (7).

<sup>19</sup> See EU, *Council Decision 2007/845/JHA concerning cooperation between Asset Recovery Offices of the Member States in the field of tracing and identification of proceeds from, or other property related to, crime*. Available from <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2007:332:0103:0105:EN:PDF>

<sup>20</sup> In addition to the networks discussed in Chapter 20 on asset recovery and Global Focal Point Initiative supported by StAR and INTERPOL, there are a number of regional networks, which were not included, but can be found at the UNODC website: [www.unodc.org/unodc/en/legal-tools/international-cooperation-networks.html](http://www.unodc.org/unodc/en/legal-tools/international-cooperation-networks.html)

co-operation, especially in the areas of information exchange, training and sharing of expertise.<sup>21</sup>

### INTERPOL<sup>22</sup>

INTERPOL is the world's largest international police organization, whose primary role is to assist law enforcement agencies around the world in combating all forms of transnational crime. It runs a secure global police information and supports a system that connects all 190 National Central Bureaus, along with other authorized law enforcement agencies and strategic partners, allowing them to instantly access, request and submit vital data.<sup>23</sup> It also provides support to member countries in ongoing international investigations on a case-by-case basis.

### Europol<sup>24</sup>

Europol is the EU's law enforcement agency that assists the EU Member States in preventing and combating serious international organized crime and terrorism. Within the MLA context, Europol helps to improve the sharing of intelligence between law enforcement bodies across the EU and globally.

### Eurojust<sup>25</sup>

Eurojust was set up in 2002 to permit effective judicial co-operation between EU Member States. Its key aim is to support and strengthen co-ordination and co-operation among national investigating and prosecuting authorities in relation to serious crime. It facilitates the execution of international MLA and provides assistance with extradition requests. Eurojust's competence covers the same types of crime and offences for which Europol has competence. For other types of offences, Eurojust may assist in investigations and prosecutions at the request of a Member State.<sup>26</sup>

### European Judicial Network<sup>27</sup>

The European Judicial Network (EJN) is a network of national contact points for the facilitation of judicial co-operation in criminal matters between the EU Members States.

"National contact points are designated by each Member State among Central authorities in charge of international judicial co-operation, judicial authorities

and other competent authorities with specific responsibilities in the field of international judicial co-operation, both in general and for certain forms of serious crime, such as organized crime, corruption, drug trafficking or terrorism."<sup>28</sup>

### The Competent National Authorities (CNAs) online Directory<sup>29</sup>

The online Directory of CNAs provides information on the competent national authorities designated under the UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988, the UNTOC and the Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the UNTOC.

The Directory contains the contact information of over 600 CNA's authorized to receive, respond to and process requests for a number of actions, including MLA in criminal matters.

It also contains essential information on:

- State membership in existing regional networks;
- Legal and procedural requirements for granting of requests;
- Use of the Organized Crime Convention as the legal basis for requests;
- Links to national laws and websites;
- Indication of requests that can be made through INTERPOL.

In the area of **asset recovery**, the World Bank/UNODC Stolen Asset Recovery (StAR) Initiative (see Chapter 1, Section 1.2.6) has joined forces with INTERPOL in order to create a global network of asset recovery experts, who assist with the exchange of information.<sup>30</sup>

The International Centre for Asset Recovery (ICAR) of the Basel Institute on Governance (see Chapter 1, Section 1.2.7) assists law enforcement agencies and prosecutors in partner countries with handling concrete and complex international corruption and/or money laundering cases with an asset recovery angle. ICAR's experts also assist countries with MLA requests, through strategic and drafting advice, as well as with cross-border issues and international co-operation, facilitating collaboration with other jurisdictions.<sup>31</sup>

21 See <http://www.egmontgroup.org/about>

22 See [www.interpol.int/](http://www.interpol.int/)

23 See <http://www.interpol.int/About-INTERPOL/Priorities>

24 See [www.europol.europa.eu/](http://www.europol.europa.eu/)

25 See <http://eurojust.europa.eu/Pages/home.aspx>

26 See <http://www.eurojust.europa.eu/about/background/Pages/mission-tasks.aspx>

27 See [www.ejn-crimjust.europa.eu](http://www.ejn-crimjust.europa.eu). In addition, there is a European Judicial Network in Civil and Commercial Matters, see <http://ec.europa.eu/civiljustice/>

28 See [www.ejnforum.eu/cp/](http://www.ejnforum.eu/cp/)

29 [www.unodc.org/comppauth](http://www.unodc.org/comppauth)

30 See <http://www.interpol.int/Crime-areas/Corruption/International-asset-recovery>

31 See <https://www.baselgovernance.org/theme/icar>

## 18.7 Conclusions

The transnational nature of the crime of corruption often requires investigators, prosecutors and judges to have the ability to gather evidence located in another State. International co-operation measures are an important part of the process, but they still remain a challenge for most practitioners. States should, in addition, to being a party to all the key treaties/Conventions have in mind the following:

- Ensure flexibility in their domestic law and practice to afford one another the widest possible measure of MLA in investigations, prosecutions and judicial proceedings by, *inter alia*, minimizing the ambit of grounds for refusal in MLA and enabling the execution of relevant requests in accordance with procedures that make possible the use of evidence in the foreign proceedings;
- Further strengthen the effectiveness of designated central authorities involved in MLA and maintain direct channels of communication between them in order to ensure timely execution of requests;
- Make practitioners (law enforcement, prosecutors and judiciary) aware of, and join networks that help in facilitating informal and formal co-operation between States.
- Provide regular training programmes and guidance materials for investigators, prosecutors and judiciary on MLA, which could also improve the drafting of the MLA requests.

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# CHAPTER 19

# Extradition

## CONTENTS

19.1 Co-operation arrangements	218
19.2 Procedure	219
19.3 Double or dual criminality	219
19.4 European Arrest Warrant	220
19.5 Sufficiency of facts and evidence	220
19.6 'Extradite or prosecute'	221
19.7 Grounds for refusal of an extradition request	221
19.8 Conclusions and recommendations for action	222
Selected Bibliography	223

## CHAPTER 19

# Extradition

*Extradition is the oldest form of international co-operation in criminal matters; it enables a State to gain custody of a person outside its territory. It is the formal process by which a State, asserting jurisdiction, requests another State to transfer to it a person accused of a crime in order to stand trial or, if already convicted, to serve the sentence in the requesting State.*

*Extradition and jurisdiction are, therefore, inextricably linked. There is no customary international law obligation with respect to extradition. It is usually carried out on the basis of a bilateral treaty, concluded between the two States, that has specified the extraditable crimes as well as the permissible exceptions and the procedure. Normally, the alleged act must constitute a serious crime and be punishable in both jurisdictions (dual criminality requirement). Most States will not extradite their own nationals or will refuse an extradition request if it concerns an act that the requested State considers to be a political offence or one which has already been tried (double jeopardy principle). As crime has become more transnational in nature, some States have begun to conclude regional treaties or multilateral arrangements to facilitate the extradition process and mutual legal assistance, so as to ensure justice and combat impunity.*

## 19.1 Co-operation arrangements

The international community has responded to the rise in transnational crime by adopting multilateral treaties to enable extradition and mutual legal assistance. For example, *ad hoc* regional instruments such as the 1957 *European Convention on Extradition* (Council of Europe) establish agreed procedures and, more recently, the 2002 *Framework Decision on the European Arrest Warrant* (EAW) establishes a streamlined approach. Numerous United Nations treaties addressing specific crime issues contain provisions allowing the treaty

itself to serve as the basis for extradition - such as the 2003 *United Nations Convention against Corruption* (UNCAC), the 2000 *United Nations Convention against Transnational Organized Crime* (UNTOC) and the 1988 *United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*.

Like all international instruments, the Conventions seek to achieve two aims: first, to provide a legal basis for co-operation between States Parties in the absence of a bilateral arrangement; and second, to allow for the expansion of scope of extraditable offences specified under the existing bilateral arrangements.

The starting point in any extradition request is that there must be a legal basis for making the request, either:

- Bilateral extradition treaties;
- Regional extradition treaties or arrangements, e.g., the 1957 *European Convention on Extradition*, the 1966 *Commonwealth Scheme for the Rendition of Fugitive Offenders* and *sui generis* regional schemes for the surrender of fugitives such as the 2002 EAW;
- Universal instruments, e.g., Article 44 of the UNCAC, Article 16 of the UNTOC, or Article 10 of the *Anti-Bribery Convention of the Organisation for Economic Co-operation and Development* (OECD);
- Domestic legislation enabling extradition;
- Reciprocity and comity; or
- *Ad hoc* arrangements between States.

The procedures with regard to each scheme may overlap, with the exception of the EAW. The fundamental principles are present in all of them – the main differences lie in the details.

However, the universal conventions increasingly set a basic minimum requirement for extradition for the offences covered by them and encourage States Parties to adopt a variety of mechanisms designed to streamline the extradition process. They also increasingly eliminate

common obstacles to extradition, allowing a person to be extradited even when the conduct has not been criminalized by the State Party from which he or she is sought.<sup>1</sup>

## 19.2 Procedure

There are essentially two ways in which the extradition process may be initiated:

1. *Request for provisional arrest*: this applies where there is a flight risk. Many treaties and conventions set out the provisions for provisional arrest and provide for the time period in which the requesting State must submit a request for extradition with all supporting documentation. For example, Article 16 of the 1957 European Convention on Extradition allows for a maximum of 40 days.

The provisional request for arrest is often submitted via INTERPOL but sometimes to the competent authorities directly with an accompanying letter that provides a commitment that an extradition request will follow. Any request for provisional arrest must be accompanied by the following documents:

- An arrest warrant;
- A list of charges;
- A description of conduct;
- The personal details (including a photograph, if available) of the person sought.

2. *Request for extradition*: submission of the formal request for extradition and supporting documents via diplomatic channels, or through direct transmission of the request to the competent authority, or any other agreed mechanisms. Such an approach is preferable when there is no risk that the person sought is likely to leave the requested State. Arrest may follow after due consideration of the request.

However, in the case of the EAW, the procedure is simpler; the issuing authority submits the warrant to the executing authority for surrender of the person requested for extradition (see section 19.4).

Following arrest through either route, the domestic law of the requested State governs the entire proceedings. This includes any appeals challenging the extradition request by the person sought.

<sup>1</sup> See, for example, Article 44 (2), UNCAC.

## 19.3 Double or dual criminality

Most extradition treaties contain a clause that has traditionally been regarded as an essential safeguard, i.e. the requirement of double or dual criminality. This rule requires that, for an extradition request to succeed, the conduct complained of in the request must be criminalized in both the requesting and the requested State. Failure to satisfy this requirement normally leads to a rejection of the extradition request. This principle has been upheld in the courts of most jurisdictions.

What amounts to an extraditable offence varies between instruments and generally only applies to offences punishable under the laws of both the requesting and requested State with a sentence of twelve months or more.<sup>2</sup> In some treaties, the sentence threshold is set at two years or more.<sup>3</sup>

Article 43 (1) of the UNCAC establishes a conduct-based approach when interpreting the dual criminality requirement. Article 44 (2) of the UNCAC provision reflects a shift in the approach to extradition, as it allows a State Party, if its national law so permits, to grant extradition for any of the offences covered by the UNCAC, whether or not the offences are punishable under its own laws. Accordingly, the Convention makes it clear that the convention offence neither needs to be defined in the same terms in both countries, nor does it need to be placed within the same category of criminal offence, nor constitute an offence at all in the requested State. This provision greatly streamlines the approval process for extradition requests, where permissible by the laws of the requested State.

In addition to the definition of the conduct as a crime, consideration must also be given to the date of the offence, which is relevant in cases in which double criminality must be established: the offence must have been a crime under the law of both the requesting and requested State on the date the offence was committed so as not to violate the principle of legality, in particular the rule prohibiting retroactivity (*nullum crimen, nulla poena sine praevia lege poenali*).

<sup>2</sup> See, for example, European Convention on Extradition, 1957, Article 2. Available from <http://conventions.coe.int/Treaty/en/Treaties/Html/024.htm>

<sup>3</sup> See London Scheme for Extradition within the Commonwealth, 2002, para. 2. Available from [http://www.oas.org/juridico/english/mesicic3\\_jam\\_london.pdf](http://www.oas.org/juridico/english/mesicic3_jam_london.pdf)

## 19.4 European Arrest Warrant

In contrast, the EAW relies on mutual recognition of arrest warrants and surrender of the person concerned, on the understanding that an arrest warrant is a judicial decision issued by a Member State. One of the approaches embraced by the European Union (EU) to expedite regional co-operation was to adopt the innovative idea of ‘mutual recognition’ of judicial decisions, the aim of which is to make the judicial decisions of one Member State enforceable in all other Member States without the need for the traditional procedures for extradition or mutual legal assistance.

The EAW addressed the need to simplify and expedite the traditionally complex and lengthy extradition process. The EAW was one of the conclusions of the Tampere European Council of 15 and 16 October 1999 and was adopted through the Council Framework Decision of 13 June 2002 (2002/584/JHA). It was one of the first such measures to be adopted, and has the effect of eliminating the former formal requests and replacing them with mutual recognition by Member States of judicial decisions.

Under the Framework Decision, which must be transposed into national law in order to be implemented, an EAW may be issued for acts punishable by the law of the “issuing Member State” by imprisonment of at least 12 months or, when a person has already been sentenced, for sentences of at least four months. In addition, Article 2 (2) of the Framework Decision establishes a list of 32 offences which, if they are punishable under the law of the issuing Member State with imprisonment of at least three years, are exempt from the requirement of verification of dual criminality.

The 32 listed offences were considered to be common to all Member States, and included: participation in a criminal organization; terrorism; trafficking in human beings; sexual exploitation of children and child pornography; illicit trafficking in narcotic drugs and psychotropic substances, weapons, explosives, nuclear or radioactive materials, stolen vehicles; corruption; fraud; money laundering; counterfeiting; rape; arson; crimes within the jurisdiction of the International Criminal Court; unlawful seizure of aircraft or ships; sabotage. The requirement of dual criminality could be eliminated on the presumption that these offences had been defined as serious crimes in all Member States, and thus there was no need to require the step of verifying the dual criminality element. Nevertheless, the elimination of the explicit dual criminality requirement was initially not well received

by practitioners as it touched upon a fundamental safeguard of the rights of the accused.

National courts in Member States have generally demonstrated a willingness to give effect to the EAW. Support for the EAW can also be found in the judgments rendered by the European Court of Justice (ECJ),<sup>4</sup> encouraging States to interpret domestic law in a manner consistent with the purpose of the Framework Decision.

## 19.5 Sufficiency of facts and evidence

Multilateral conventions urge their States Parties to “expedite extradition procedures and to simplify evidentiary requirements” in respect of the convention crimes.<sup>5</sup>

In most civil law systems, extradition is viewed as a preliminary, auxiliary tool of international legal co-operation for bringing a fugitive offender to justice. The objective of the extradition mechanism is to surrender the person sought for proceedings that are being conducted in another jurisdiction. According to this concept, courts dealing with extradition cases abstain from examining the evidence of guilt against the person sought, as they consider that this examination is a matter exclusively for the judicial authorities of the requesting State. The authorities of the requested State are satisfied with the fact that a valid judicial warrant of arrest has been issued for an extraditable offence, that the substantive and procedural requirements for extradition have been met, and that none of the contractually or statutorily stipulated grounds for refusal of an extradition request applies in the given case.

In contrast, in common law systems (except those that recognize the EAW), in addition to the requirements stated above, a *prima facie* case against the accused must be presented, based on sufficient evidence. This means that when considering the extradition request, the judge must be satisfied that the evidence presented is adequate to justify the charges brought against the accused before the person can be surrendered to the requesting State.

<sup>4</sup> See Judgment of the Court (Grand Chamber), *Case C-105/03, Pupino, (2005)*. Available from <http://curia.europa.eu/juris/showPdf.jsf?text=&docid=59363&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=379451>

<sup>5</sup> See, for example, Article 44 (9), UNCAC.

The *prima facie* evidence of guilt has proved in practice to be a considerable impediment to extradition, not only between systems of different legal traditions but also between States following a similar legal system but having differing rules on the admissibility of evidence in judicial proceedings. Several common law States have waived the requirement in prescribed circumstances. Consequently, a trend may be developing to keep the burden of proof in extradition proceedings to a minimum and take into account the need for simplification of evidentiary requirements. Such an approach has been adopted in Article 16 (8) of the UNTOC and Article 44 (9) of the UNCAC.

## 19.6 'Extradite or prosecute'

At their core, the United Nations conventions have the principle that no criminal should escape justice. Thus, if countries do not extradite their own nationals, usually for legal and/or constitutional reasons, then they need to take on the responsibility of prosecuting the crime themselves. UN Conventions since the 1970s invariably contain an 'extradite or prosecute'<sup>6</sup> clause, otherwise known as *aut dedere aut judicare*.

Most civil law countries assert criminal jurisdiction over their nationals for all offences, wherever those nationals may have committed the offence(s), i.e. under the active personality principle of jurisdiction. Therefore, they will generally refuse to extradite their own nationals. This is in direct contrast to common law practice. The legislation of common law countries usually contains an explicit prohibition of extraterritoriality, and the assertion of criminal jurisdiction based on the active personality principle must be specifically provided for. In order to accommodate this difference between these two principal legal systems, many recent conventions require States Parties to consider extending the scope of their jurisdiction. Furthermore, Conventions have required States Parties to consult with each other in appropriate circumstances in order to avoid the competing jurisdictions as much as possible.<sup>7</sup>

Treaties containing the formula *aut dedere aut judicare* can be divided into two categories. The first category of international conventions contains clauses that

impose an obligation to extradite, while the obligation to prosecute arises only after the refusal of extradition. The second category of international conventions imposes an obligation to submit the case to prosecution, with extradition being either an available option or an obligation in case the State fails to submit the case to prosecution.<sup>8</sup>

In contrast, the EAW excludes the possibility of refusal to execute a warrant on the grounds of nationality, although it sets forth alternatives (for example, temporary surrender) where constitutional provisions prohibit the extradition of nationals.<sup>9</sup> This inevitably posed serious constitutional challenges in civil law countries, and required an amendment to national constitutions – or the development of clear and consistent case law – so as to give effect to the EAW without departing from fundamental principles established by the domestic legislation.

## 19.7 Grounds for refusal of an extradition request

Approval of a request for extradition is at the discretion of the requested State. The grounds for refusal are varied and may include:

- Double jeopardy: a person may not be tried twice for the same crime. Consequently, if the person sought has already been convicted or acquitted of the act, the extradition request will not be granted;
- Political offence exception (see below);
- Statute of limitations: the request will be refused if the date of the alleged conduct is outside the statutory limitations of the national law;
- Age: the request may be refused due to the age of the person sought;
- Absence of speciality: if the crime is not one which may only be tried in the requesting State (as specified in an extradition treaty), the requested State may refuse it;
- Previously extradited: if the requested State has custody of the person based upon an earlier extradition request, the requested State may need to seek the permission from the State that extradited the person to the requested country in the first place;

<sup>6</sup> See Article 44 (11), UNCAC.

<sup>7</sup> For deciding whether to prosecute or extradite, see, for example, Principle 8 of the Princeton Principles on Universal Jurisdiction, which provides that such decision shall be based on the balance of certain criteria: the fairness and impartiality of the proceedings in the requesting State; convenience to the parties and witnesses, as well as the availability of evidence in the requesting State, etc. Principle 8, Princeton Principles on Universal Jurisdiction, Princeton Project on Universal Jurisdiction, Princeton University, 2001. Available from [https://lapa.princeton.edu/hosteddocs/unive\\_jur.pdf](https://lapa.princeton.edu/hosteddocs/unive_jur.pdf)

<sup>8</sup> Para 11, The obligation to extradite and prosecute (*aut dedere aut judicare*), *Final Report of the International Law Commission*, 2014, p.6. Available from [http://legal.un.org/ilc/texts/instruments/english/reports/7\\_6\\_2014.pdf](http://legal.un.org/ilc/texts/instruments/english/reports/7_6_2014.pdf)

<sup>9</sup> See European Union, *Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States* (2002/584/JHA). Available from [http://eur-lex.europa.eu/resource.html?uri=cellar:3b151647-772d-48b0-ad8c-0e4c788042c2e.0004.02/DOC\\_1&format=PDF](http://eur-lex.europa.eu/resource.html?uri=cellar:3b151647-772d-48b0-ad8c-0e4c788042c2e.0004.02/DOC_1&format=PDF)

- Human rights: extradition will be refused when it violates human rights under any treaty in force for the requested State, e.g., under the *European Convention on Human Rights*, if the crime is punishable by the death penalty unless the requesting State undertakes not to impose it;
- Discrimination: if the requested State Party has substantial grounds for believing that the request has been made for the purpose of prosecuting or punishing a person on account of that person's sex, race, religion, nationality, ethnic origin or political opinions or that compliance with the request would cause prejudice to that person's position for any of these reasons (Article 6 (14) of the UNTOC, Article 44 (15) of the UNCAC);
- Physical or mental condition: if the person sought is in ill health to the extent that it would be unjust or oppressive to surrender him/her, the request may be refused or adjourned until the condition improves;
- Military offence exception (offences under military law which are not offences under ordinary criminal law).

In particular, the political offence exception has received renewed attention in the universal instruments and merits further consideration. Over the years, the political offence exception has constituted a ground for refusal of extradition in many countries. That exception was based upon the States' reluctance to assist in punishing political activity directed against the government of another State, such as treason, sedition, or attempts to force a ruling group to change or adopt certain policies, otherwise referred to as "pure" or "absolute" offences. This approach is fairly straightforward, however the difficulty arises in respect of "relative" offences, that is, conduct that alleges criminality but is also linked with political activity. It is this latter range of offences that national courts and international bodies have tried to deal with.

Extradition treaties usually refer to the term 'political offence' without further defining it, and, moreover, requested States retain an exclusive unilateral discretion to characterize an offence as criminal or political.<sup>10</sup>

However, various UN anti-terrorism instruments as well as the UNCAC have identified a range of offences that are excluded from being considered as 'political offences'.<sup>11</sup> Many national courts have been guided in

their interpretation of the term by these UN treaties as well as by the general comments and interpretation guidance issued by human rights committees and commissions.

## 19.8 Conclusions and recommendations for action

Extradition is the formal process of surrendering a person accused or convicted of a crime from one State to another. To ensure that a State does not unwittingly create a 'safe haven' for those accused/convicted of serious crimes such as bribery and corruption, it should, in addition to being a party to treaties/conventions, bear in mind the following:

- take appropriate measures aimed at simplifying and expediting extradition proceedings;
- recognize potential human rights challenges and resolve them;
- recognize the universal conventions as a treaty basis for extradition, mutual legal assistance or international co-operation in criminal matters;
- consider approaches on the regional level to facilitate extradition such as the EAW;
- strengthen capacities of the competent national authorities and the understanding of the extradition process in line with a State's regional and international commitments;
- provide assistance in the drafting of extradition requests and training programmes for investigators, prosecutors and judiciary, including the development of practical guidance manuals on extradition practices and procedures for practitioners.

<sup>10</sup> See Van den Wijngaert, C., *The Political Offence Exception to Extradition: The Delicate Problem of Balancing the Rights of the Individual and the International Public Order*, 1980, pp. 44-45.

<sup>11</sup> Under Article 44 (4) of UNCAC, bribery and corruption offences fall outside the exception. This is of importance specifically with regard to the treatments of PEPs.

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## CHAPTER 20

# Anti-Money Laundering and the Confiscation and Recovery of Assets

### CONTENTS

20.1	Anti-money laundering	226
20.2	Confiscation and recovery of assets	231
20.2.1	International framework for asset confiscation and recovery	231
20.2.2	Conviction-based asset confiscation	233
20.2.3	Non-conviction based (in rem) asset confiscation	234
20.2.4	Civil proceedings In Personam	235
20.2.5	Settlements in foreign bribery cases	235
20.2.6	Return of confiscated assets	236
20.2.7	National asset recovery bodies	236
20.2.8	Regional and international co-operation	237
20.3	Conclusions	238
	Selected Bibliography	239
<i>Box 20.1</i>	<i>Main models of Financial Intelligence Units</i>	227
<i>Box 20.2</i>	<i>Financial Action Task Force definition of PEPs</i>	229
<i>Box 20.3</i>	<i>The European Union Third Anti-Money Laundering Directive definition of PEPs</i>	229
<i>Box 20.4</i>	<i>Canadian definition of PEPs</i>	229
<i>Box 20.5</i>	<i>The United States' definition of PEPs</i>	230
<i>Box 20.6</i>	<i>The United Kingdom's definition of PEPs</i>	230
<i>Box 20.7</i>	<i>The Stolen Asset Recovery (StAR) Initiative's Principal Recommendations on PEPs</i>	231
<i>Box 20.8</i>	<i>Case study: Tunisia</i>	236
<i>Figure 20.1</i>	<i>Three part structure of UNCAC Article 57 (3) – return and disposal of assets</i>	232

## CHAPTER 20

# Anti-Money Laundering and the Confiscation and Recovery of Assets

*Acquisitive crime, be it corruption, fraud, or trafficking in narcotics, arms or human beings, is motivated by the prospect of financial gain. To enjoy the proceeds of their crimes, criminals and corrupt officials often launder money by placing it in financial institutions, moving funds through the international financial system in order to conceal their criminal origin, and reintegrating the funds in such a way that they appear to be legal. When States fail to confiscate proceeds of crime, criminals, including corrupt officials, can maintain access to those illicit funds, even during or after serving a prison sentence.*

*To help prevent and disrupt the money laundering process, countries have implemented anti-money laundering measures, which comprise of comprehensive legislation, creation of specialized government units, facilitation of interagency and international co-operation and close collaboration with the private sector. Effectively preventing, identifying and suppressing money laundering has several notable benefits, including reducing the appeal of criminal activity by making the*

*use of criminal proceeds more expensive, preventing criminals from enjoying the proceeds of their illicit activities, allowing States to more effectively identify and address criminal activity in their territory and increasing government revenue.*

*Identifying assets that may be tied to grand corruption is particularly fraught with difficulty, in large part due to the power that corrupt officials may wield. Financial institutions, government agencies and employees may also be wary of reporting suspicious transactions linked to high-level officials.*

*Examples have shown, however, that when corrupt officials lose power, national and international authorities can move quickly to identify assets that have been stolen from the State. Nonetheless, the process of locating, restraining and confiscating those assets can be challenging, particularly at the international level.*

*This Chapter provides an overview of anti-money laundering regimes and processes, it describes practices that have been developed to mitigate the money laundering risks associated with corrupt officials, and it examines the legal bases and international co-operation mechanisms for the confiscation and return of illicit assets.*



Sergey Kapinos (centre-left), the Head of the OSCE Centre in Bishkek and Melis Mambetjanov, Chairperson of the State Finance Intelligence Service under the President of the Kyrgyz Republic, signing an MoU on the launch of a joint project on combating money laundering, Bishkek, 15 May 2014

## 20.1 Anti-money laundering

Numerous cases have shown that corrupt officials, and criminals in general, often seek to move the proceeds of their crime into bank accounts and asset classes, which, due to their location or ownership structure, are difficult for law enforcement to identify.<sup>1</sup> The process of obscuring the illicit origin of assets is known as money

<sup>1</sup> See, for example Willebois, E., Halter E.M., et al., *The Puppet Masters: How the Corrupt Use Legal Structures to Hide Stolen Assets and What to Do About It*, 2011, available from <https://star.worldbank.org/star/sites/star/files/puppetmastersv1.pdf>

**Box 20.1 Main models of Financial Intelligence Units:**

- The **Judicial Model** is established within the judicial branch of government wherein “disclosures” of suspicious financial activity are received by the investigative agencies of a country from its financial sector such that the judiciary powers can be brought into play e.g., seizing funds, freezing accounts, conducting interrogations, detaining people, and conducting searches.
- The **Law Enforcement Model** implements anti-money laundering measures alongside already existing law enforcement systems, supporting the efforts of multiple law enforcement or judicial authorities with concurrent or sometimes competing jurisdictional authority to investigate money laundering.
- The **Administrative Model** is a centralized, independent, administrative authority, which receives and processes information from the financial sector and transmits disclosures to judicial or law enforcement authorities for prosecution. It functions as a “buffer” between the financial and the law enforcement communities.
- The **Hybrid Model** serves as a disclosure intermediary and a link to both judicial and law enforcement authorities. It combines elements of at least two of the FIU models.

*Source:* The Egmont Group of Financial Intelligence Units. Available from [www.egmontgroup.org/about/financial-intelligence-units-fius](http://www.egmontgroup.org/about/financial-intelligence-units-fius)

laundering. Legal definitions vary by jurisdiction, but money laundering can generally be described as occurring in three distinct stages: placement, layering and integration.

- The placement stage involves the placement of illicit proceeds into the financial system. This can be accomplished, for example, by depositing cash in a bank account.<sup>2</sup>
- The layering stage involves the execution of financial transactions between accounts and often across national borders in order to obscure the origin of the funds.
- The final stage of money laundering is integration. Funds that have been placed and layered are reintroduced into the legitimate economy through the purchase of luxury goods or real estate, company shares and other investments that tend to hold or generate value.

International standards to tackle money laundering and financing of terrorism are largely set by the Financial Action Task Force (FATF).<sup>3</sup> The FATF Recommendations, developed initially in 1990 and revised most recently in 2012, provide a comprehensive framework for States to build, maintain and improve efforts to fight money laundering and terrorist financing, both at the national and international level. Countries that are members of the FATF and FATF-style regional bodies conduct mutual evaluations against the FATF Recommendations. Mutual evaluations against the revised recommendations focus not only on technical

compliance (i.e. the implementation of the specific requirements of the FATF Recommendations, including the framework of laws and enforceable means; and the existence, powers and procedures of the competent authorities), but importantly, on the effectiveness of their implementation.

A primary goal of anti-money laundering measures is to guard against the exploitation of financial institutions and designated non-financial businesses and professions by those seeking to move or store the proceeds or instrumentalities of crime. The FATF Recommendations call upon States to adopt an adequate legal framework to criminalize, prevent, identify and suppress money laundering and to work with all relevant stakeholders, including the private sector, to implement that framework.

In response to the FATF Recommendations, States have adopted a variety of regulatory and supervisory systems to oversee private sector compliance with anti-money laundering rules and to manage international co-operation in cross-border cases. In nearly every national system, the financial intelligence unit (FIU)<sup>4</sup> holds a central role both as the key or sole recipient of suspicious transaction reports and other financial disclosures, as a hub of national knowledge on money laundering, and as a vehicle for the secure international exchange of information with key bodies, including other FIUs.

The FATF recommends that financial institutions and designated non-financial businesses and professions (hereafter referred to as reporting entities) be obliged to conduct customer due diligence and file suspicious activity reports. Many States have introduced anti-money laundering obligations for institutions or services

<sup>2</sup> When non-cash proceeds of crime are already in the financial system, for example, in the case of online theft from bank accounts, there is no placement stage.

<sup>3</sup> See Chapter 1, Section 1.2.9 for further details on FATF, and [www.fatf-gafi.org](http://www.fatf-gafi.org); international obligations in this area are formulated in Articles 6 and 7 of the United Nations Convention against Transnational Organized Crime (UNTOC), and Articles 14 and 23 of the United Nations Convention against Corruption (UNCAC).

<sup>4</sup> See also Article 58, UNCAC.

in addition to banks, such as credit card companies, money transfer services and online payment processors. Attorneys, notaries and other professions that serve as financial intermediaries or executors, or those who assist in the creation of corporate vehicles or trusts are also subject to anti-money laundering legislation. Dealers in high value goods such as art, precious metals and stones and even vehicles may also be affected, and casinos and real estate dealers are increasingly being brought into national anti-money laundering regimes. The goal of these obligations is to safeguard the integrity of financial systems and to create a climate of vigilance against crime, thereby reducing opportunities for criminals and corrupt officials to launder money through the placement, layering and integration of illicit proceeds and to avoid the unwitting involvement of financial intermediaries in laundering the proceeds of corruption.

To prevent money laundering from occurring, the international standards recommend that a reporting entity identifies the beneficial owner of potential and current customer by ascertaining the identity of the customer and by verifying the customer name against lists of known criminals, terrorists and politically exposed persons (PEP). These identification measures are broadly referred to as customer due diligence or Know Your Customer (KYC) requirements and they form a key component of the preventive side of anti-money laundering regimes.

Another goal of anti-money laundering measures is to suppress financial crime by identifying, reporting and investigating suspicious financial activity. To a large extent, public authorities rely on reporting entities to review transactions for indicators of suspicious activity and to report that activity to the FIU and further to law enforcement authorities for possible investigation. In a typical anti-money laundering regime, regulators and supervisory agencies work to ensure that the reporting entities submit suspicious transaction reports to a country's FIU. The FIU subsequently analyses the reports and develops files for further investigation by law enforcement authorities. Law enforcement authorities then forward cases for prosecution, and together with other forms of evidence, the suspicious financial activity may form the basis for a conviction on money laundering charges.

The FATF Recommendations, as revised in 2012, call for States and the private sector to employ a risk-based approach in national anti-money laundering efforts. Among national authorities, the risk-based approach to anti-money laundering involves a candid

country-assessment of the size and nature of the money laundering threat, vulnerabilities in the current anti-money laundering system and the consequence of successful money laundering. Among private sector entities, the risk-based approach involves a review of the risks present among the markets, products and customers with which the bank or company works. By identifying vulnerabilities, States and private sector entities are expected to be better able to direct their resources toward the highest risk areas, thus increasing overall effectiveness in the fight against money laundering stemming from all crimes, including corruption. In reviewing its risk-based approach guidelines, the FATF adopted *Risk-Based Guidance for the Banking Sector*<sup>5</sup> in 2014. In identifying and assessing the money laundering / terrorist financing (ML/TF) risk to which they are exposed, banks should consider - among a range of factors - jurisdictions with relatively higher levels of corruption.

#### **Anti-money laundering measures as an anti-corruption tool**

Money is laundered with the goal of enabling criminals to enjoy the proceeds of their crimes with impunity, and the proceeds of corruption are no exception. Not only does implementation of the FATF Recommendations assist States in reducing the risks of money laundering, but it also supports the objectives of the United Nations Convention on Transnational Organized Crime (UNTOC) and the United Nations Convention against Corruption (UNCAC).

Recognizing the links between corruption and money laundering, Article 14 of the UNCAC commits States Parties to institute comprehensive regimes "to deter and detect all forms of money laundering". The FATF also recognizes the utility of anti-money laundering measures in combating corruption, noting that "the measures taken by countries to combat money laundering and terrorist financing (ML/TF) are powerful tools that are useful in the fight against corruption."<sup>6</sup>

The FATF notes further that "Corruption is more likely to go unpunished in opaque circumstances where the proceeds of such crimes are laundered and cannot be traced back to the underlying corrupt activity, as is the case when the ownership of assets is obscured, and transactions and transfers leave an incomplete (or

<sup>5</sup> Available from <http://www.fatf-gafi.org/media/fatf/documents/reports/Risk-Based-Approach-Banking-Sector.pdf>

<sup>6</sup> See FATF, *Best Practices Paper: The Use of the FATF Recommendations to Combat Corruption*, 2013, p. 3. Available from <http://www.fatf-gafi.org/media/fatf/documents/recommendations/BPP-Use-of-FATF-Recs-Corruption.pdf>

**Box 20.2** Financial Action Task Force definition of PEPs

*“Foreign PEPs:* individuals who are or have been entrusted with prominent public functions by a foreign country, for example Heads of State or of government, senior politicians, senior government, judicial or military officials, senior executives of state owned corporations, important political party officials.

*Domestic PEPs:* individuals who are or have been entrusted domestically with prominent public functions, for example Heads of State or of government, senior politicians, senior government, judicial or military officials, senior executives of state owned corporations, important political party officials.

*International organisation PEPs:* persons who are or have been entrusted with a prominent function by an

international organisation, refers to members of senior management or individuals who have been entrusted with equivalent functions, i.e. directors, deputy directors and members of the board or equivalent functions.

*Family members* are individuals who are related to a PEP either directly (consanguinity) or through marriage or similar (civil) forms of partnership.

*Close associates* are individuals who are closely connected to a PEP, either socially or professionally.”

Source: FATF Guidance, *Politically Exposed Persons (Recommendations 12 and 22)*, 2013, available from <http://www.fatf-gafi.org/media/fatf/documents/recommendations/guidance-pep-rec12-22.pdf>

**Box 20.3** The European Union Third Anti-Money Laundering Directive definition of PEPs

“Natural persons who are or have been entrusted with prominent public functions and immediate family members, or persons known to be close associates, of such persons.”

Source: Directive 2005/60/EC of the European Parliament and of the Council.

**Box 20.4** Canadian definition of PEPs

The Freezing Assets of Corrupt Foreign Officials Act of March 2011, states that “politically exposed person” means a person “who holds or has held one of the following offices or positions in or on behalf of a foreign state and includes any person who, for personal or business reasons, is or was closely associated with such a person, including a family member:

- (a) head of state or head of government;
- (b) member of the executive council of government or member of a legislature;
- (c) deputy minister or equivalent rank;
- (d) ambassador or attaché or counsellor of an ambassador;

- (e) military officer with a rank of general or above;
- (f) president of a state-owned company or a state-owned bank;
- (g) head of a government agency;
- (h) judge;
- (i) leader or president of a political party represented in a legislature; or
- (j) holder of any prescribed office or position.”

The Act gives Canadian authorities the power to freeze assets of a PEP at the request of the foreign State.

Source: Freezing Assets of Corrupt Foreign Officials Act of March 2011<sup>8</sup>

no) audit trail. Effective implementation of the FATF Recommendations increases the transparency of the financial system by creating a reliable paper trail of business relationships, transactions, and discloses the true ownership and movement of assets.”<sup>7</sup>

When the proceeds of corruption are laundered, investigations of corruption necessarily involve investigations of money laundering. Thus, when properly implemented, anti-money laundering and anti-corruption efforts can mutually enforce one another.

**Politically Exposed Persons**

According to the FATE, politically exposed persons (PEPs) are those individuals who have been entrusted with prominent public functions.<sup>9</sup> National definitions vary, but many States have defined PEPs as heads of State, senior politicians, prominent judicial officials and their close family members and associates.

Given the power PEPs wield and the likelihood that some corrupt PEPs will attempt to launder the proceeds of their crime, FATF Recommendation 12 calls upon countries to require reporting entities dealing with

<sup>7</sup> See FATE, *A Reference Guide and Information Note on the use of the FATF Recommendations to support the fight against Corruption*, 2012. Available from <http://www.fatf-gafi.org/media/fatf/documents/reports/Corruption%20Reference%20Guide%20and%20Information%20Note%202012.pdf>

<sup>8</sup> Available from <http://laws-lois.justice.gc.ca/eng/acts/F-31.6/FullText.html>

<sup>9</sup> See also Article 52 (1), UNCAC.

### Box 20.5 The United States' definition of PEPs

The USA PATRIOT Act, Section 312 Title 3 refers to “senior foreign political figure” which is to a great extent similar to the definition of PEP. It calls for enhanced scrutiny of private banking accounts requested or

maintained by, or on behalf of a “senior foreign political figure, or any immediate family member or close associate of a senior foreign political figure.”

Source: USA PATRIOT Act of 2001<sup>10</sup>

### Box 20.6 The United Kingdom's definition of PEPs

The United Kingdom's Money Laundering Regulations' definition is limited to foreign PEPs:

“a politically exposed person' means a person who is -

- (a) an individual who is or has, at any time in the preceding year, been entrusted with a prominent public function by -
  - (i) a state other than the United Kingdom;
  - (ii) a Community institution; or
  - (iii) an international body, including a person who falls in any of the categories listed in paragraph 4 (1) (a) of Schedule 2
- (b) an immediate family member of a person referred to in sub-paragraph (a) [...]; or
- (c) a known close associate of a person referred to in sub-paragraph (a) [...].”

The Money Laundering Regulations additionally note that:

- “(a) individuals who are or have been entrusted with prominent public functions include the following -
  - (i) heads of state, heads of government, ministers and deputy or assistant ministers;
  - (ii) members of parliaments;
  - (iii) members of supreme courts, of constitutional courts or of other high-level judicial bodies whose

- decisions are not generally subject to further appeal, other than in exceptional circumstances;
- (iv) members of courts of auditors or of the boards of central banks;
- (v) ambassadors, chargés d'affaires and high-ranking officers in the armed forces; and
- (vi) members of the administrative, management or supervisory bodies of state-owned enterprises;
- (b) the categories set out in paragraphs (i) to (vi) of sub-paragraph (a) do not include middle-ranking or more junior officials;
- (c) immediate family members include the following -
  - (i) a spouse;
  - (ii) a partner;
  - (iii) children and their spouses or partners; and
  - (iv) parents;
- (d) persons known to be close associates include the following -
  - (i) any individual who is known to have joint beneficial ownership of a legal entity or legal arrangement, or any other close business relations, with a [PEP]; and
  - (ii) any individual who has sole beneficial ownership of a legal entity or legal arrangement which is known to have been set up for the benefit of a [PEP].”

Source: The Money Laundering Regulations 2007<sup>11</sup>

foreign, domestic or international organization PEPs, whether as customers or beneficial owners, to establish the PEP's source of wealth and source of funds and to closely monitor business relationships. In high-risk business relationships with PEPs, Recommendation 12 calls for the same enhanced due diligence to be applied to PEPs and their family members and close associates as well.

Historically, national efforts to scrutinize PEPs have focused on foreign PEPs. In 2012, however, in revisions to its Recommendations, the FATF placed a stronger emphasis on domestic PEPs. This expansion of the definition of PEPs is fairly recent and challenging; many countries have yet to bring their practices into full compliance.

Although many States have produced legal definitions of PEPs, the practical implementation of efforts to monitor PEPs and identify suspicious activity remains incomplete. The challenges posed to an effective PEPs regime are several. For instance:

- PEPs often hide behind complex structures involving anonymous trusts and legal entities created in States that are unwilling or legally unable to identify the beneficiaries.
- Shell corporations registered in jurisdictions that do not adequately collect or share beneficial ownership information can also be abused by corrupt PEPs to open bank accounts, move funds and purchase assets.
- With careful planning, it is possible for the name of the beneficiary of a financial arrangement to be absent from any public documentation.
- In situations in which a beneficiary's name does appear, it may be that of a relative or professional

<sup>10</sup> See [www.gpo.gov/fdsys/pkg/PLAW-107publ56/pdf/PLAW-107publ56.pdf](http://www.gpo.gov/fdsys/pkg/PLAW-107publ56/pdf/PLAW-107publ56.pdf)

<sup>11</sup> Available from [www.legislation.gov.uk/uksi/2007/2157/pdfs/ukxi\\_20072157\\_en.pdf](http://www.legislation.gov.uk/uksi/2007/2157/pdfs/ukxi_20072157_en.pdf)

### Box 20.7 The Stolen Asset Recovery (StAR) Initiative's Principal Recommendations on PEPs:

#### Principal Recommendation 1:

##### *Apply Enhanced Due Diligence to all PEPs*

Foreign and domestic laws and regulations should make no distinction between domestic and foreign PEPs. The standards adopted by FATF and regional and national standard setters should require similar enhanced due diligence for both foreign and domestic PEPs.

#### Principal Recommendation 2:

##### *Require a Declaration of Beneficial Ownership*

At account opening and as needed thereafter, banks should require customers to complete a written declaration of the identity and details of the natural person(s) who are the ultimate beneficial owner(s) of the business relationship or transaction as a first step in meeting their beneficial ownership customer due diligence requirements.

#### Principal Recommendation 3:

##### *Request Asset and Income Disclosure Forms*

A public official should be asked to provide a copy of any asset and income declaration forms filed with their authorities, as well as subsequent updates. If a customer

refuses, the bank should assess the reasons and determine, using a risk-based approach, whether to proceed with the business relationship.

#### Principal Recommendation 4:

##### *Periodic Review of PEP Customers*

PEP customers should be reviewed by senior management or a committee including at least one senior manager using a risk-based approach, at least yearly, and the results of the review should be documented.

#### Principal Recommendation 5:

##### *Avoid Setting Limits on the Time a PEP Remains a PEP*

Where a person has ceased to be entrusted with a prominent public function, countries should not introduce time limits on the length of time the person, family member, or close associate needs to be treated as a PEP.

Source: Greenberg T.S. et al., *Politically Exposed Persons: Preventive Measures for the Banking Sector*, 2012, the Stolen Asset Recovery (StAR) Initiative. Available from <https://star.worldbank.org/star/publication/politically-exposed-persons>

associate not captured under a particular country's definition, and as a result, the business relationship may not be subject to enhanced customer due diligence and monitoring.

PEPs who are knowledgeable in financial matters, or who are advised by financial experts, may succeed in identifying specific jurisdictions, financial institutions and arrangements that are less likely to face scrutiny or co-operate with law enforcement. National and global anti-money laundering efforts are ultimately as strong as their weakest components. Therefore, the effectiveness of efforts to prevent corrupt PEPs from relocating and disguising the proceeds of their crime would be bolstered across the board by the strengthening of anti-money laundering controls.

## 20.2 Confiscation and recovery of assets

The confiscation of illicit assets has traditionally been exercised by seizing and destroying drugs or weapons that are directly implicated in the commission of crimes. This approach, however, has been found to be insufficient in addressing many modern acquisitive crimes, such as international drug smuggling, trafficking in human beings and corruption, in which large amounts of money may be laundered and used to make purchases

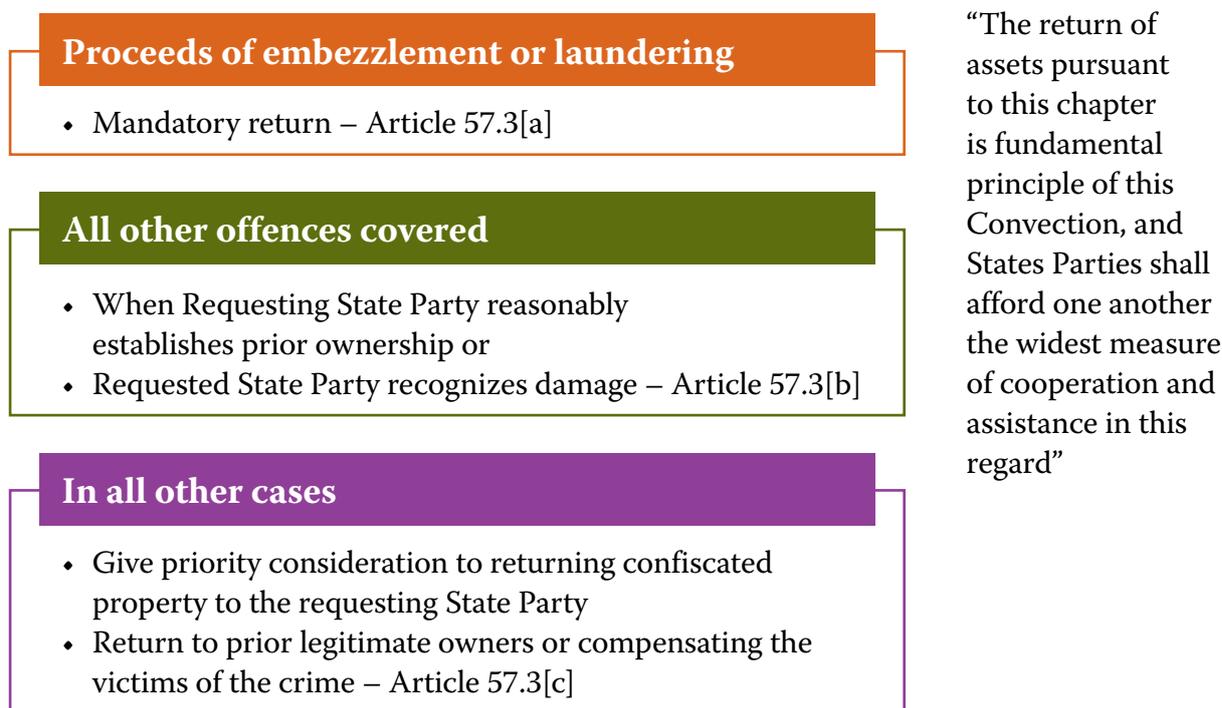
and investments that are not visibly linked to crime. When criminals, corrupt officials and their families are able to enjoy the fruits of crime, even during or after serving a prison sentence, law enforcement has a limited deterrent effect.

To meaningfully deter acquisitive crime, countries have recognized the need to focus enforcement efforts on confiscating the proceeds and instrumentalities of crime. International instruments such as the Vienna Convention on Drug Trafficking, adopted in 1988, introduced an international standard on confiscations related to drug trafficking, paving the way for additional international conventions that have since extended confiscation to all acquisitive crimes, including bribery and other corruption-related offenses. To date, the United Nations Convention on Transnational and Organized Crime and the United Nations Convention against Corruption comprise the broadest collection of international tools to confiscate proceeds of crime. The UNCAC also contains Chapter V (Articles 51-59) devoted to asset recovery.

### 20.2.1 International framework for asset confiscation and recovery

Article 12 of the UNTOC and Article 31 of the UNCAC require States Parties to adopt such measures as may be necessary to identify, trace, freeze or seize property that might be the object of an eventual confiscation order.

**Figure 20.1** Three part structure of UNCAC Article 57 (3) – return and disposal of assets



Source: Stolen Asset Recovery Initiative (StAR) of the World Bank and the UNODC, 2014.

The UNCAC addresses the recovery and return of assets that are derived from corruption-related offences. Article 51 declares that the return of assets is a fundamental principle and requires States Parties to afford one another the widest measure of co-operation and assistance in this regard.

Chapter V of the UNCAC sets forth the following obligations for States Parties:

- To take preventive measures: to require financial institutions to verify the identity of customers, to take reasonable steps to determine the identity of beneficial owners of funds deposited into high-value accounts and to conduct enhanced scrutiny of accounts of individuals who have been entrusted with prominent public functions and their family members and close associates (Article 52 (1));
- To facilitate direct civil and administrative actions by other States (Article 53);
- To recognize and provide mutual legal assistance on the basis of foreign confiscation orders in relation to proceeds of crime, property, equipment and other instrumentalities related to corruption offences (Articles 54 and 55);
- To return property to requesting States and legitimate owners, to compensate victims (Article 57). Paragraph 3 of the Article provides

three important guiding points as illustrated in Figure 20.1.

The final point above on the return of assets is a significant shift from the asset sharing model embodied in the United Nations Convention on Transnational Organized Crime. The UNTOC aims to promote international co-operation in order to prevent and combat transnational organized crime more effectively. Its Articles 12-14 address the question of confiscation, seizure, and disposal of assets.

Similarly to the UNCAC, the UNTOC requires States Parties to enable confiscation of the proceeds and instrumentalities of organized crime. Where the proceeds have been transformed or converted into other property, or intermingled with legitimate property, Article 12 makes such property liable to confiscation.

The UNTOC allows the confiscating State to dispose of the confiscated assets in accordance with its domestic law. When a request is made for the return of assets, the confiscating State is required under Article 14 to give priority consideration to returning the confiscated property to the requesting State.

Many States have made changes to their national legal frameworks to comply with the UNCAC and to facilitate

the confiscation and recovery of proceeds of crime, including corruption-related offenses. The strongest asset confiscation regimes provide for the identification, freezing, seizure and confiscation of proceeds of crime, including illicitly acquired funds, real estate and other assets. They also allow States to request freezing and confiscation from other States, and, in turn, to execute foreign freezing and confiscation orders.

The Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism<sup>12</sup> provides States with strong tools and co-operation mechanisms to increase their effectiveness in pursuing money-laundering cases stemming from predicate offenses including corruption.

The fundamental importance of effectively preventing transfers of the proceeds of crime, theft, embezzlement and other diversion of public assets as well as of recovering stolen assets for the credibility of countries anti-corruption efforts, have also been acknowledged by all OSCE participating States in the 2012 Ministerial Council Declaration on Good Governance.<sup>13</sup> They have agreed that effective asset recovery requires strong political will, putting in place the necessary legal and institutional frameworks, empowering practitioners with proper skills and resources, and establishing proactive and swift national and international co-operation and networking frameworks. They have also expressed political support for the implementation of international asset-recovery commitments.

### 20.2.2 Conviction-based asset confiscation

Post-conviction asset recovery plays an essential role in effectively addressing acquisitive crime. It is clear that criminalizing the conduct from which illicit proceeds or profits are made is not sufficient to punish or deter an offender: even if arrested and convicted, the offender will be able to enjoy the illegal gains, either personally, or through their families or associates. Therefore, without post-conviction confiscation of illegally acquired property, there remains the perception that crime pays, and the criminal justice system is ineffective in removing the incentive for acquisitive crime.

For this reason, States must, to the greatest extent possible under their national system of law, have the necessary legal framework to enable post-conviction confiscation.<sup>14</sup> A strong confiscation regime will provide for the identification, freezing, seizure and confiscation of the proceeds and instrumentalities of crime.

There are several systems of conviction-based asset recovery, depending on the property which is confiscated:

#### (i) Property-based system

A property-based system allows confiscation of property found to be proceeds or instrumentalities of crime (“tainted property”):

- Direct proceeds of the crime, such as the funds stolen or received as a bribe;
- Indirect proceeds of the crime, such as property purchased with the stolen funds or the appreciation in the value of bribe payments;
- Instrumentalities of the crime – property that may have been acquired legitimately but was used to commit a crime. While some jurisdictions accept that any use of asset, even if peripheral to the crime, justifies confiscation, others require more than an incidental connection: the crime must be dependent on or resulting directly from the use of the asset.<sup>15</sup>

In some countries, post-conviction confiscation of criminal proceeds is mandatory – examples include Germany, Italy, Finland, and Sweden.<sup>16</sup>

Sometimes it may be difficult to estimate the amount of the proceeds of crime, or such evidence may be difficult to present. In such instances, some jurisdictions estimate the proceeds by taking into account the nature of the offence, the extent of the criminal activity and other relevant circumstances.

As this basis for recovery is specific to property, confiscation becomes difficult in cases where the property cannot be located, has been transferred to a third party, is outside the State, has been substantially diminished in value, or has been mixed with other property.

<sup>12</sup> See Council of Europe, *Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism* (CETS No.198), 2005, available from [www.coe.int/t/dghl/monitoring/cop198/about/about\\_en.asp](http://www.coe.int/t/dghl/monitoring/cop198/about/about_en.asp)

<sup>13</sup> See OSCE, *Declaration on Strengthening Good Governance and Combating Corruption, Money-Laundering and the Financing of Terrorism* (MC. DOC/2/12), available from <http://www.osce.org/cio/97968>

<sup>14</sup> Establishing a national system of post-conviction confiscation is required by Article 31 (1) of the UNCAC.

<sup>15</sup> Brun, J.-P., Gray, L., Scott, C., and Stephenson, K.M., *Asset Recovery Handbook: A Guide for Practitioners*, 2011, Stolen Asset Recovery Initiative, pp. 109-111.

<sup>16</sup> See [http://ec.europa.eu/dgs/home-affairs/e-library/documents/policies/organized-crime-and-human-trafficking/confiscation-and-asset-recovery/index\\_en.htm](http://ec.europa.eu/dgs/home-affairs/e-library/documents/policies/organized-crime-and-human-trafficking/confiscation-and-asset-recovery/index_en.htm); and European Commission, *Report Assessing the effectiveness of EU Member States' practices in the identification, tracing, freezing and confiscation of criminal assets* (01/06/2009).

## (ii) Value-based, or benefit system

A value-based, or benefit system allows for the determination of the value of proceeds and instrumentalities of crime and the confiscation of an equivalent value, in the form of a monetary penalty. Under this system, the court calculates the direct and indirect benefit to the convicted offender of a particular offence. The court will make a confiscation order for the amount of the accrued benefit, or for the amount of the realisable assets in the defendant's position, if these are lower than the overall benefit obtained.

Examples of countries that permit value-based confiscation include the United Kingdom, Denmark, France and the Netherlands.<sup>17</sup>

Under this system, the benefit must be linked to the offence for which the defendant was convicted. However, in cases where the prosecution does not succeed in proving all the charges or chooses only to pursue a number of selected charges, it may be problematic to determine the actual benefit that was obtained by the defendant.<sup>18</sup>

## (iii) Combination system

In fact, most States adopt a combination of the two systems. Value-based is typically permitted under certain conditions, for instance, when the proceeds have been used, destroyed or hidden by the offender.

The confiscation proceedings following a criminal conviction are generally, but not always, of a civil nature and use the civil standard of proof (balance of probabilities). The burden of proof is also frequently reversed: certain property is presumed to be the proceeds or instrumentalities of the crime for which the conviction was entered, and it is the burden of the convicted person to prove otherwise.

## 20.2.3 Non-conviction based (in rem) asset confiscation

Non-conviction based, or *in rem*, asset confiscation or forfeiture (NCB)<sup>19</sup> generally does not require a criminal trial and a conviction. NCB procedures are typically judicial actions against assets and not individuals, which allow a government to confiscate assets despite insufficient evidence to support criminal conviction or

in cases in which the violator is unavailable because he or she is deceased, a fugitive, immune, highly powerful or simply unknown. NCB confiscation can be used to recover proceeds of crimes in cases in which the power and influence of corrupt officials or other realities prevent criminal investigations. In addition, with close international co-operation, NCB confiscations may be used to confiscate assets located outside of the State where the corruption occurred.

Article 54 (1) (c) of the UNCAC specifically addresses NCB asset confiscation: "Consider taking such measures as may be necessary to allow confiscation of such property without a criminal conviction in cases in which the offender cannot be prosecuted by reason of death, flight or absence or in other appropriate cases."

### **Arguments against NCB asset confiscation/forfeiture:**

1. *Breach of the presumption of innocence by shifting the burden of proof:* the individual is required to prove beyond reasonable doubt that the assets are not related to a crime, whereas the authorities only have to prove on the balance of probabilities that the assets are proceeds or instrumentalities of crime.
2. *Breach of the right to property:* property is taken away without any finding of guilt.

### **European Court of Human Rights (ECtHR) responses in favour of NCB asset confiscation:**

1. Confiscation is a preventive measure, which is designed to take out of circulation money that is presumed to be related to illegal acts. It *does not determine a criminal charge* against the applicant and cannot be compared to a criminal sanction.<sup>20</sup> However, confiscation *will not be justified where the individual has been acquitted.*<sup>21</sup>
2. Shifting the burden of proof to the accused is not incompatible with the fairness of a trial as long as appropriate procedural safeguards are provided to the defence. For example, in *Butler v UK*, the customs' authorities did not have unfettered discretion to seize and forfeit the applicant's money: the exercise of their powers was subject to judicial supervision, and at no stage was the applicant faced with irrefutable presumptions of fact or law. The domestic courts weighed the evidence before them, assessed it carefully and based the forfeiture order on that evidence.<sup>22</sup>

<sup>17</sup> Ibid.

<sup>18</sup> Brun, J.-P., Gray, L., Scott, C., and Stephenson, K.M., *Asset Recovery Handbook: A Guide for Practitioners*, 2011, Stolen Asset Recovery Initiative, p. 113.

<sup>19</sup> Greenberg, T.S., Samuel, L.M., Grant, W., and Gray, L., *Stolen Asset Recovery – A Good Practices Guide for Non-Conviction based Asset Forfeiture*, 2009, Stolen Asset Recovery Initiative, pp. 13-19.

<sup>20</sup> European Court of Human Rights (ECtHR), *Butler against the United Kingdom*, Application no. 41661/98, Admissibility decision of 27 June 2002, p. 9; *Walsh against the United Kingdom*, Application no. 43384/05, Admissibility decision of 21 November 2006, p. 5.

<sup>21</sup> ECtHR, *Geerings against Netherlands*, Application no. 30810/03, Judgment of 1 March 2007, § 47.

<sup>22</sup> ECtHR, *Butler against the United Kingdom*, Application no. 41661/98, Admissibility decision of 27 June 2002, p. 12-13; *Arcuri and Others against Italy*, Application no. 52024/99, Admissibility decision of 5 July 2001, p. 5-6.



Specialists from second-tier banks of Kazakhstan learn about international standards on anti-money laundering at the OSCE-supported international certification programme, Almaty, 9 December 2015

3. Interference with the right to property is permitted under certain conditions (Article 1 of Protocol 1 of the ECHR). Notwithstanding any appeal, the preventive purpose of confiscation justifies its immediate application and confiscation *in rem* is proportionate if it pursues an *aim that is in the general interest*, for example, the fight against organized crime, drug trafficking and corruption.<sup>23</sup>
- Reclaiming its property that was illicitly acquired by the defendant;
  - Compensation for damages caused by unlawful conduct;
  - Revoking a contract that was corruptly awarded;
  - Requesting the defendant to return illegal profits gained after illicit enrichment, including in cases in which the victim has not suffered any harm.<sup>25</sup>

#### 20.2.4 Civil proceedings In Personam

There may be instances where neither a criminal conviction, nor a NCB confiscation is possible. For example, the suspect may have fled or be entitled to immunity from jurisdiction; or the prosecution may not be able to meet the criminal standard of proof (beyond reasonable doubt). At the same time, NCB confiscation proceedings may not be available because the location of the illicit assets is unknown, or there is a lack of co-operation with the State in which the assets are located. In such situations, States have the option of accessing national courts of other States and instituting civil proceedings for the recovery of property directly against the suspected individuals.<sup>24</sup>

Civil proceedings *in personam* provide the aggrieved party (in this case – the State) with various remedies, such as:

#### 20.2.5 Settlements in foreign bribery cases

States can also take control of proceeds of corruption through the settlement of foreign bribery cases. In cases reviewed by the Stolen Asset Recovery Initiative of the World Bank and the UNODC, monetary sanctions against corporations totalled USD 6.9 billion between 1999 and 2012.<sup>26</sup> In the vast majority of the cases, however, the monetary sanctions were imposed by countries other than the country where the bribed or allegedly bribed officials were employed. In addition, in the cases reviewed, only USD 197 million, or 3.3 per cent of the monetary sanctions were returned to

<sup>23</sup> ECtHR, *Raimondo against Italy*, Application no. 12954/87, Judgment of 22 February 1994, § 30; *Arcuri and Others v. Italy*, Application no. 52024/99, Admissibility decision of 5 July 2001, p. 5.

<sup>24</sup> Article 53 of the UNCAC requires States Parties to take measures to permit other States to initiate civil actions in their courts to establish title to or ownership of property acquired through corrupt acts, or to claim damages.

<sup>25</sup> Brun, J.-P. et al., *Asset Recovery Handbook: A Guide for Practitioners*, 2011, Stolen Asset Recovery Initiative, p. 160-168; see also Brun, J.-P. et al., *Public Wrongs, Private Actions: Civil Lawsuits to Recover Stolen Assets*, 2015, Stolen Asset Recovery Initiative.

<sup>26</sup> See Oduor, J.A., Fernando, F.M.U. et al., *Left Out of the Bargain: Settlements in Foreign Bribery Cases and Implications for Asset Recovery*, 2013, Stolen Asset Recovery Initiative, p. 2, available from <http://star.worldbank.org/star/sites/star/files/9781464800863.pdf>

### Box 20.8 Case study: Tunisia

After former Tunisian President Ben Ali was removed from office in 2011, the European Union (EU) Council ordered the freezing of assets of all individuals “responsible for misappropriation of Tunisian State funds”. On 28 May 2013, however, following a legal challenge from two of Ben Ali’s sons-in-law and his wife’s nephew, the EU General court annulled the sanctions listing of those three individuals.<sup>27</sup> According to the Court’s judgment, the three individuals were placed on the EU sanctions list because they were subject to judicial investigation by the Tunisian authorities for money laundering operations. However, the Court

found that it had not been established under Tunisian law that “misappropriation of public funds” encompassed money laundering. The Court further held that it had not been established that the investigations in Tunisia concerned the laundering of public rather than private funds. The fact that the individuals were related to Ben Ali was deemed insufficient to create a presumption that the money laundering investigations related to the misappropriation of state funds. The funds held in the names of the three individuals that had been frozen were then ordered to be released.<sup>30</sup>

the countries whose officials were bribed or allegedly bribed.<sup>28</sup>

### 20.2.6 Return of confiscated assets

The return of confiscated assets culminates the process of asset recovery. The receiving country’s authorities will need to plan in advance how to repatriate and dispose of the funds, and put in place appropriate management arrangements. The management of asset return is complex and should include consideration of the timing of the return, budgetary and economic impacts, and the institutions and stakeholders to be involved in decision-making. It is important to ensure that arrangements are made for the assets’ disposal in a transparent manner and following established procedures.<sup>29</sup>

The final use of confiscated assets differs by jurisdiction, predicate offense and case. Some jurisdictions allocate confiscated assets to the central public budget, while others award the assets to the law enforcement agencies involved in the investigation of the crime. In cases of grand corruption on an international scale, where assets have essentially been stolen from a State, a common goal is to return confiscated assets to the rightful owner, which in such cases is the country of origin.

The return of proceeds of grand corruption, however, is often fraught with challenges. The international nature of the return of the assets can engender a number

of technical and political obstacles ranging from differences in legislation, insufficient technical expertise, lack of political will to shepherd the return process and concerns about returning assets to countries facing instability or ongoing issues of corruption.<sup>31</sup> A key challenge, however, is illustrated by a case study below; when judicial processes in two different countries approach corruption, money laundering and asset recovery from different perspectives, countries may face great difficulty in aligning their efforts to finally confiscate and return the proceeds of grand corruption.

### 20.2.7 National asset recovery bodies

At the national level, many countries have established dedicated asset recovery bodies to serve as a national centre of knowledge on asset recovery issues and to lead national efforts to identify, restrain and recover proceeds of crime, including corruption-related offenses. There are several different models for asset recovery bodies (ARBs), including:

- A dedicated ARB with the competence to address asset recovery (post-conviction confiscation and confiscation in rem) in relation to all acquisitive crime/unlawful activity.
- A dedicated ARB with confined competence to managing assets that have been restrained/frozen, while individual prosecutorial/law enforcement entities are in charge of both post-conviction and *in rem* confiscation proceedings.
- No dedicated ARB. Powers of asset recovery, including asset management, are given to already existing entities in accordance with their areas of competence.

27 See the following StAR corruption cases: Case T-187/11, *Trabelsi v. Council*, Judgment of the General Court of 28 May 2013; Case T-188/11, *Chiboub v. Council*, Judgment of the General Court of 28 May 2013; Case T-200/11, *Al Matri v. Council*, Judgment of the General Court of 28 May 2013. Available from [http://star.worldbank.org/corruption-cases/sites/corruption-cases/files/Ben\\_Ali\\_EU\\_General\\_Court\\_Judgment\\_Cases\\_Trabelsi\\_Choboub\\_Al\\_Matri\\_May\\_28\\_2013.pdf](http://star.worldbank.org/corruption-cases/sites/corruption-cases/files/Ben_Ali_EU_General_Court_Judgment_Cases_Trabelsi_Choboub_Al_Matri_May_28_2013.pdf)

28 Ibid.

29 For more on return of confiscated assets see *Stolen Assets Recovery. Management of Returned Assets: Policy Considerations*, 2009, Stolen Asset Recovery Initiative. Available from <https://star.worldbank.org/star/sites/star/files/ManagementReturnedAssets.pdf>

30 See StAR corruption case on Zine El Abidine Ben Ali (European Union), available from <http://star.worldbank.org/corruption-cases/node/18602>

31 See also Stephenson K. M. et al., *Barriers to Asset Recovery*, 2011, Stolen Asset Recovery Initiative. Available from <https://star.worldbank.org/star/sites/star/files/Barriers%20to%20Asset%20Recovery.pdf>

Experience has demonstrated that the creation of a distinct multidisciplinary ARB can be a highly effective tool for facilitating international co-operation; when officers in other countries require legal assistance in asset recovery cases, it is easier for them to direct their requests to a single ARB rather than to several separate agencies with divergent competences and levels of knowledge about asset recovery processes.

### 20.2.8 Regional and international co-operation

Asset recovery cases frequently cross national borders: individuals and their assets move and portions of related crimes may be committed in more than one country. Thus, asset recovery will often involve several different jurisdictions with distinct legal systems. As previously discussed, differences between the legal systems pose numerous challenges to practitioners seeking international co-operation; it is not always clear which national bodies to contact for legal assistance or how to make mutual legal assistance (MLA) requests effective. To help mitigate this challenge, a number of G7 and G20 members have put forth guides to their asset recovery processes and mutual legal assistance practices.<sup>32</sup> In addition, a number of international co-operation networks have developed.

#### Co-operation networks

An effective way of enhancing co-operation between asset recovery bodies of different States is through formal or informal co-operation networks. Such networks typically require States to designate focal points from competent national law enforcement and/or judicial bodies whom their counterparts from other States can contact to facilitate interaction between the different jurisdictions. Co-operation networks may also exchange information and expertise among their members.

Examples of such networks include:

- The *Camden Asset Recovery Inter-Agency Network* (CARIN), which gathers practitioners and experts from law enforcement agencies and judicial authorities to exchange expertise in all aspects of tackling the proceeds of crime. Membership is open to EU Member States, while other States and international organizations may join as observers

<sup>32</sup> See StAR related publications, available from <http://star.worldbank.org/star>. See also G20 Assets Tracing Country Profiles, 2012, available from [https://www.g20.org/sites/default/files/g20\\_resources/library/Assets\\_Tracing\\_Country\\_Profiles%20ACWG.pdf](https://www.g20.org/sites/default/files/g20_resources/library/Assets_Tracing_Country_Profiles%20ACWG.pdf); and G20 A Step-by-Step Guide: Requesting Mutual Legal Assistance in Criminal Matters from G20 Countries, 2012, available from [https://www.g20.org/sites/default/files/g20\\_resources/library/MLA\\_Guide.pdf](https://www.g20.org/sites/default/files/g20_resources/library/MLA_Guide.pdf)

- or associates. Among others, current observers and associates include Eurojust, INTERPOL, the World Bank and the International Monetary Fund.<sup>33</sup>
- The *Asset Recovery Inter-Agency Network of Southern Africa* (ARINSA) is a CARIN-style network of focal points from the Southern Africa region. ARINSA has observer status with CARIN.
- *GAFISUD's Assets Recovery Network* (Red de Recuperacion de Activos de GAFISUD (RRAG)) is another CARIN-style network, which gathers focal points from North, Central and South America. Like ARINSA, RRAG has observer status with CARIN.
- The *Global Focal Points Initiative* (GFPI), established by INTERPOL and the Stolen Asset Recovery Initiative (StAR), addresses the recovery of corruption-related illicit assets, and the focal points are anti-corruption practitioners. Membership is open to all members of INTERPOL.<sup>34</sup>



David Shaulov (right) of Uzbekistan's Ministry of Economy and Batyr Sheraliev (left) of Customs Committee discuss a case study during an OSCE-organized workshop on a national risk assessment of money laundering and terrorism financing, Tashkent, 22 September 2014

- The *Egmont Group of Financial Intelligence Units* is a network of financial intelligence units from all States, aiming to improve co-operation in the fight against money laundering and the financing of terrorism. It enables secure information sharing between its members via the Egmont Secure Web (ESW).<sup>35</sup>

In addition to the above-mentioned networks which focus primarily on proceeds of crime, other formal bodies exist to facilitate broader co-operation in

<sup>33</sup> See Europol, *Camden Asset Recovery Interagency Network (CARIN) Manual*, 2012. Available from <https://www.europol.europa.eu/content/publication/camden-asset-recovery-inter-agency-network-carin-manual-1665>

<sup>34</sup> See [www.interpol.int/Crime-areas/Corruption/International-asset-recovery](http://www.interpol.int/Crime-areas/Corruption/International-asset-recovery)

<sup>35</sup> See [www.egmontgroup.org/](http://www.egmontgroup.org/)

criminal matters such as INTERPOL,<sup>36</sup> Europol<sup>37</sup> and Eurojust<sup>38</sup> discussed in Chapter 18.

### Role of international organizations

Several organizations have focused on addressing challenges to effective asset recovery through the provision of knowledge materials and technical assistance:

- The *StAR Initiative* of the World Bank and the UNODC works upon request with developing countries and financial centres to recover stolen assets by providing technical advice and developing case strategy, legislative and institutional frameworks, research reports and handbooks on relevant technical issues, a database of completed and active international asset recovery cases and, country guides on asset recovery by the G7 countries and other financial centres.<sup>39</sup>
- The *International Centre for Asset Recovery* (ICAR) provides on-site training to countries, provides advice to law enforcement authorities in handling specific asset recovery cases and develops IT tools and products, such as software and e-learning modules to facilitate the implementation of asset recovery processes.<sup>40</sup>
- The *United Nations Open-ended Intergovernmental Working Group on Asset Recovery* gathers UN Member States and advises the Conference of the States Parties to the UNCAC on the implementation of its mandate regarding the return of proceeds of corruption.<sup>41</sup>
- The *UNODC* provides technical assistance to countries seeking to strengthen their institutional, legal and operational asset recovery capacity. It also offers a host of tools for asset recovery practitioners through its website including, *inter alia*:
  - TRACK, the central platform of “Tools and Resources for Anti-Corruption Knowledge” including a legal library of corruption and asset recovery related legislation in member countries.
  - The *Legislative Guide for the Implementation of UNCAC*.
  - The *Technical Guide to UNCAC*.
  - The country profiles on the outcomes of the UNCAC Review (including self-assessment checklists, executive summaries and country reports).
  - The *Mutual Legal Assistance Request Writer Tool*.

- The *Compendium of International Legal Instruments against Corruption*.
- The *Manual on International Cooperation for the Purposes of Confiscation of the Proceeds of Crime*.

The *OSCE* works with the above and other partners to raise awareness of good practices and challenges related to the location, confiscation and return of proceeds of corruption.

## 20.3 Conclusions

Money is laundered with the goal of enabling criminals, including corrupt officials to enjoy the proceeds of their crimes. Thus, effectively implementing anti-money laundering measures will significantly strengthen States’ ability to prevent proceeds of corruption from entering into the financial sector and, when corrupt proceeds are moved through the financial sector, assist authorities in identifying, restraining and recovering them.

Although many States have produced legal definitions of foreign politically exposed persons (PEPs), many States have yet to do the same for domestic PEPs. States also need to intensify their practical efforts to monitor PEPs and identify suspicious activity. One important way to do so is the creation of public-private partnerships for the identification of politically exposed persons, beneficial owners of assets and suspicious transactions.

In addition, States should implement the commitments they have made to develop effective prevention, identification, seizure and confiscation regimes. They should do this by establishing asset recovery as a policy priority and developing specific asset recovery strategies, including the creation of institutional frameworks dedicated to the recovery of assets and their effective management and disposal. The design and implementation of multistakeholder co-ordination mechanisms, such as co-operation between agencies handling official asset declarations and money laundering supervision, can be particularly effective in preventing and identifying corruption.

To broaden the variety of options available to fight corruption and discourage such behaviour States may, in line with the UNCAC, consider introducing NCB asset forfeiture and allow for the enforcement of NCB forfeiture orders issued by other jurisdictions.

As the recovery and return of confiscated assets is a complex and technically demanding exercise, a number

<sup>36</sup> See [www.interpol.int/](http://www.interpol.int/)

<sup>37</sup> See [www.europol.europa.eu/](http://www.europol.europa.eu/)

<sup>38</sup> See [www.europol.europa.eu/](http://www.europol.europa.eu/)

<sup>39</sup> See StAR corruption cases databases, available from <http://star.worldbank.org/corruption-cases/>

<sup>40</sup> See <http://www.baselgovernance.org/icar/>

<sup>41</sup> See <http://www.unodc.org/unodc/en/treaties/CAC/working-group2.html>

of regional and international co-operation mechanisms and networks have been established to allow policy makers, professionals and experts to exchange information, build capacity and support one another. Although advances have been made, much still remains

to be done to bring different legal traditions, frameworks and practices closer together in order to facilitate more effective asset recovery co-operation. International actors can assist in this regard by providing knowledge materials and technical services.

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# Abbreviations and Acronyms

<b>ACN</b>	Anti-Corruption Network for Eastern Europe and Central Asia	<b>ODIHR</b>	Office for Democratic Institutions and Human Rights
<b>ADB</b>	Asian Development Bank	<b>OECD</b>	Organisation for Economic Co-operation and Development
<b>ARB</b>	Asset recovery body	<b>OGP</b>	Open Government Partnership
<b>ARINSA</b>	Asset Recovery Inter-Agency Network of Southern Africa	<b>OSCE</b>	Organization for Security and Co-operation in Europe
<b>CARIN</b>	Camden Asset Recovery Inter-Agency Network	<b>PEFA</b>	Public Expenditure and Financial Accountability Programme
<b>CCPR</b>	Centre for Civil and Political Rights	<b>PEP</b>	Politically exposed person
<b>CIS</b>	Commonwealth of Independent States	<b>RFOM</b>	Representative on Freedom of the Media
<b>CoE</b>	Council of Europe	<b>SEE</b>	South-Eastern Europe
<b>COSP</b>	Conference of the States Parties	<b>SIGMA</b>	Support for Improvement in Governance and Management initiative
<b>EAG</b>	Eurasian group on combating money laundering and financing of terrorism	<b>SMEs</b>	Small and medium-sized enterprises
<b>EAW</b>	European Arrest Warrant	<b>StAR</b>	Stolen Asset Recovery Initiative
<b>EBRD</b>	European Bank for Reconstruction and Development	<b>TI</b>	Transparency International
<b>ECHR</b>	European Convention on Human Rights	<b>UN</b>	United Nations
<b>ECOSOC</b>	Economic and Social Council	<b>UNCAC</b>	United Nations Convention against Corruption
<b>ECTHR</b>	European Court of Human Rights	<b>UNCITRAL</b>	United Nations Commission on International Trade Law
<b>EEW</b>	European Evidence Warrant	<b>UNDP</b>	United Nations Development Programme
<b>EU</b>	European Union	<b>UNECE</b>	United Nations Economic Commission for Europe
<b>FATF</b>	Financial Action Task Force	<b>UNESCO</b>	United Nations Educational, Scientific and Cultural Organization
<b>FIU</b>	Financial Intelligence Unit	<b>UNODC</b>	United Nations Office on Drugs and Crime
<b>FSRB</b>	FATF-style regional body	<b>UNTOC</b>	United Nations Convention against Transnational Organized Crime
<b>G20</b>	Group of 20	<b>WCO</b>	World Customs Organization
<b>G8</b>	Group of 8	<b>WGB</b>	Working Group on Bribery
<b>GA</b>	General Assembly	<b>WTO</b>	World Trade Organization
<b>GDP</b>	Gross Domestic Product		
<b>GPA</b>	Agreement on Government Procurement		
<b>GRECO</b>	Group of States against Corruption		
<b>IACA</b>	International Anti-Corruption Academy		
<b>IAP</b>	Istanbul Anti-Corruption Action Plan		
<b>ICAC</b>	Independent Commission against Corruption		
<b>ICAR</b>	International Centre for Asset Recovery		
<b>ICCPR</b>	International Covenant on Civil and Political Rights		
<b>IMF</b>	International Monetary Fund		
<b>INTERPOL</b>	International Criminal Police Organization		
<b>IRG</b>	Implementation Review Group		
<b>MENA</b>	Middle East and North Africa		
<b>ML/TF</b>	Money laundering / terrorist financing		
<b>MLA</b>	Mutual Legal Assistance		
<b>NCB</b>	Non-conviction based		
<b>NGO</b>	Non-governmental organization		
<b>OCEEA</b>	Office of the Co-ordinator of OSCE Economic and Environmental Activities		

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