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Prevention of fraud, corruption and bribery committed through legal entities for the purpose of financial and economic gain

Comparative Overview

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1. Introduction

General Overview

In 2010 the European Commission[1] issued the targeted Call for Proposals with regards to "Financial and Economic Crime"[2] under its programme "Prevention of and Fight against Crime" 2007-2013. In 2007 the Council took the Decision to start this specific programme.[3] It aims at realising four main objectives, namely: (a) to develop methods to prevent and fight crime among others through the work of public-private partnerships and by means of best practices; (b) to promote coordination among law enforcement agencies; (c) to promote and develop best practices for the protection of and support to witnesses; and (d) to promote and develop best practices for the protection of crime victims.[4] The T.M.C. Asser Instituut[5] applied for an action grant with a project proposal titled: "*Prevention of fraud, corruption and bribery committed through legal entities for the purpose of financial and economic gain*". The application was submitted in August 2010 together with the Polish Institute of International Affairs (PISM)[6] in Warsaw as beneficiary partner and the Dutch Ministry of Security and Justice[7] as associate, non-beneficiary partner. The project proposal was awarded with an action grant by the Commission in August 2011 and activities started shortly thereafter.

The project aims at the implementation of one of the priorities of the Commission's programme, namely "Prevention and fight against corruption, development of anti-corruption policies". More specifically, it envisages contributing to the prevention of fraud, corruption and bribery committed by and through legal entities. Legal entities were expressly chosen as the main focus of the project. They play the most dominant role in the overall economy. Obviously they are established for the purpose of financial gain but can be misused making illegal profits through fraud and corruption. Such malpractices, e.g. VAT fraud, are also often cross-border in nature and take advantage of

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[1] Directorate-General Justice, Freedom and Security, Directorate F: Security, Unit F4: Financial support – Security. Under the Barroso II Commission this Directorate-General was split up in two different ones: Home Affairs and Justice. The responsibilities for this program were taken up by the new Directorate-General Home Affairs, more specifically its Directorate A: Internal Security, Unit A4: Financial Support – Internal Security.

[2] The full text of this Call is available through the website link: http://ec.europa.eu/home-affairs/funding/isec/call_10134/tc3_call_2010_en.pdf. The deadline of the Call was 18 June 2010.

[3] Council Decision 2007/125/JHA of 12 February 2007 establishing for the period 2007 to 2013, as part of General Program on Security and Safeguarding Liberties, the Specific Program 'Prevention of and Fight against Crime', *OJ* L 58/7, 24.2.2007.

[4] Ibid., article 3 'Themes and specific objectives'. Paragraph 3 provides that: "The Programme does not deal with judicial cooperation".

[5] T.M.C. Asser Instituut (TMCAI) in The Hague (NL) is a foundation established in 1965 by the law faculties of the Association of Dutch universities. Since its foundation, the TMCAI has developed into an academic inter-university institute in the field of International Law, cooperating closely with and supporting the Dutch and other universities. The academic fields covered by the Institute are Private International Law, Public International Law, the Law of the European Union, International Commercial Arbitration, International Humanitarian Law, International Criminal Law and International Sports Law. The TMCAI's mission is to initiate, support and realise innovative, scholarly research and postgraduate education activities, preferably on an inter-university basis, and be instrumental in initiating and facilitating other activities which are of importance to disseminating in-depth and broad knowledge of International and European Law in the Netherlands and beyond. *See* http://www.asser.nl.

[6] The Polish Institute of International Affairs (PISM) is a leading and independent think-tank that conducts original, policy-focused research. PISM provides advice to all branches of government and contributes to wider debates on international relations in Europe and beyond. PISM also publishes books and journals, and houses one of the best specialist libraries in Central Europe. Situated in between the world of policy and independent expertise on international affairs, PISM promotes the flow of ideas that inform and enhance the foreign policy of Poland. *See* English version of PISM's website: http://www.pism.pl/en.

[7] *See* English version of the Ministry's website: http://www.government.nl/ministries/venj (retrieved June 2012).

opportunities offered by the European internal market. This leads to negative effects for the EU internal market and the financial system of the EU Member States. Differences in civil, administrative and criminal law and regulations of the Member States make it more difficult to tackle such cross-border malpractice. The application of common preventive methods can enhance the effectiveness of efforts aimed at tackling these phenomena. Improving exchange of information on private legal entities by interconnecting business registers in the Member States is a perfect example of such a preventive strategy.

The following paragraphs of this chapter deal with the overall design of the project, its main objectives and the activities needed to achieve those objectives and the ensuing results.

Overview of the project

The project is composed of a range of activities, which are subdivided - in time - over several blocks. The main building blocks are:

(1) conducting a comparative study on the application of international and EU legislation related to the prevention of and fight against crimes, such as fraud, corruption and bribery committed by either legal entities and/or by their directors, and on concerned policies and best practices developed by Member States and Candidate States. Input for the comparative overview was provided by a network of national rapporteurs in all 30 concerned States. The network was established to draft national reports consisting of answers given to a specifically designed questionnaire;

(2) establishing an inventory of best practices with respect to the prevention of such malpractices by those entities. This inventory will be part of the final version of the comparative overview;

(3) the convening of a conference in Warsaw, Poland with the participation of expert representatives from the Member States and Candidate States, from international stakeholders such as the OECD, UNOCD, GRECO and from the EU anti-corruption network, on the results of the research and the survey through discussing among others a first draft version of the comparative overview;

(4) publishing the comparative study with the results of the research and the conference and (secondly) publishing a reader. The reader provides the participants of the Warsaw conference with background information regarding this project and the conference, and introduces the speakers and moderators. Furthermore, a selection of relevant legal texts derived from EU law and international law and some examples of already available best practices;

(5) the convening of an expert meeting on best practices in The Hague (NL) with regard to preventing corruption, in particular directed at the drafting of a manual for developing best practices in this area;

(6) publishing a manual of best practices and horizontal tools in the prevention of bribery, corruption and other economic and financial crimes committed through legal entities in order to promote them at EU level.

The comparative overview presented in this report pertains mainly to the outcome of the first three blocks of activities. The draft version of the report is presented and discussed at the conference (third block). Results of the conference will be used to help finalise the comparative overview. In its turn,

the final draft of the comparative overview also will partly provide input to the expert meeting on best practices, the fifth main block of this project. To that end, the comparative overview contains information on best practices assembled through the national reports.

The main theme

As already mentioned, the project "Prevention of fraud, corruption and bribery committed through legal entities for the purpose of financial and economic gain" aims at contributing to one of the priorities of the Commission: the prevention of and fight against corruption and the development of anti-corruption policies. In the concerned Targeted Call for Proposals this priority is explained through the following three sub-targets:[8]

(1) Improving exchange of information, best practices and professional standards between Member States, including the support to the activities of European Anti-Corruption Network (EACN), established by the Council Decision 2008/852/JHA;

(2) Analysing main trends of corruption (most vulnerable areas) in the EU Member States and effects of corruption on the society, with a focus on potential measures;

(3) Analysing measures existing at EU level and in Member States (public and private sector), with a focus on what could be extended as best practice.

All three elements are covered by the design of this project. The exchange of information regarding corruption will be improved by means of this comparative overview based on the national reports of EU Member States and Candidate States. The report presents overviews of relevant legal provisions derived from EU law and international Conventions. Furthermore, it provides an overview of current national anti-corruption policies and measures taken at the national level with a view to international cooperation in this area. Finally, it presents best practices developed in and by the Member States and Candidate States concerning the prevention of corruption in general and more specifically in three sector specific areas. These three areas are: the prevention of corruption and organised crime in the area of illegal trafficking of waste; in the area of public procurement; and emission rights trading.

These specific priorities are not stand alone targets, but are to be positioned within the context of the overall objectives of the specific program "Prevention of and Fight against Crime".[9] That program aims at realising four main objectives, which are, in summary: (a) to develop methods to prevent and fight crime among others through the work of public-private partnerships and by means of best practices; (b) to promote coordination among law enforcement agencies; (c) to promote and develop best practices for the protection of and support to witnesses; and (d) to promote and develop best practices for the protection of crime victims. The Specific Program does not deal with judicial cooperation.[10]

Within the context of this project the above mentioned priority "prevention and fight against corruption", as defined by the Call for Proposals, and the general objectives of the Specific Program were merged to one overriding theme reflected by the title of this project: "*Prevention of fraud,*

[8] See *supra,* note 2, p. 4.
[9] See *supra,* note 3.
[10] Ibid., article 3.

corruption and bribery committed through legal entities for the purpose of financial and economic gain".

The general theme is not so much about combating and preventing corruption as a single phenomenon, but about preventing and combating corruption and fraud as a form of criminal behaviour performed by formal actors (legal entities and their directors) in the economic–financial domain of society. Furthermore, comparative research regarding the illegal acquiring or affording of benefits - often in an organised way - through bribes and corruption either for private gain or to provide benefits or a beneficial position to the legal entity itself or their directors are covered by this project.

Fraud and corruption committed by or through misusing legal entities is posing an increasing threat to the EU and its Member States. In this respect, two understandings of corporate crime can be identified. A first notion of corporate crime concerns the misconduct of legal entities that were established with lawful intentions (see for example the Parmalat case). A second notion of corporate crime concerns those legal entities which are established as a result of a previous criminal act, or with the intention of committing new criminal offences. As it emerges from the Europol Organised Crime Threat Assessment (OCTA) studies of 2007 and 2011,[11] the misuse of legal entities for committing financial crimes is closely linked to Organised Crime groups (OC groups). According to that study, OC groups make use of Legitimate Business Structures for facilitating criminal activities, money laundering and reinvesting laundered money. The current economic and financial crisis calls for the development of preventive measures within the internal market, to address the misuse of the financial and economic system by legal entities, whether linked to OC groups or not. Academic research demonstrates the strong negative impact of corruption and bribery on the public moral and the general economy in particular.[12] Preventive measures regarding legal entities could be effective, in particular with regard to fraud and corruption prevention.

Aims and purpose of the project

As already indicated, the project aims at the implementation of the third priority of the Commission programme: "Prevention and fight against corruption, development of anti-corruption policies". More specifically, it will contribute to the prevention of fraud, corruption and bribery committed by and through legal entities through the promotion of cooperation and mutual understanding among law enforcement agencies and related EU bodies. The comparative study, the international conference, the distribution of a conference reader and recommendations for preventive actions in this field, and an expert meeting aimed at the development of a manual will together ensure that the project objectives will be achieved.

To that end, the project develops and promotes knowledge in three different areas related to corruption and organised crime: (firstly) knowledge about Member States' and Candidate States' legal measures, (secondly) their policies and (thirdly) best practices with regard to preventive measures in the fight against fraud and corruption committed by and through legal entities. With a view to acquire and be able to present such knowledge, a study of a comparative nature was

[11] OCTA, EU Organised Crime Threat Assessment 2007, EUROPOL, The Hague, June 2007 and June 2011.
[12] *See, e.g.*: Van Dijk, Jan, *Mafia markers: assessing organized crime and its impact upon societies*; in: Trends in Organised Crime (2007) 10:39–56. This study provides a statistical analysis of the negative effect of organised crime ("Mafia"), corruption and the lack of rule of law on national wealth.

designed, directed at depicting the current legal and policy state of affairs within the concerned States and best practices helping to prevent corruption and related offences.

Aims and purpose of the comparative research

Firstly, the conducted study aims to seek how and to what extent the concerned States adopted national measures related to prevention of and fight against crimes, legally as well through their national policies in this area. The legal knowledge pertains to the application of EU and international legal instruments addressing organised crime, fraud and corruption committed through legal entities. However, the focus of this study is not to assess whether the objectives have been attained, but to compare the means created by national legislators and policy makers to attain them. Besides and closely related to this general focus, the study did not scrutinise whether or not the aforementioned provisions are correctly and exhaustively implemented by national legislators. Hence, this is not a compliance study, but rather a study on legal and other (policy and best practices) measures taken with a view to prevent and combat these crimes.

Secondly, the research aims at the exchange of know-how strengthening state and corporate capacities in this field. Special attention was given to legal provisions and administrative bodies. Information was gathered concerning the criminal responsibility of corporations and legal entities and about disqualification provisions and business registers of directors of legal entities in the Member States and Candidate States. Such information can also be useful as a preventive tool. An inventory will be drawn up of best practices with a view to describing tools and techniques developed within the investigated States to prevent fraud and corruption committed through legal entities.

Methodology of the research

The factual information necessary to acquire the above described knowledge was assembled through a network of national experts specifically established for this comparative research in the concerned States. Most experts of the network are either legal academics working at universities or lawyers working at law offices. In principle, all these experts can be defined as scholars and experts fully independent from the main object, i.e. the concerned States.[13] The national experts were invited to draw up a national report concerning these three areas of knowledge, by means of providing answers to questions assembled in a specifically designed Questionnaire. The outline of the Questionnaire will be expounded in the next paragraphs.

The results of the national reports have been condensed and summarised in a comparative study. This study is providing a horizontal overview of legal instruments, policies and best practices - all related to preventing and combating corruption and organised crime committed by in particular private legal entities – as implemented and applied in the EU and by three Candidate States. Within the overall framework of the project this study is referred to as the "Comparative Overview".

[13] In one case the expert was attached to a research unit of a police force but was also conducting a PhD study at a university. Further scrutiny convinced the TMCAI that in this case, both responsibilities were separated.

1.1.1. The Questionnaire

A questionnaire was drawn up serving as the main information and knowledge gathering instrument. Its main objective was to help implement the above described knowledge objectives. Experts from the research network drew up their national reports by answering the questions of the questionnaire. In accordance with the described study objectives the experts were expressly reminded of the fact that they were not to execute a compliance study, but rather to indicate comparable or similar national provisions.

The questionnaire is subdivided in three parts (A, B and C), posing questions with regard to respectively legislation (A), governmental policies (B) and best practices (C). An explanatory hand-out provided methodological guidance to the national experts how to comprehend and deal with different questions.

1.1.2. PART A of the Questionnaire

The questions in PART A are about relevant national legislation in line with EU acquis and selected provisions from international conventions. More specifically, PART A was devoted to two main EU legal instruments in the area of combating corruption and organised crime: the EU Council Framework Decision 2003/568/JHA on combating corruption in the private sector[14] and the EU Council Framework Decision 2008/841/JHA on the fight against organised crime[15]. Furthermore, the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions[16] was used in PART A as guiding document for the establishment of the relevant national rules on combating transnational bribery.

The substantive objective of PART A was thus not to provide an implementation study of EU legislation; rather, the scope of this part of the questionnaire was to identify the different national rules and regulations among the EU Member States and Candidate States in order to study the different choices – in terms of criminal policies - made in order to attain the objective of fighting corruption and bribery committed by legal entities and their directors and organised crime. Besides, for the purposes of this project, it was also investigated whether measures have been taken to combat the bribery of national officials without a cross-border aspect (where the OECD Convention on Bribery deals only with bribery of foreign public officials).

To that end, the national experts were asked to identify the relevant national rules and regulations possibly legislated in three different fields of law: criminal law, civil law and administrative law, and to specify the national rules and measures within these three different fields of law.

Furthermore, the national experts were requested to give a general assessment regarding the enforcement of these rules. Information was requested on the effectiveness thereof in terms of type and number of cases brought against offenders, and on the impact of these judicial practices on the private sector. Where possible and relevant, national trends and specifically successful methods were to be described.

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[14] Council Framework Decision 2003/568/JHA of 22 July 2003 on combating corruption in the private sector, *OJ* L 192/54, 31.07.2003.

[15] Council Framework Decision 2008/841/JHA of 24 October 2008 on the fight against organised crime, *OJ* L 300/42, 11.11.2008.

[16] OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, adopted on 21 November 1997 by the Negotiating Conference of the Council of the Organisation for Economic Cooperation and Development (OECD).

1.1.3. PART B of the questionnaire

PART B of the Questionnaire specifically deals with preventive policies and concrete measures taken by the Member States and the Candidate States to help prevent corruption and bribery committed by legal entities and/or their directors. Questions were posed with regard to policies which might have been developed by national authorities or private bodies to help enhance the application of the concerned rules and regulations on combating and preventing corruption, bribery and organised crime. These measures might reside under criminal, civil, or administrative law. In particular, questions were aimed at malpractices conducted by legal entities. A distinction was made between general policies and more specific measures directed at preventing corruption and fraud and concerning the above mentioned legal areas.

Provisions stemming from the UN Convention against Corruption (UNCAC)[17], the UN Convention on Transnational Organised Crime (UNTOC)[18] and the OECD Convention on Combating Bribery[19] were used as points of reference for questions as put forward in this part of the questionnaire. Wherever possible and useful, the rapporteurs were requested to make reference to relevant examples mentioned in Council of Europe (CoE) Conventions, in Commission Communications and EU programmes like the Stockholm Programme.

In particular, questions were posed in this part of the questionnaire referring to provisions derived from these UN and CoE Conventions, which require, in a mostly non-obligatory way, to make specific arrangements aimed at the establishment of anti-corruption bodies or authorities and to take preventive measures in the area of the training of anti-corruption officers; exchange of information between the private and the public sector on a national as well as cross border level (including police/justice); and providing protection to whistle-blowers.

1.1.4. PART C of the questionnaire

This part of the questionnaire was directed at making an inventory of best practices. Questions were posed to provide information on measures and best practices developed with regard to: (1) the EU Contact-point network against corruption (EACN); (2) whistle-blowers; and (3) the interconnection of business registers and public records.

The EACN has been established pursuant to Council Decision 2008/852/JHA[20] providing amongst others that each Member State will establish a contact-point for the purposes of this network. The questions regarding whistle-blowers are based upon and derived from CoE Conventions' and UNCAC provisions.

The questions in PART C regarding (3) the interconnection of business registers and public records were all based upon Article 31 (2) (d) UNTOC. This provision requires State Parties to endeavour to take special measures, which may include: i) the establishment of public records on legal and natural persons involved in the establishment, management and funding of legal persons; ii) the

[17] United Nations Convention against Corruption (UNCAC) adopted by the General Assembly resolution 58/4 of 31 October 2003.
[18] United Nations Convention against Transnational Organized Crime (UNTOC) adopted by General Assembly resolution 55/25 of 15 November 2000.
[19] *See supra,* note 16.
[20] Council Decision 2008/852/JHA of 12 November 2008 on a contact-point network against corruption, *OJ* L 301/38, 12.11.2008.

introduction of the possibility of disqualifying, by court order or any appropriate means for a reasonable period of time, persons convicted of offences covered by the UNTOC from acting as directors of legal persons incorporated within their jurisdiction; iii) the establishment of national records of persons disqualified from acting as directors of legal persons; and iv) the exchange of information contained in the records on legal persons and criminal records thereof as mentioned in points (i) and (iii).

PART C of the questionnaire was concluded with questions regarding measures and best practices as might have been developed in or by the Member States and Candidate States in three specific sectors, being: (4) waste management (notably transport of waste);[21] (5) public procurement;[22] and (6) emission rights trading.[23]

[21] Directive 2008/98/EC of the European Parliament and of the Council of 19 November 2008 on waste and repealing certain Directives, *OJ*L 312/3 22.11.2008 *see:* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:312:0003:0030:EN:PDF. For recent Council conclusions on *inter alia* the EU waste management policy, *see*: *Draft Council Resolution on the creation of an informal network for countering environmental crime - "EnviCrimeNet"*, http://www.montesquieu-instituut.nl/9353000/1/j4nvgs5kjg27kof_j9vvhfxcd6p0lcl/vipl5ozaceye/f=/.pdf (retrieved 5 January 2012).

[22] For recent information on the Commission's policy, *see*: Commission Green paper COM (2011)15 final: *on the modernisation of EU public procurement policy: Towards a more efficient European Procurement Market*, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0015:FIN:EN:PDF (retrieved 5 January 2012).

[23] For recent information on the Commission's policy, *see:* Commission Communication COM (2010)796 final: *Towards an enhanced market oversight framework for the EU Emissions Trading Scheme*, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0796:FIN:EN:PDF (retrieved 5 January 2012).

2. The international legal framework: Introduction

The misuse of legal entities for committing financial crimes is closely linked to OC groups. This emerges from the OCTA studies conducted by Europol in 2007 and 2011.[24] According to these studies, OC groups make use of Legitimate Business Structures (LBS) in order to facilitate criminal activities, to launder money and to reinvest laundered money.

The use of LBS by OC groups represents one of the main threats to the safety and solidity of the internal market on the one side, and the finances of the EU and its Member States on the other. A business sector that is particularly affected by this trend is the transport sector. In this sector, OC groups run businesses in order to launder money reinvest laundered money and facilitate criminal activities such as human trafficking. The Europol OCTA studies show that other sectors are also affected. For instance, VAT frauds are often committed by groups of companies that agree to make one company bankrupt so that the VAT chain is broken and the outstanding VAT cannot be collected by the fiscal authorities anymore.

Unfortunately, because of the differences that still exist in the regulatory frameworks of the EU Member States concerning the rules on the form, incorporation, establishment and registration of companies and charities,[25] the Union presents itself as an attractive place to commit economic and financial crimes. At the same time, the EU has been developing a number of instruments to enhance either the approximation of national legislations concerning the criminalisation of certain activities[26], or to enhance judicial cooperation in criminal matters in respect of the executing part of criminal judgments.[27] However, nothing has been developed in respect of preventive measures yet.[28] Moreover, action by the Union in the aforementioned fields falls squarely in a broader context where a number of international organisations and bodies are promoting the fight against financial and economic crimes committed by legal entities.

This chapter will provide a short overview of the international and EU instruments adopted to prevent and fight fraud, corruption and bribery committed by legal entities. To do so, the first two sections will provide an overview of the international instruments to fight corruption (section 2.1) and the EU legislative initiatives against corruption (section 2.2). Then, attention will be paid to respectively the initial (section 2.3) and current (section 2.4) initiatives taken internationally and by

[24] OCTA, EU Organised Crime Threat Assessment 2007, EUROPOL, The Hague, June 2007 and June 2011.
[25] For more information on this topic, *see:* T.M.C. Asser Instituut, *Prevention of organised crime: The registration of legal persons and their directors and the international exchange of information; a comparative legal study in the EU Member States on the possibilities for the improvement of the international exchange of information on legal persons with the purpose of (transnational) organised crime prevention,* The Hague, December 2006 (Commissioned by the Dutch Ministry of Justice).
[26] Council Framework Decision 2001/413/JHA of 28 May 2001 on combating fraud and counterfeiting of non-cash means of payment, *OJ* L 149/1, 02.6.2001; Council Framework Decision 2001/500/JHA of 26 June 2011 on money laundering, the identification, tracing, freezing, seizing, and confiscation of instrumentalities and the proceeds of crime, *OJ* L 182, 05.07.2001.
[27] Council Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders, *OJ* L 328/59, 24.11.2006; Council Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties, *OJ* L 76/16, 22.3.2005.
[28] In spite of the fact that the Stockholm Program confers a clear mandate to the Member States and the Commission in this respect, where it holds that they should "facilitate the exchange of best practice in prevention and law enforcement, in particular within the framework of the Asset Recovery Office Network and the Anti-Corruption Network", *OJ* EU 2010, C 115, p.23.

the EU to combat (transnational) organised crime. The last section will look at the issue of criminalising the conduct of the perpetrators of economic and financial crimes (section 2.5).

International legal instruments combating corruption

The Inter-American Convention against Corruption of 1996[29] is the first example of a multilateral effort to fight corruption by the means of a public international law instrument. Since then a number of regional and universal international organisations promoted the adoption of international binding instruments as well as soft law instruments to promote the fight against corruption.
From a chronological perspective, the second international instrument adopted was the EU Convention against corruption involving officials of the EU or officials of the EU Member States.[30] This document, adopted under the rules of the Treaty of Maastricht, was developed as a corollary of the "Protocol directed in particular at acts of corruption involving national or Community officials and damaging or likely to damage the European Communities' financial interests"[31] in the aftermath of the conclusion of the Convention on the protection of the European Communities' financial interests of 1995.[32]

The 1997 EU convention against corruption involving EU or Member States' officials aimed to approximate the criminal law provisions on corruption of the Member States in order to make sure that: 1) this specific type of corruption was punishable in the whole EU territory; 2) corruption would constitute a criminal offence in the active and passive form and 3) the national criminal provisions would be applicable not only in national context but also when the envisaged offences were committed by or against a limited range of EU officials in the exercise of their duties (the principle of assimilation).[33]

Shortly after these EU initiatives, the OECD adopted the Convention on Combating Bribery of Foreign public officials in International Business Transactions in 1997.[34] This convention entered into force in 1999. However, contrary to the EU instruments adopted shortly before, the OECD Convention had a limited scope. Indeed, the Convention was adopted to approximate national legislations only in relation to bribery and only in relation to international business transactions.

In 1999, the Council of Europe (CoE) adopted two conventions on corruption with the aim to approximate, in a systematic manner, the issue of corruption. Firstly, in January 1999 the Member States of the Council of Europe adopted an instrument in the field of criminal law in order to guarantee that active and passive acts of bribery and corruption would constitute criminal offences in relation to domestic public officials, members of domestic public assemblies, in relation to foreign public officials, in relation to members of foreign public assemblies, international organisations,

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[29] Inter-American Convention against corruption, adopted on 29 March 1996 and entered into force in 1997. http://www.oas.org/juridico/english/treaties/b-58.html (retrieved June 2012).
[30] Convention on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union, *OJ* C 195, 25.6.1997.
[31] Council Act of 19 June 1997 drawing up the Second Protocol of the Convention on the protection of the European Communities' financial interests, *OJ* C 221, 19.7.1997.
[32] Convention on the protection of the European Communities' financial interests, *OJ* C 316, 27.11.1995. This Convention has been ratified by 25 Member States (*i.e.* all Member States, except the Czech Republic and Malta).
[33] Respectively the Members of the Commission of the European Communities, the European Parliament, the Court of Justice and the Court of Auditors of the European Communities. Article 4 of this EU Convention.
[34] *See supra,* note 16.

international courts as well as in relation to passive and active bribery in the private sector. Therefore, this Council of Europe convention represented at the time the international instrument with the broadest scope of applicability. Yet, also in this case the actual provisions were less exhaustive than the ones adopted at EU level.[35]

Parallel to the criminal law convention on corruption the Council also adopted in the same year a convention related to the fight against corruption but based on civil law instruments.[36] This second convention had the purpose of promoting the development of "effective remedies for persons who have suffered damage as a result of acts of corruption, to enable them to defend their rights and interests, including the possibility of obtaining compensation for damage".[37] In this respect the Convention on civil law against corruption can be considered as founded upon three pillars whereby Member States must ensure that: 1) victims of acts of corruption should be allowed to seek for full compensation of the damages suffered in courts; 2) States should be responsible to pay damages for acts of corruption committed by public officials in the exercise of their functions and 3) the responsibility of the defendant to pay damages should arise not only if the defendant has committed or authorised the act of corruption, but also if the defendant failed to take reasonable steps to prevent the act of corruption from occurring.[38]

Finally, in 2003, the United Nations Conventions against Corruption (UNCAC) was adopted.[39] This instrument entered into force in 2005 and has a threefold aim. Firstly, it aims at promoting and strengthening measures to prevent and combat corruption; secondly, it aims at facilitating and supporting international cooperation and technical assistance in the prevention and fight against corruption with the inclusion of the recovery off assets and, thirdly, it aims at promoting integrity, accountability and proper management of public affairs and property.[40] Therefore, the broad scope of this instrument appears as a development of the different covenants that, since the Inter-American convention of 1996 had emerged in the international community. Indeed, the UN Convention covered private acts of corruption as well as bribery of public officials, regulated mutual legal assistance among states and established rules in relation to the compensation of the damages suffered by the victims of such criminal acts. Moreover, other than traditional mechanisms for the review of the convention, the UN instrument included a specific chapter to promote – parallel to the traditional instruments of criminal and civil law - the prevention of corruption as a criminal phenomenon by demanding that the states parties take specific initiatives.

EU legislative initiatives with regard to combating and preventing corruption

The European Union has been increasingly involved in the development of transnational initiatives against corruption. Indeed the role of the EU in the fight against corruption stems from a number of factors. Firstly, the EU's role in the fight against corruption derived from the expansion of its internal powers and the increased integration of the EU member states. This spill-over effect is best

[35] *Criminal Law Convention on Corruption* of the Council of Europe, entry into force 27 January 1999.
[36] *Civil Law Convention on Corruption* of the Council of Europe, entry into force 1 November 2003.
[37] Ibid., article 1.
[38] Ibid., articles 3-6.
[39] *See supra,* note 17.
[40] Ibid., article 1.

exemplified by the chronological order of early EU instruments. After the adoption of the Convention on the protection of the European Communities' financial interests (PIF Convention)[41] the EU adopted its first instrument against corruption. At the same time, the role of the EU in anti-corruption policy is a result of the emergence of the Union as an actor in the field of public order and public security. In this perspective, since the first steps taken at the end of the 1990s, the EU has expanded its mandate in the field of criminal law and has become an established actor in the fight against corruption, independently from the link with the protection of the Union's finances that was fundamental to justify its action back in the early 1990s. This is reflected by the Lisbon Treaty's express reference to the fight against corruption that has been inserted in the context of the Area of Freedom, Security and Justice. Thus, on the basis of the general purpose of ensuring "a high level of security through measures to prevent and combat crime, racism and xenophobia, and through measures for coordination and cooperation between police and judicial authorities and other competent authorities, as well as through the mutual recognition of judgments in criminal matters and, if necessary, through the approximation of criminal laws"[42] the EU was conferred with a specific mandate in relation to the fight against corruption.

Article 83 of the Treaty on the Functioning of the EU (TFEU) codifies the primary law mandate to the EU in relation to the approximation of criminal law among the Member States. Corruption figures among the specific types of crimes in relation to which the Union's institutions can legislate. The inclusion of corruption in article 83 TFEU as well as the content of this provision demand further clarifications. Firstly, in relation to the material scope of the powers conferred, it must be emphasised that the Union is competent to deal only with forms of "particularly serious crime with a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis".[43] Secondly, it must be borne in mind that article 83 TFEU confers powers to the Council and the European Parliament to, by the means of Directives, establish minimum rules concerning the definition of criminal offences and sanctions. This means that the EU cannot fully harmonise national laws.

Even more restrictive is the specific TFEU provision with regard to the prevention of crime. Article 84 TFEU provides, in so many words, that in accordance with the ordinary legislative procedure measures may be taken to support and promote actions of the Member States in the field of crime prevention. However, such EU legislation may not provide for harmonisation of the laws and regulations of the Member States. In other words, it seems that the national hemisphere of substantive criminal law has to be safeguarded against harmonising rules on preventing crime. A definition of what should be understood by the concept of "crime prevention" would be helpful to see what type of rules would fall within such a safeguarding and what rules and measures not. It could be guessed for example that EU legal rules on establishing a specific EU agency and its related national bodies, as e.g. the EnviCrimeNet,[44] could be viewed as an example of such a preventive measure, legally binding prescribed to be set up in the EU and all Member States on the basis of article 84 TFEU.

[41] *See supra*, note 31.
[42] Article 67(3) TFEU.
[43] Article 83(1) TFEU.
[44] The EnviCrimeNet has been established by a Council Resolution 10291/11 on the creation of an informal network for countering environmental crime.

Notwithstanding these restrictions, the EU powers in relation to the specific field of corruption rest in a series of concrete measures and initiatives adopted since the 1997 Convention that constitute the Union's *acquis* for the field. The main instrument in relation to corruption adopted by the Union is Framework Decision 2003/568/JHA on combating corruption in the private sector.[45] Thus, following the developments in relation to the fight of corruption in the public sector with the adoption of the conventions of the 1990s, this instrument was specifically addressing the problem of corruption in the private one. This action, other than representing the last element of the EU legislative strategy against corruption, was also required by the adoption of the European Arrest Warrant[46] where the offence of corruption was inserted in the list of crimes for which the double criminality prerequisite had been lifted. Therefore, the Framework Decision provides for the EU Member States a common legal basis for the fight against active and passive corruption as well as in relation to the criminal liability of legal persons for acts of corruption.

However, in spite of the implementing deadline set for July 2005, the implementation process of this instrument has been rather fragmented and unsatisfactory, especially in relation to the definition of the conducts to be criminalised and in relation to the liability of legal persons.[47] The shortcomings of national implementation and the monitoring of the Commission of the activities of the Member States must be read in the light of other developments such as the strong mandate conferred to the Commission by the European Council in the Stockholm programme in relation to corruption.[48] Indeed, the EU agenda in relation to the fight against corruption has been bolstered by the adoption of the anti-corruption package of 2011[49]. One of its main measures relates to the establishment of an EU Anti-corruption reporting mechanism for the periodic assessment of anti-corruption efforts in EU States, the so called "EU Anti-corruption Report".[50] Otherwise this EU agenda on fighting corruption demonstrates that "prevention" of crime, and more specifically prevention of corruption, is neither a well-integrated concept nor a well-established tool to help address corruption problems. Nothing is stated about the legal and practical dimensions of the concept of prevention (especially of corruption).

Prevention as such is addressed only once in the context of preventing (and fighting) political corruption (section 4.5. of the Communication) and conceptually linked to the enforcement of transparency and supervision rules.[51] Legally speaking, the Communication exemplifies the absence

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[45] Council Framework Decision 2003/568/JHA of 22 July 2003 on combating corruption in the private sector *OJ* L 300/42,11.11.2008.

[46] Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, *OJ* L 190/1, 18.7.2002.

[47] *See:* Report of the Commission to the European Parliament and the Council based on article 9 of the Framework Decision, COM(2011) 309 final, 06.06.2011.

[48] The Stockholm Program — An open and secure Europe serving and protecting citizens, *OJ* 2010 C, 115/01, 4.5.2010. *See* point 4.4.5 in relation to corruption.

[49] The Communication on Fighting Corruption in the EU, COM(2011) 308. *See*: http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/organized-crime-and-human-trafficking/corruption/index_en.htm (retrieved July 2012). The package includes: 'Communication on fighting corruption in the EU', 'A Commission Decision establishing an EU anti-corruption reporting mechanism', and 'Report on the modalities of EU participation in the Council of Europe Group of States against Corruption (GRECO)'.

[50] Commission Decision of 6 June 2011 establishing an EU Anti-corruption reporting mechanism for periodic assessment ('EU Anti-corruption Report'), C(2011) 3673 final. http://ec.europa.eu/dgs/home-affairs/what-is-new/news/pdf/com_decision_c(2011)_3673_final_en.pdf

[51] A quick scan of the activities of the European Crime Prevention Network (EUCPN), specialised in developing and promoting crime prevention programmes and best practices, shows also that a focus on prevention of corruption is lacking. E.g., the issue is not addressed in the last, 2011 Annual programme neither during its annual conferences. *See*: http://www.eucpn.org/index.asp (retrieved July 2012). In accordance with the network's broadened objective

of a common legal framework regarding corruption. The Communication systematically refers to corruption as a general phenomenon permeating all sorts of societal and policy areas, but a legal framework in accordance with that approach is actually lacking. Instead the EU leans on one piece of legislation, the Framework Decision on combating corruption in the private sector. Additionally, the Commission proposes to apply other international anti-corruption instruments (UNCAC, OECD Convention and several CoE Conventions) and to cooperate with the international organisations in charge of these Conventions. Such a line of conduct alone should be supported but could probably become more effective supported by encompassing EU corruption legislation providing for a broader field of application and covering both repressive and preventive aspects.

Interestingly the recent Commission proposal for a Directive on the fight against fraud to the Union's financial interests by means of criminal law[52] addresses different criminal offences, integrating among others fraud and corruption into one instrument. Nevertheless it pertains to one policy area only, in this case the field of the Union's financial interest covered by article 325 TFEU.

Article 1 on the *substance matter* states that the proposed directive establishes necessary measures in the field of prevention of and fight against fraud and other illegal activities affecting the Union's financial interests by defining criminal offences and sanctions. However, provisions regarding preventive measures could not be detected in the proposed text although according to its legal basis the Union shall adopt the necessary measures in the fields of prevention and of fight alike against fraud affecting the Union's financial interests (article 235, paragraph 4, TFEU). In other words, this new legal step forward in addressing corruption problems at the EU level tackles a specific area only without a genuine preventive *volet*.

EU and international legal instruments combating Organised crime: first steps

The first steps towards the current legal framework in the fight against organised crime were taken in the late 1990s by the European Union. Indeed, it was in 1998 that the EU, on the basis of the Maastricht treaty's "third pillar", adopted a Joint Action on making it a criminal offence to participate in a criminal organisation in the EU Member States.[53] This legislative initiative was a first attempt at the international level to adopt a standard notion of organised crime and while observers had noticed that the definition provided for in that document was rather broad,[54] already then the legislative instrument demanded Member States to ensure the criminal liability of legal entities as well as of individuals.[55]

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of the 2009 Council Decision recast setting up the EUCPN one could wonder whether the network could not make it help possible to develop e.g. preventive corruption policies. Another option could of course be to invite the European Anti-corruption Network (EACN) to promote such an activity.

[52] Proposal for a Directive of the European Parliament and of the Council on the fight against fraud to the Union's financial interests by means of criminal law, COM(2012) 363 final, 11.7.2012.

[53] Joint Action 98/733/JHA of 21 December 1998 adopted by the Council on the basis of article K.3 of the Treaty on European Union, on making it a criminal offence to participate in a criminal organisations in the Member States of the European Union, *OJ* EC 1998, L 351, p. 1.

[54] Ibid., article 2. For an early commentary, *see*, *e.g.:* Mitsilegas V., *Defining organised crime in the European Union: the Limits of European Criminal Law in an Area of Freedom Security and Justice*, European Law Review, Vol. 26, 2001, p. 571.

[55] Ibid., article 3.

The text of the EU Joint Action served as an inspiration for the subsequent adoption of the United Nations Convention on Transnational organised Crime (the Palermo Convention or UNTOC) in 2000.[56] More precisely, the UNTOC followed the Joint Action adopted by the EU in the decision to pursue a "dual model of criminalisation".[57] Thus, the UNTOC also essentially allows countries to choose between the criminalisation of the participation to a criminal organisation and the criminalisation of conspiracy.[58] In addition to that, however, the Convention has a broader spectrum and contains not only measures requesting the criminalisation of participation in a criminal organisation, but also contains provisions on the prevention of organised crime activities as well as measures on money-laundering.

Since the adoption of the UNTOC, the European Union has adopted other measures with the aim of fighting organised crime. The biggest development in this perspective is Framework Decision 2008/841/JHA adopted in October 2008 on the fight against organised crime.[59] This Framework Decision repealed Joint Action 98/733 and essentially constitutes a development of the existing instruments. Thus, it provided a new definition of organised crime as well as providing new indications for penalties and new rules on jurisdiction for the prosecution of the crime. However, the Framework Decision, which was due to be implemented in May 2010, does not contain measures on prevention. And while the European Council in the Stockholm Programme has called upon the Member States to facilitate the exchange of best practices concerning the prevention of economic crime and corruption in the context of the fight against serious and organised crime,[60] the Action Plan Implementing the Stockholm Programme[61] only envisaged the development of a "customs risk management framework in order to prevent organised crime activities linked to goods".[62] With regard to the functioning of this Framework Decision, more clarity might arise in November 2012 when the Commission is to issue an assessment report on the extent to which Member States have complied with the provisions of this Framework Decision.[63]

Yet, while the dossier on prevention has not been particularly developed by the EU, prevention is a well-established concept in the fight against crime that has been codified not only in UNTOC,[64] but also in the TFEU itself. As a tool instrumental to help prevent crime it seems less well developed. The next section will look in more details at the international instruments dedicated to it.

EU and international legal instruments combating organised crime: new legal basis and current developments

Article 3 TEU, paragraph 2, affirms that one of the objectives of the Union shall be to offer citizens an area of freedom, security and justice in which free movement of persons is assured in conjunction with appropriate measures to, *inter alia*, prevent and combat crime. Furthermore, the combined reading of articles 67 and 83 TFEU demands the EU and its Member States to prevent and combat

[56] *See supra*, note 18.
[57] *See, e.g.:* McClean D., *Transnational organised Crime. A commentary on the UN Convention and its Protocols*, OUP, Oxford, 2007.
[58] Ibid., p.67.
[59] See *supra,* note 15.
[60] The Stockholm Program — An open and secure Europe serving and protecting citizens, *OJ* 210 C, 115/01, 4.5.2010, p. 23 (paragraph 4.4.5).
[61] COM(2010) 171 final, Brussels, 20.4.2010.
[62] Ibid., p. 33.
[63] Article 10, paragraph 2 of this Framework Decision.
[64] *See supra,* note 18.

crime, whether organised or not by means of judicial cooperation and eventually by approximating national legislations. Because the EU area is transnational by definition, the type of crime referred to is transnational by implication. At UN level, article 1 UNTOC[65] affirms that the main purpose of that Convention is to promote cooperation in order to prevent and combat transnational organized crime more effectively. It can be concluded that in both instances, cooperation in order to prevent and combat transnational (organised) crime is a core feature of the two regulatory systems.

However, an important difference between these two legal frameworks pertains to the level of specification. The focus of Chapters 4 and 5 of Title V TFEU concerns the enhancement of police and judicial cooperation in criminal matters among the Member States of the EU. Thus, even though prevention of (organised, trans-border) crime is mentioned as a main objective of their cooperation, no details are provided for the type of actions that the EU must promote on this matter. As stated above, the measures adopted thus far by the EU mainly concern the enhancement of judicial cooperation in order to facilitate the prosecution and the execution of criminal proceedings.

On the other hand, the UNTOC contains detailed provisions on prevention in article 31[66] obliging States which have ratified the instrument to endeavour to develop measures to prevent transnational organised crime. These measures not only have to be directed at the strengthening of the cooperation between their law enforcement agencies or prosecutors but also (among others) at: i) cooperation between private entities, including industry[67], ii) promoting the development of standards and procedures designed to safeguard the integrity of public and private entities[68]. Furthermore, with

[65] Article 1: The purpose of this Convention is to promote cooperation to prevent and combat transnational organized crime more effectively.

[66] Article 31: 1.States Parties shall endeavour to develop and evaluate national projects and to establish and promote best practices and policies aimed at the prevention of transnational organized crime. 2. States Parties shall endeavour, in accordance with fundamental principles of their domestic law, to reduce existing or future opportunities for organized criminal groups to participate in lawful markets with proceeds of crime, through appropriate legislative, administrative or other measures. These measures should focus on: (a) The strengthening of cooperation between law enforcement agencies or prosecutors and relevant private entities, including industry; (b) The promotion of the development of standards and procedures designed to safeguard the integrity of public and relevant private entities, as well as codes of conduct for relevant professions, in particular lawyers, notaries public, tax consultants and accountants; (c) The prevention of the misuse by organized criminal groups of tender procedures conducted by public authorities and of subsidies and licences granted by public authorities for commercial activity; (d) The prevention of the misuse of legal persons by organized criminal groups; such measures could include: (i) The establishment of public records on legal and natural persons involved in the establishment, management and funding of legal persons; (ii) The introduction of the possibility of disqualifying by court order or any appropriate means for a reasonable period of time persons convicted of offences covered by this Convention from acting as directors of legal persons incorporated within their jurisdiction; (iii) The establishment of national records of persons disqualified from acting as directors of legal persons; and (iv) The exchange of information contained in the records referred to in subparagraphs (d) (i) and (iii) of this paragraph with the competent authorities of other States Parties. 3. States Parties shall endeavour to promote the reintegration into society of persons convicted of offences covered by this Convention. 4. States Parties shall endeavour to evaluate periodically existing relevant legal instruments and administrative practices with a view to detecting their vulnerability to misuse by organized criminal groups. 5. States Parties shall endeavour to promote public awareness regarding the existence, causes and gravity of and the threat posed by transnational organized crime. Information may be disseminated where appropriate through the mass media and shall include measures to promote public participation in preventing and combating such crime. 6. Each State Party shall inform the Secretary-General of the United Nations of the name and address of the authority or authorities that can assist other States Parties in developing measures to prevent transnational organized crime. 7. States Parties shall, as appropriate, collaborate with each other and relevant international and regional organisations in promoting and developing the measures referred to in this article. This includes participation in international projects aimed at the prevention of transnational organized crime, for example by alleviating the circumstances that render socially marginalized groups vulnerable to the action of transnational organized crime.

[67] Article 31, paragraph 2(a).

[68] Article 31, paragraph 2(b).

regard to the prevention of the misuse of legal persons by organised criminal groups, the states which have ratified are even obliged by article 31, paragraph 2 (d) to endeavour to take special measures. Such measures may include: i) the establishment of public records on legal and natural persons involved in the establishment, management and funding of legal persons; ii) the introduction of the possibility of disqualifying by court order or any appropriate means for a reasonable period of time persons convicted of offences covered by the UNTOC from acting as directors of legal persons incorporated within their jurisdiction; iii) the establishment of national records of persons disqualified from acting as directors of legal persons; and iv) the exchange of information contained in the records on legal persons and criminal records thereof as mentioned in points (i) and (iii).

In 2004, the European Community acceded to the UNTOC after intensive negotiations concerning the division of powers between the Community and its Member States; [69] thus, the Community competences and obligations have been laid down in a declaration attached to the Convention[70].

A specific issue: perpetrators of economic and financial crimes

A specific issue relates to the type of perpetrators of the economic and financial crimes. In this comparative study we concentrate on legal persons in this respect. Title V of Part two of the TFEU, among others concerning police and judicial cooperation in criminal matters, makes no specific reference to the nature of the targeted offenders. Therefore, Member States have given the EU a general competence to combat and prevent transnational crime committed by both natural and legal persons. This conclusion is confirmed by the secondary legislation of the EU based upon the relevant provisions of the before mentioned Title V TFEU.

In a vast range of framework decisions it is determined that Member States shall take the necessary measures to ensure that a legal person can be held liable for the conduct(s) defined as punishable under the relevant instrument. As a general criterion, it seems that the responsibility of a legal person emerges if the offence(s) is (are) committed for the benefit of the legal entity by any person having a leading executing position within that entity, acting either individually or as part of an organ of the legal person. As for what concerns the nature of the liability of a legal person, the choice is left open so that it can be criminal, civil or administrative. However, Member States are obliged to implement effective, proportionate and dissuasive penalties. Moreover, in many cases penalties are tailored to the features of legal persons. This is the case of the Framework Decision 2008/841/JHA on the fight against organised crime[71] in which article 5[72] demands Member States to take the

[69] Council Decision 2004/579/EC of 29 April 2004 on the conclusion, on behalf of the European Community, of the United Nations Convention against transnational organised crime, *OJ* L 261/69, 06.08.2005.
[70] Annex II to the UNTOC, Declaration concerning the competence of the European Community with regards to matters governed by the United Nations Convention Against Transnational Organised Crime.
[71] *See supra*, note 15.
[72] Article 5: *Liability of legal persons* 1. Each Member State shall take the necessary measures to ensure that legal persons may be held liable for any of the offences referred to in Article 2 committed for their benefit by any person, acting either individually or as part of an organ of the legal person, and having a leading position within the legal person, based on one of the following: (a) a power of representation of the legal person; (b) an authority to take decisions on behalf of the legal person; or (c) an authority to exercise control within the legal person. 2. Member States shall also take the necessary measures to ensure that legal persons may be held liable where the lack of supervision or control by a person referred to in paragraph 1 has made possible the commission, by a person under its authority, of any of the offences referred to in Article 2 for the benefit of that legal person. 3. Liability of legal persons under paragraphs 1 and 2 shall be without prejudice to criminal proceedings against natural persons who are

necessary measures to ensure the liability of legal persons for the offence of participating in a criminal organisation committed by any person having a leading position within the legal entity Moreover, article 6(1)[73] of the same framework decision indicates the following penalties: (a) exclusion from entitlement to public benefits or aid; (b) temporary or permanent disqualification from the practice of commercial activities; (c) placing under judicial supervision; (d) a judicial winding-up order. As mentioned above, many framework decisions contain these clauses, so it can be concluded that by means of secondary legislation the EU provided itself with a number of instruments to combat organised crime committed by legal persons.

The UNTOC expressly demands the contracting parties to regulate the liability of legal persons. Article 10(1)[74] obliges the contracting parties to establish the liability of legal persons and to adopt the necessary measures in the case of participation in serious crimes involving an organised criminal group and for committing the range of offences considered in articles 5 ('Criminalisation of participation in an organised criminal group'), 6 ('Criminalisation of the laundering of proceeds of crime'), 8 ('Criminalisation of corruption'), and 23 (Criminalisation of obstruction of justice). The liability of legal persons under the UNTOC may be criminal, civil or administrative[75] and shall be without prejudice to the criminal liability of the natural persons who have committed the offences.[76] Finally, each contracting party shall ensure that legal persons held liable for those envisaged actions are subject to effective, proportionate and dissuasive sanctions, including monetary ones.[77]

perpetrators of, or accessories to, any of the offences referred to in Article 2. 4. For the purpose of this Framework Decision 'legal person' shall mean any entity having legal personality under the applicable law, except for States or public bodies in the exercise of State authority and for public international organisations.

[73] Article 6: *Penalties for legal persons* 1. Each Member State shall take the necessary measures to ensure that a legal person held liable pursuant to Article 5(1) is punishable by effective, proportionate and dissuasive penalties, which shall include criminal or non-criminal fines and may include other penalties, for example: (a) exclusion from entitlement to public benefits or aid; (b) temporary or permanent disqualification from the practice of commercial activities; (c) placing under judicial supervision; (d) judicial winding-up; (e) temporary or permanent closure of establishments which have been used for committing the offence.

[74] Article 10: *Liability of legal persons* 1. Each State Party shall adopt such measures as may be necessary, consistent with its legal principles, to establish the liability of legal persons for participation in serious crimes involving an organized criminal group and for the offences established in accordance with articles 5, 6, 8 and 23 of this Convention. 2. Subject to the legal principles of the State Party, the liability of legal persons may be criminal, civil or administrative. 3. Such liability shall be without prejudice to the criminal liability of the natural persons who have committed the offences. 4. 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.

[75] Article 10, paragraph 2.

[76] Article 10, paragraph 3.

[77] Article 10, paragraph 4.

3. *PART A: The legal framework of corruption, bribery and organised crime committed by or through legal entities*

Part A of the Questionnaire is titled "The legal framework of corruption, bribery and organised crime committed by or through legal entities". In this chapter, the findings of the national rapporteurs are presented and commented upon.

Corruption committed in the private sector

3.1.1. Criminalisation of private sector corruption

1.1) Have measures been taken to ensure that any form of active corruption constitutes a criminal offence?

This Comparative Overview starts with an exploration and analysis of the criminalisation laid down in the national legal systems of the EU Member States and three Candidate States of corruption committed at the horizontal level of private legal entities. The first question of the Questionnaire refers, for this reason, to article 2 (1) (a) of the Framework Decision 2003/568/JHA on combating corruption in the private sector. This provision reads as follows:

"1. Member States shall take the necessary measures to ensure that the following intentional conduct constitutes a criminal offence, when it is carried out in the course of business activities:

(a) promising, offering or giving, directly or through an intermediary, to a person who in any capacity directs or works for a private-sector entity an undue advantage of any kind, for that person or for a third party, in order that that person should perform or refrain from performing any act, in breach of that person's duties."

This provision requires EU Member States to criminalise active bribery of an employee or agent of a private sector entity. The next question asked to the national rapporteurs is the following:

2.1) *Have measures been taken to ensure that any form of passive corruption constitutes a criminal offence?*

This question refers to article 2 (1) b Framework Decision 2003/568/JHA, which requires EU Member States to criminalise passive bribery, i.e. soliciting to a bribe. The provision stipulates:

"(…) directly or through an intermediary, requesting or receiving an undue advantage of any kind, or accepting the promise of such an advantage, for oneself or for a third party, while in any capacity directing or working for a private sector entity, in order to perform or refrain from performing any act, in breach of one's duties."

This provision mirrors article 2 (1) a, while adding that the solicitor does not have to request or receive the bribe himself. Using a 'middle man' does not exempt the receiver of the bribe from falling under the definition of the offences of article 2 (1) Framework Decision 2003/568/JHA.

The answers given to these questions are discussed simultaneously. As could be expected, based upon the latest implementation report of the EU Commission[78], most concerned States have adopted – in one way or another – criminal law provisions that criminalise this kind of corruption. Of the investigated States – including the Candidate States – three had not yet adopted any legislation that specifically encompasses private corruption, namely: EE, LT and FYROM. It should also be noted that – at the moment of drafting this comparative overview – the Italian criminal law is void of any specific provision as well. However, despite its transposition in article 2635 of the Italian Civil Code, this provision is backed-up with criminal sanctions, including imprisonment, and as a consequence can be considered by this study as materially criminal.

Article 2(1) (b) Framework Decision 2003/568/JHA requires that the person to whom the advantage is given works for or directs, in any capacity, a private sector entity. Therefore, both bribery of employees as well as of directors, high-level managers and other agents are covered by the definition of this article. The private sector entity includes both profit as well as non-profit organisations. However, in any case, the provision requires that the conduct must be carried out in the course of business activities.

Some rapporteurs have stated that their legal system does not distinguish between corruption/ bribery committed purely among private entities (horizontal corruption) and corruption/bribery committed in a public-private relationship (vertical corruption). Instead, such States have adopted anti-corruption provisions which apply to horizontal and vertical types of corruption offences alike (CZ, RO, SI and UK). However, the legislation of PL, PT, HU and IT only refers to the bribery of staff employees, thus excluding independent contractors, agents or self-employed persons. Most systems refer to agents and employees, thus excluding the bribery of self-employed persons. However, in the case of Italy, this consequence is mitigated by including specific provisions for the bribery of individuals without directly identifiable principals, such as medical practitioners.[79]

- The law of Romania provides for an exceptional case, because its legislation is, strictly speaking, only applicable to the corruption of 'officials'. However, the meaning of the term 'official' is interpreted so extensive, that it also encompasses persons whose task has any

[78] COM (2011) 309 Final.
[79] Article 171 Royal Decree no. 1265 of 27 July 1934.

relevance for the society as a whole and can thus include private entities, working for a 'public' benefit.

- The offence of private corruption was introduced into the French criminal code by law of July 4th, 2005.

The key elements of article 2 (1) Framework Decision 2003/568/JHA consist of the requirements that the advantage given should be 'undue' and that awarding or promising to award such an advantage should be aimed at having the recipient to perform (or refrain from performing) in breach of that person's duties. What type of advantage should be considered as 'undue' is not explained in the Framework Decision. However, it is not necessary that it should be an advantage for the recipient of the bribe. A third party may be the beneficiary of the advantage as well. Furthermore, that advantage does not necessarily have to be given or promised by the briber himself. He may also use an intermediary. However, a breach of duty should, according to article 1 Framework Decision 2003/568/JHA, at least cover […] "any disloyal behaviour constituting a breach of a statutory duty, or, as the case may be, a breach of professional regulations or instructions, which apply within the business of a person who in any capacity directs or works for a private sector entity. (…)". The breach of a duty thus does not only relate to breaches of statutory obligations, but also to breaches of contractual obligations.

Relating to these requirements, it is surprising to see how divergent the criminal legislation of the investigated States is. The legislation of 13 States requires that the bribe should have the aim or the result that the person bribed breaches a statutory or contractual duty (AT, BE, BG, DK, EL, IT, LV, LU, PT, RO, SK, TR, UK, FR). Most of these provisions refer to duties relating to the capacity of the person bribed, duties resulting from his occupational relationship, a duty to inform the principal about the gift or leave the definition open for judicial interpretation. However, the legislation of seven States does not require that the bribe related conduct breaches a duty in any way (HR, CZ, DE, HU, RO, SE, SI). Under these provisions, even rewarding a legitimate performance by the person bribed could result in an offence. In some cases this is caused by the distinction made by some States between 'gratuities' and 'bribes'. The former covers an illegitimate reward for a legitimate performance, while the latter requires an illegitimate performance as well (see for instance the legislation of Slovenia).

Another constitutive element varying between different national legislations is the concept of 'undue advantage'. The criminal provisions of ten States explicitly refer to the requirement that the advantage to be given has to be 'undue' (BE, DE, EL, HU, IT, LV, PT, SE, SK, SI). However, most provisions do not specify the exact meaning of this element. Other States – also nine – do not require the advantage to be undue, but instead, the offence is focused on the illegitimacy of the performance (AT, BG, HR, CZ, DK, LU, PO, RO, UK).

- Notable is the legislation of Latvia, whose provision on active bribery requires that the recipient 'accepted' the bribe in order for the briber to be held liable for active bribery.
- According to the Swedish rapporteur, an advantage is at least considered to be 'improper' if its value exceeds SEK 500 – 1000 (€56. - - €113.-).

Most private corruption provisions of the investigated States do not require that the bribe is awarded directly by the briber to the person being bribed, but instead also incriminates the offender who uses

an intermediary to bribe another person (AT, BE, BG, EL, IT, LV, PT, RO, SK, SV) and vice versa (AT, BE, DK, DE, EL, IT, LV, LU, PT, SK, SV, UK). However, some provisions do not directly refer to these kinds of situations.[80] However, as has been argued by the Finnish and Swedish rapporteurs, such situations are often covered by secondary offences, such as complicity, aiding and abetting.

1.3) Have measures been taken to ensure that instigating, aiding and abetting of corruption constitutes a criminal offence?

Although article 3 Framework Decision 2003/568/JHA requires that the EU Member States criminalise the secondary offences instigating, aiding and abetting, the national reports indicate that not all States have done so. While instigation, aiding and abetting often forms a part of general national substantive criminal law provisions some States have only criminalised aiding (BG) or only aiding and abetting (AT, PT, PO).

3.1.2. Applicable penalties and sanctions

2.1) *Have measures been taken to ensure that the above mentioned offences are punishable by criminal penalties?*

This question refers to the penalties and other sanctions applicable to the offences of article 2 and 3 Framework Decision 2003/568/JHA. Article 4 (1) of the Framework Decision requires that this should at least cover effective, proportionate and dissuasive criminal penalties. In the case of article 4(2) Framework Decision 2003/568/JHA, this should be covered by a maximum prison sentence of at least one to three years.

The private corruption provisions of all investigated States provide for, at least, a custodial sentence. The legislation of nine States provide for a higher maximum prison sentence for passive corruption than for active corruption (BG, HR, CZ, HU, LV, PO, PT, RO, SK). According to Macauley, who reviewed the results of GRECO's third evaluation round, the reason for this distinction is that many legal systems believe that the breach of trust that is vested in a person is a greater wrong than that of inducing it.[81] However, other States do not make this distinction. In a majority of the investigated systems, the maximum applicable prison sentences for active corruption are three or five years and five years for passive corruption. The legislation of some of the investigated States also provides for aggravated forms of corruption (both active and passive) (HR, CZ, DE, EL, HU, LV, PO, PT, RO, SK, SI). The aggravation often relates to the amount of the rewarded or promised advantage (SE, EL), the advantage obtained by the briber (SE, SK), the unlawfulness of the – required – performance or the harm caused to third parties or the competition in general (PT).[82]

- As to the United Kingdom, the maximum applicable prison sentence is ten years in case the offence is tried on indictment.
- The Turkish legislation provides for a maximum custodial sentence of 12 years.
- When considering aggravated circumstances, the passive corruption offence of Romania provides for the highest duration of imprisonment, 15 years in case the person possesses controlling powers.

[80] Considering active corruption: HR, CZ, DK, DE, HU, PO, SE; and passive corruption: BG, CZ, HU, PO, RO, SE.
[81] Macauley R., *Fighting Corruption; Incriminations; Thematic Overview of GRECO's Third Evaluation Round,* 2012, Council of Europe: www.coe.int/t/dghl/monitoring/greco/general/MACAULEY_EN.pdf, paragraph 52.
[82] Ibid., paragraph 51.

- The lowest applicable maximum prison sentence is provided by the criminal law of Luxembourg, which is five months.
- The Polish provision also contains a mitigating circumstance that reduces the maximum applicable imprisonment from five to two years in case the corruption is considered to be 'of lesser importance'.

The Framework Decision 2003/568/JHA does not necessitate that EU Member States provide for any monetary sanctions. However, a vast number of the national rapporteurs state that their national legislation does provide for this in cases of corruption committed by natural persons (AT, BE, BG, CZ, DE, LV, LU, NL, PO, PT, SE, SK, UK, FR). It proved, however, to be impossible to give an average of the maximum amount of the fine to be imposed since some States use a maximum amount (NL, LU, BE, BG, SK, FR) while other systems use a flexible system to calculate the fine, usually by multiplying the income of the offender with the applicable 'daily rates' (DE, SE, FI, AT, ES).

Considering the other 17 States, the national reports were unclear whether their national system precludes the application of a monetary sanction in cases of corruption.

- The highest fine can be imposed in the United Kingdom, where legislation does not limit the amount of the fine.
- The Spanish criminal law provision calculates the fine in accordance with the benefit or advantage obtained by the bribe.
- In the investigated states which apply a fixed maximum amount for the fine, the amount ranges from €30,000. - (LU) to €500,000. - (EL).

2.2) Can measures of disqualification be imposed on natural persons in a leading position of a legal entity for having committed active or passive corruption?

Article 4 (3) Framework Decision 2003/568/JHA requires that the national law of the EU Member States should at least provide for measures to disqualify natural persons in a leading position of the company concerned who have been found guilty of one of the offences of article 2 of the Framework Decision, at least temporarily, from carrying out a comparable business activity. The disqualification of other persons than those in a leading position of a company is not required under the Framework Decision. However, Member States are free to provide for stricter penalties for the offences concerned in their national legislation.

One national rapporteur indicates that his legal system does not allow for the disqualification of offenders of corruption (BG), whereas two stated that a conviction of corruption is considered to be a ground for immediate dismissal of the offender from his employment (HR, SI). Nineteen rapporteurs indicated that disqualification of the offender is possible (AT, BE, CZ, DK, FI, DE, EL, HU, IT, LV, LU, PO, PT, RO, SK, ES, SE, TR, UK, FR). The question arises whether the immediate dismissal of an employee can be regarded as a disqualification *stricto sensu,* as it is not stated whether this also precludes the dismissed offender from retaining an equivalent position. States that do allow for disqualification of the offender could be categorised in: Those that only disqualify the offender from obtaining an occupation of which the performance is restricted by a certain professional license (EL, SK, TR); those that restrict the disqualification to obtaining a leading position in a company (DK, PO, PT, RO, UK); and those that allow for the disqualification to exercise all kinds of commercial

activities (AT, BE, CZ, DE, HU, IT, LV, LU, ES, SE). These measures are usually part of the criminal procedure, but are in some cases administrative in nature.

- The German law contains a hybrid system that allows for disqualification of an offender or an alleged offender of corruption either by a criminal conviction (article 70 German Criminal Code) or as an administrative measure (section 35 German Trade Law). This way the disqualification can be imposed either as a penalty or as a preventive measure to ward off unreliable traders.
- Under Belgium law, persons who have been disqualified from a certain profession in other States are automatically banned from the corresponding occupation in Belgium.
- In Sweden, the criminal penalty will be reduced if the offender has been disqualified from his occupation as a consequence of corruption.

Besides the aforementioned penalties, many rapporteurs also mention the possibility of confiscating the benefits of corruption, the imposing of civil sanctions such as tort liability and nullification of contracts.

3.1.3. Liability of legal persons

3.1) Have measures been taken to ensure that all or only some specific types of legal persons can be held liable for the above mentioned offences (active and/or passive forms of corruption) when committed by persons in a leading position?

This question is based on article 5 Framework Decision 2003/568/JHA. This provision requires that EU-Member States provide for corporate liability for private corruption when *committed for their benefit by any person, acting either individually or as part of an organ of the legal person, who has a leading position within the legal person* or when *lack of supervision or control by a person with a leading position within the legal entity has made possible the commission of private corruption for the benefit of that legal person by a person under its authority. Additionally, Liability of a legal person must not exclude criminal proceedings against natural persons who are involved as perpetrators, instigators or accessories of private corruption.*

Article 1 of Framework Decision 2003/568/JHA refers to a definition of the legal status or the entity in conformity with its national system, while excluding State or other public authorities. This also seems to be the overall trend. Asking after the distinction between various types of entities, most rapporteurs report that their system excludes criminal liability for State or other public entities, at least in so far as the entity commits the offence in the framework of its public capacity.

According to the Framework Decision 2003/568/JHA, liability should at least be attributed to the entity in case the corruption or the instigation, aiding or abetting of that, has been committed for its benefit by a person with a leading position within that entity. It thus refers to actions of those who are 'the directing mind and will' of the legal person and who had the aim of committing the offence for the benefit of the legal person. Article 1 (a), (b) and (c) describe the criteria on which such leading position should be based upon. The actions of persons in a leading position seem to be the benchmark of corporate liability in all observed States as well. However, the legislation of some States also attributes the actions of other employees to the corporate entity.

3.2) Please specify the nature of these measures; where appropriate please specify the different types of measures taken for different types of legal persons.

Article 5 of Framework Decision 2003/568/JHA requires the EU Member States to implement liability provisions for legal entities, but leaves the nature of the liability – criminal, administrative or civil – up to the discretion of the EU Member States themselves. Therefore, this question aims to discover how these Member States and the Candidate Countries have dealt with that discretion.
The national reports show a great diversity in this regard. States like Greece, Bulgaria and Turkey allow for administrative liability of legal entities, often based on the argument that corporate criminal liability infringes upon the general criminal law principal of individual guild, or contradicts with fundamental aspects of their criminal law system that bases criminal liability upon the actions of physical persons. Most other legal systems provide for criminal liability of a legal entity for corruption often in addition to civil and/or administrative liability. While some investigated States hold an entity accountable for actions of those in a leading position, others provide for a wider scope by attributing liability for offences committed by other employees and agents as well (AT, BE, BG, DK, IT, PO, RO). In Italy, the particular type of liability for cooperation's is heavily debated among legal scholars and practitioners. However, the prevailing opinion is that their liability should be considered administrative in nature.

- In Germany, the liability of a legal entity is considered as an "*Ordnungswidrigkeit*", i.e. a regulatory offence that is neither purely criminal nor administrative. As a consequence, prevention and control are considered to be the major objectives rather than retribution and deterrence.[83] Additionally, the liability of the entity is inextricably linked to the criminal liability of the individual offender.

3.3) Have measures been taken to ensure the liability of legal persons where the lack of supervision or control by a natural person possessing a leading position in the legal entity has made possible the commission of the above mentioned offences? If appropriate please make a distinction between different types of legal persons.

Paragraph 2 of article 5 Framework Decision requires EU Member States to provide for liability for actions of those other than a person in a leading position of the entity, when the offence is committed by someone under the authority of a person in a leading position of the legal person. The liability for the offence is attributed to the legal entity if the subordinate was able to commit the offence as a result of insufficient supervision and control by his superior.. Again, the offence must be committed with the aim to benefit the legal entity. The liability is attributed to the legal entity, when its management has taken insufficient due diligence measures to prevent the offence from being committed by someone under their authority. Subsequently, the provision is not limited to actions of employees only, but covers anyone under the authority of those in a leading position of the entity. This could include other agents as well.
Most rapporteurs state that their national legal system also holds the entity accountable for being negligent to prevent offences committed by persons under their responsibility and for their benefit.

[83] For a comment on this system, *see*: *Öztürk* v. *Germany*, ECtHR Judgement of 21 February 1984, app. 8544/79.

Only Bulgaria and Croatia do not to seem to allow for liability of a corporate entity based on that principle.

- A famous – some would say notorious – example of this, is Section 7 UK Bribery Act, which provides for strict, vicarious liability for commercial organisations for bribery, committed for their benefit, by persons associated with them. Because it is a form of strict liability, no *mens rea* – not even negligence – of the corporation is needed. However, the organisation is allowed to put up as a defence that it had in place adequate procedures designed to prevent such conduct. The Secretary of State has been tasked with publishing guidelines in order for the organisations to assess what procedures could be considered as 'adequate'.[84]

Based on the national reports, the common denominator seems to be that the offender has at least some connection with the legal entity, and commits the offence for the benefit of that entity.

In France, the law of March 9th, 2004 extended, as from December 31st, 2005, the responsibility of legal entities, with the exception of the State, to all offences, except for violations of the laws governing the press and assimilated. This principle appears in article 121-2 of the Criminal code. Legal entities can therefore be prosecuted for corruption or traffic in influence.
The criminal liability of legal entities does not exclude that of individual authors or accomplices of the same facts.
Legal entities are criminally responsible for offences committed to their account, although the law does not envisage a connection between the corrupt act and the benefit or interest of the legal entity.
As far as the law gives no definite answer because of the plurality of responsibilities, a circular of the French Minister of Justice of February 13th, 2006 encourages judges and prosecutors to prosecute, in case of calculated offence, at the same time the natural person, author and accomplice of the facts, and the legal entity, when those facts were made by one of its organs or its representatives.

3.1.4. Applicable penalties

4.1) Have measures been taken to ensure that legal persons held liable pursuant to Article 5(1) are punishable by criminal penalties?

Article 6 Framework Decision 2003/568/JHA specifies the applicable penalties and sanctions that the law of EU Member States should at least provide for against legal persons held liable for corruption. The applicable penalty must at least be effective, proportionate and dissuasive. These penalties shall include a fine, but may also include certain auxiliary sanctions such as: (a) exclusion from entitlement to public benefits or aid; (b) temporary or permanent disqualification from the practice of commercial activities; (c) placing under judicial supervision; or (d) a judicial winding-up order.[85] Whereas the Framework Decision does not necessitate that the penalties are 'criminal' the question is focused on this particular type of penalty. However, in accordance with the terminology

[84] This guidance is available at: http://www.sfo.gov.uk/bribery--corruption/the-bribery-act/adequate-procedures.aspx (retrieved June 2012).
[85] Article 6(1) Framework Decision.

used by the European Court of Human Rights, these types of measures – that at least should cover a fine – are considered to be criminal in nature.[86].
All investigated countries do allow for the imposition of a fine for the responsible legal entity. Based on the analysis of the national reports, a division can be made between: States that provide for a fixed amount fine; States where financial penalties are flexible; and States that do not limit the amount of the fine (DK, DE, UK). Legal systems with flexible rates usually calculate the fine based on the benefit obtained or the damage caused by the conduct or the turnover of the company or financial situation of the company (AT, EL, HU, IT).

- The Austrian penalty system for legal entities is based upon the turnover of the legal entity and as a consequence, the fine applicable to non-profit organisations or organisations which are making losses is relatively low (€2750.- in case of private corruption).
- Greece and Hungary both use a system in which the maximum fine is three times the annual turnover of the legal entity.

In the investigated States that provide for fixed maximum fines, the minimum rate is €100,000. -- (SE, BE) and €1,660,000.-- at most (PO, SK), but often rates range between the €400,000.- – 800,000.- (BG, FIN, NL, RO, SI, TR).[87]

- The Finnish rapporteur points out that, although the maximum fine applicable to legal entities is €850,000.- in Finland, the highest fine imposed so far has been €500,000.-. Moreover, the average fine imposed upon corporations in Finland is €2,000.-.
- In France incurred penalties are the fine (quintuple of the sum of the fine incurred by natural persons (i.e. 5X 150 000 =750 000 Euros) and/or one or more of the penalty listed in article 131-39 of the Criminal Code. The additional penalty of confiscation is incurred ipso facto for crimes and misdemeanours /crimes punishable by imprisonment for a term exceeding one year, with the exception of press offenses.

Of the auxiliary sanctions, the criminal confiscation measure (BE, HR, CZ, DE, LV, LU, PO, RO, SK, SI, TR, UK, FR) and the temporary or permanent prohibition from exercising certain business activities (BE, HR, CZ, EL, HU, IT, LV, PT, RO, SI, ES, SE, FR) are among the measures mentioned the most. The judicial winding-up order has been mentioned by six national rapporteurs (BE, HR, CZ, HU, PT, ES). Other measures include: the publication of the judgment (BE, CZ, PO, PT, RO, SI); the disqualification from or the revocation of subsidies (CZ, EL, IT, PO, PT, ES, FR); prohibition to participate in public tenders or contracting with the public administration (CZ, DK, DE, IT, LU, PO, RO, FR); revocation of permits (HR, IT, SI); and the closure of the premises of a certain branch of the entity (BE, PT, RO, ES, FR).

- The Polish rapporteur specifically mentions the possibility provided by Polish law, to prohibit a legal entity from using grants or subsidies provided to it by an international organisation of which Poland is a member.

[86] *See: Engel and others* v. *The Netherlands*, ECtHR Judgement of 8 June 1976, app. 5100/71, 5101/71, 5102/71, 5354/72, 5370/72, paragraph 82; *see also: Öztürk* v. *Germany*, ECtHR Judgement of 21 February 1984, app. 8544/79, paragraph 50.
[87] The rates of the investigated states that are not part of the Eurozone are, for the purpose of this comparative study, converted to Euro's based on the currency rate in May and June 2012.

– While explicitly mentioned in the Framework Decision 2003/568/JHA, only the rapporteurs of Portugal and Spain explicitly state the possibility under their legal system to place the legal entity under judicial supervision.

Judicial supervision for legal entities

Although explicitly mentioned in article 6 (1) c of the Framework Decision, only a few of the national rapporteurs have indicated that their legal system provides for the possibility to place a convicted legal entity under judicial supervision. Judicial supervision is aimed at restoring the corporations' integrity and compliance by appointing a trustee with the task to reorganise or monitor the reorganisation of the company. While very invasive, this measure could be seen as a useful tool as it rehabilitates the legal entity without resorting to criminal penalties or other drastic measures, such as the termination of the corporation. Under the banner of the RICO-act (1) and the FCPA (2), this measure has already been employed frequently and successfully in the United States. See for example the instalment of the compliance monitor at Siemens AG as a result of a prosecution settlement for charges of corruption (3).

As an exception, the Spanish and the Portuguese national rapporteurs have indicated that their system does provide for the imposition of judicial supervision upon corporations. For instance, article 33 (7) g of the Spanish Criminal Code (SCC), allows the court to impose, as a penalty upon the legal entity, a judicial intervention to safeguard the rights of the workers or creditors, for a maximum duration of five years. The court has the competence to appoint the trustee and to determine his tasks. The trustee is entitled to access all premises of the corporation and has the authority to receive from the company any information he deems necessary. Additionally, he has to submit a monitoring report to the court. Also the Portuguese Law no. 59/2007 of 4th September 2007 provides for a similar measure.
From a formal point of view judicial supervision is a sanction which can be imposed upon a legal entity by the judge. Practically speaking it can be considered as rather preventive measure helping to get e.g. a company back on track without having to close- temporarily or permanently - its premises. Comparatively other sanctions like a fine, disqualification of directors or winding up a business are far more punitive. See also the closing remarks made by Prof. Fijnaut (Appendix).

Sources:
(1) Racketeer Influence and Corrupt Organizations Act (18 U.S.C § 1961).
(2) Foreign Corrupt Practices Act (15 U.S.C. § 78dd-1)
(3)http://www.siemens.com/press/en/pressrelease/?press=/en/pressrelease/2008/corporate_communication/axx20081220.htm (retrieved 29 August 2012).

3.1.5. Jurisdiction

5.1) What are the relevant national rules on jurisdiction with regard to legal entities committing corruption inside the national territory?

Question 5 of the questionnaire relates to article 7 Framework Decision 2003/568/JHA, namely the minimum rules regarding the jurisdiction of the EU Member States over the offences of article 2 and 3, but in this case, specifically related to the liability of legal entities. Article 7 Framework Decision 2003/568/JHA requires that the EU Member State should at least establish jurisdiction over these offences when committed on its own territory (territorial jurisdiction).
Al investigated States whose legislation provide for criminal liability of legal entities, are able to establish jurisdiction over offences committed by legal entities on their territory (AT, BE, HR, FI, DE, EL, LV, LU, NL, PO, PT, SK, SI, ES, TR, UK, FR). The common criteria to determine whether the act has been committed on the territory of that State are based on the materialisation of a constituent element of the offence. This means that one of the constituent elements of the offence must be carried out or materialised on the territory of the State concerned. As to private corruption, this could, for instance, cover the situation in which an employee of a legal entity of State A is sent to State B to bribe an employee of his business partner for the benefit of the legal entity.

Only in some States, of which the national system attributes liability of legal entities based on administrative law, it is unclear whether territorial jurisdiction applies. In these States, the jurisdiction encompasses entities whose seat is located in that State or who are registered there (CZ, HU, IT).

5.2) What are the relevant national rules on jurisdiction with regard to legal entities committing corruption outside the national territory?

Question 5.2 seeks to get an overview of the use of extraterritorial jurisdiction by the investigated States. According to article 7 Framework Decision 2003/568/JHA, EU Member States should at least establish jurisdiction over corruption committed by its nationals or when the offence has been committed for the benefit of a legal entity with its headquarters on the territory of that State (active personal jurisdiction). [88]

A majority of the national rapporteurs reports that their legal system at least provides for jurisdiction over offences committed abroad by their nationals (AT, BE, HR, CZ, FI, HU, EL, IT, LU, NL, PT, SK, SI, ES, TR, UK). In these States the 'nationality' of the legal entity is usually determined by their place of registration, the location of their headquarters and/or the existence of an establishment on the territory of that State. Other States also grant jurisdiction in case the offence has been committed against one of its citizens (passive personal jurisdiction) (AT, CZ, LU, PT, RO, SK, SI, ES, TR) or against specific interests of the State (CZ, LV, SK, SI, ESP, ESP, TR). However, in almost all cases, dual criminality with the State on which territory the offence has been committed has to be established in order to obtain a successful conviction (exception: LU, UK).

- Again, the UK Bribery Act provides for a remarkable example. Under section 7 of the UK Bribery Act, jurisdiction is granted over corruption committed by a person associated with

[88] Article 7(1) of the Framework Decision.

and on behalf of a corporation that carries out a business or part of its business in the United Kingdom, irrespective of whether the acts or omissions which form part of the offence take place in the United Kingdom.

- The Greek anti-corruption legislation also grants a quasi-universal jurisdiction since it is applicable to any commission of corruption, irrespective of the place of the commission, on the condition that the offence has been committed in a State Party to the UN Convention Against Corruption (article 8 Law No. 3666/2008).
- Also Luxembourg establishes jurisdiction over corruption committed outside its territory on the condition that the perpetrator is 'found' in Luxembourg.
- Denmark, Sweden and Finland consider citizens of other Nordic countries as their own citizens for determining passive or active personal jurisdiction.
- In France article 113-6 of the Criminal code provides for the competence of the French authorities for offences committed by French persons abroad if the facts are punishable according to the Law of the concerned State and article 113-8 of Criminal code provides for a monopoly of the Office of Public Prosecutor, i.e. in case of a complaining victim, or when the authorities of the State file a criminal complaint.

5.3) Can the Public Prosecutor initiate legal proceedings ex officio or only after a complaint by a victim of corruption or a third party?

To give effective meaning to the national anti-bribery legislation, adequate prosecution is called for. As is generally known, the criminal law of many States distinguishes between offences which can be tried by the public prosecutor's office on its own motion (*ex officio*) or only after an interested party – commonly the victim – filed a complaint against the alleged offender. Especially in relation to international cooperation or when the conduct has adverse effects upon the interests of third parties, *ex officio* prosecution could be considered preferential over complaint-based prosecution. However, the private – internal – nature of private corruption might persuade States to allow prosecution of this offence only after a complaint has been filed. As a consequence, it is useful to get an overview of the limits under which the offence can be prosecuted.

Almost all rapporteurs have indicated that their national legal system has established *ex officio* prosecution (except for AT, IT, ES, SE). The Austrian public prosecutor is not authorised to prosecute private corruption committed within and against a person within the family circle unless a complaint has been filed by the victim of the offence.

- The current Italian anti-corruption legislation, which is based in the civil code, only allows for prosecution after a complaint has been filed by the victim. However, this is about to be changed once the proposed anti-corruption bill has been adopted.
- Although the Spanish anti-corruption legislation relating to private corruption authorises only the initiation of a prosecution after a complaint has been filed, such a complaint can be filed by anyone.
- Swedish law requires the complaint of the principal or the employer concerned in order to initiate a prosecution.

– Although the prosecution services within the jurisdictions of the UK have the power to initiate the prosecution on their own motion, consent is needed from senior-ranked officials of the prosecutor's office before prosecution can commence.

5.4) Is distinction being made between public and private entities with regard to the applicable legal regime? Please specify what these differences, if any, entail.

In relation to this question, many rapporteurs have indicated that State and other governmental bodies enjoy immunity from criminal prosecution (AT, BE, HR, CZ, DK, HU, IT, LU, PT, SI, FR). However, this immunity from criminal liability is often limited in so far as the governmental body acts within the sphere of its public authority.

3.1.6. Statutory limitations

5.5) Please identify the most relevant statutory limitations within national procedural law with regard to corruption.

Statutory limitations, such as time-limits and legal immunity, are applicable in almost all jurisdictions. The adoption of time-limits creates legal certainty and nudges the authorities to adjudicate the offence within a reasonable time. Legal immunity is usually granted to members of certain State organs or constitutional bodies in order to safeguard the separation of powers and to prevent politically motivated trials. However, time-limits and immunities that are too restrictive can become an obstacle to effective enforcement of anti-bribery legislation. Based on the same reasons as question 5.2, question 5.5 is asking the national rapporteurs to discuss the applicable statutory limitations in their legal system.

– Only the rapporteur of the United Kingdom indicates that the UK Bribery Act does not provide for any time limitations. As a consequence, the prosecution is not restrained by time limits, but an excessive delay can cause an infringement of the fair trial-principle. A time limitation of five years is, by far the most common duration in all investigated States. In some of these States, the duration is ten years, often in case of aggravated forms of corruption (AT, BG, HR, FI, SE) and 15 years at most (HR, CZ, TR).
– In Italy, the time-limits for the prosecution of legal entities is lower (five years) than for natural persons (7,5 years)
– The legal immunities discussed under question 5.4 also apply to immunities under this question. However, according to the German rapporteur, the recent case of the former German President, who was politically forced to resign after allegations of corruption, shows that legal immunity of officials does not prevent social and political repercussions compensate for this kind of enforcement limitations.

3.1.7. Overview and analysis of the adequacy of the enforcement of private sector corruption

6.1) Provide a statistical overview of cases brought against legal entities and/or their directors in the period 2005-2010;

6.2) Provide an overview of the type of offences dealt with in cases brought against legal entities and/or their directors.

Questions 6.1 – 6.2 are seeking to create understanding of 'the law in practice', i.e. how often and how are cases relating to the above-mentioned offences prosecuted?
The answers given to these questions prove to be diverse and practically incomparable. While some rapporteurs provide statistical information about the absolute number of cases prosecuted by their national authority, others provide relative numbers of convictions etc. This often relates to the diversity in which the investigated States have structured and managed their criminal databases. Often, the national rapporteur was unable to provide figures at all. Due to this, this comparative overview will provide a short enumeration of the most notable figures provided to us.

- So far, Sweden experienced practically no cases of corruption committed by legal entities. Between 2007 and 2009 only one entity has been prosecuted for passive bribery.
- Austria has registered 64 embezzlement cases committed by legal entities of which 17 resulted into a conviction between 2007 – 2009.
- In Germany, 7,500 cases of passive private corruption were filed against natural persons in 2010. Additionally, 1,400 cases of active corruption were filed in the same year. In 63% of the cases, the briber concerned a manager a corporation.

In general, it is believed that private corruption, especially if committed by legal entities, is not very actively prosecuted in the investigated States.

6.3) Provide a general assessment of the impact of the jurisprudence on private sector corruption.

The answers to this question proved to be diverse as well. However, most national reports could not provide an assessment because of a lack of publicly accessible data. Like the previous two questions, the most notable answers will be enumerated below:

- The Swedish and the Latvian rapporteurs state that their national prosecution service has traditionally been reluctant to prosecute legal entities, but instead prefer the prosecution of the natural persons who have committed the offence on behalf of the entity. The Swedish rapporteur argued that this has been caused by the prevailing view of most courts that the conviction of the legal entity would result in a second penalty for the same conduct.
- In Austria, cases of private corruption are often tried as embezzlement since the Austrian Supreme Court has ruled that gifts offered for the purpose of instigating a certain act by an employee should be considered as property of the principal/employer, causing an employee who keeps the award for himself, to misappropriate the property of his principal.

6.4) Please describe whether the prosecution strategy could be considered as adequate and effective with regard to the characteristic features of corruption in your country.

When asking about the adequacy of the prosecution of private corruption, 11 national reports have indicated that the prosecution is considered to be adequate (BE, HR, CZ, DE, FR, EL, NL, PO, RO, SE UK.), nine consider the prosecution strategy to be inadequate (AT, BG, HU, CY, IE, LV, FYROM,

SK, TR) and the remaining reports had either insufficient data to provide an answer to this question or were neutral towards it. Low priority is often mentioned as a cause of the prosecution strategy to be considered inadequate.

- The German rapporteur attributes the successful prosecution of corruption in the private sector to adequate investigation and cooperation of private sector entities themselves. It shows that corporations themselves form the 'first line of defence' against corruptive practices committed by members of their staff.

Bribery of public officials by legal entities

While the previous section of the comparative overview was focused on the criminalisation of private sector, or horizontal, corruption, the following section will consider the more classical type of corruption, bribery of officials. This analysis is based on the answers to questions 7.1 to 12.4 of the questionnaire. For the purpose of this comparative overview, the questions posed reflect the structure of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (hereinafter, the OECD Convention). While this Convention mainly requires State Parties to implement provisions regarding bribery of foreign officials, it also requires approximation of anti-bribery provisions on foreign public officials with that of national public officials. Additionally, this Convention places a direct link between bribery and commercial entities, which creates a suitable foundation for this part of the questionnaire. Offences of bribery of public officials and private corruption, both in international instruments and national legislation, often tend to have the corresponding elements. As a consequence, much of what will be discussed below will have a close connection with what has been discussed in the previous section. In order to prevent unnecessary repetition, the focus of this analysis will be on the specific characteristics of active bribery of (foreign) public officials. Firstly, an overview will be provided of the criminalisation and constituent elements of this offence and the applicable penalties. Secondly, the focus will shift to the liability of legal entities and the corresponding penalties and sanctions. Thirdly, the jurisdictional rules will be discussed followed by an analysis of the statutory limitations. This section will end with a discussion on issues relating to the enforcement of legislation covering the bribery of (foreign) public officials.

3.1.8. Criminalisation of bribery of public officials

7.1) Have measures been taken to ensure that any form of bribery of a (foreign) public official by a private legal entity, including persons in a leading position, constitutes a criminal offence?

Question 7 of part A of the questionnaire relates to the criminalisation of active bribery of public officials, both foreign and national. As established earlier, the focus of this research is crime committed by and through legal entities. For this reason, provisions relating to the passive bribery of public officials are not considered. Article 1 (1) OECD Convention and requires State Parties to:

*(…) 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 or*der 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*.

Although this question also covers the bribery of national officials, many rapporteurs have interpreted this question to be limited to bribery of foreign officials. In case this leads to any disparities with the relevant rules on bribery of national officials, this will be addressed accordingly. On the other hand, some rapporteurs have indicated that their national legal system does not provide for the criminalisation of active bribery of foreign officials (HR, LV). However, most States have also, additional to the criminalisation of bribery of national officials, criminalised active bribery of foreign public officials.

- The Polish legislation on bribery of foreign public officials restricts the bribery of officials of international organisations to organisations Poland is a Member State of.

According to the OECD, in order for the gift of promise to become a bribe that gift or promise must be considered as an undue advantage, pecuniary or other, and awarded in relation to the performance of the official's duties. What makes the advantage undue is up to the implementing State.[89]

Unlike the criminalisation of private corruption, only a minority of the national rapporteurs state that their national legal system requires that the gift or advantage should be "undue" (AT, BG, DK, DE, HU, LT, PT, SK, SE, TR). Under the legislation of the investigated states that do not require the advantage to be "undue" (BE, HR, CZ, EE, FI, EL, IT, LV, LU, FYROM, PO, SI, UK) there is no need to determine the type of the advantage. This could have the effect that any type of advantage related to the performance of the official should be considered a bribe. However, in some investigated States, case-law has ruled that, similar to private corruption, certain *minimis* gifts or gifts that are considered to be customary should not be considered a bribe.

- Such is the case in Poland. According to the national rapporteur, it is an on-going and reoccurring debate in every trial related to bribery, whether certain gifts should be considered as customary and acceptable or rather as unacceptable and thus a bribe.

The OECD Convention stipulates that the question whether the conduct falls within the official's authorised competence should be irrelevant. It only requires that the conduct relates to an official, in his/her capacity as an official.[90] However, like the criminalisation of private corruption, which does require that the person bribed breaches or is induced to breach a duty, some investigated States require the same for active bribery of an official, national or foreign (HR, DE, EL, IT, UK). This means that gratuities, i.e. advantages given for the commission of lawful performances, do not constitute bribery. Additionally, while most investigated States do not require a 'breach a duty', some rapporteurs state that this could be considered as an aggravating circumstance which increases the applicable maximum penalty accordingly (BE, FI, PO).

[89] Commentaries on the Convention on Combatting Bribery of Foreign Public Officials in International Business Transactions (annex to the OECD-Convention).
[90] Article 1(4)c of the OECD-Convention.

- Again the UK provides an exception to this rule. According to the provision on bribery of national officials (which is the same provision as bribery of private individuals) the advantages must induce or reward an improper performance or the concerned official must understand that acquiring the advantage in itself constitutes an improper performance. The impropriety of the performance is, in turn, assessed by determining whether the performance breaches a relevant expectation, which is defined by: "What a reasonable person in the United Kingdom would expect in relation to the performance of the type of function or activity concerned." This means that it depends entirely upon each separate situation whether a breach of duty is required in order for the advantage to be considered a bribe. On the other hand, the bribery of a foreign official does require that the official was 'neither permitted nor required' to receive the advantage, which is interpreted by this comparative study as a 'breach of duty-requirement'.
- Because Slovakian law does not distinguish between bribery of an official or corruption, the bribery of the official does not need to be linked to his duties as an official.

The OECD Convention is, however, restricted to cases of bribery of foreign officials in order to pursue commercial interests. This requires that the bribe must be awarded with the intention to gain an improper advantage in the conduct of international business. Most investigated States have gone beyond this requirement by not explicitly restricting the offence to cases of bribery for the benefit of commercial interests.

- An exception to this is the Greek legislation that does require that the bribery of a foreign public official is related to retaining or benefitting business.

7.2) Have measures been taken to ensure that complicity, including incitement, aiding and abetting, or the authorisation of an act of bribery constitutes a criminal offence?

An analysis of the answers to this question shows the same results as that to questions 1.3. This is because provisions relating to these secondary offences generally are incorporated in the general provisions of the criminal statutes or are considered to be part of general notions of criminal law. This means that, while most investigated States have criminalised both instigation, aiding and abetting of bribery of an official, some States have criminalised only aiding (BG) or only aiding and abetting (AT, PT, PO).

3.1.9. Applicable Penalties

8.1) Have measures been taken to ensure that the above mentioned offences are punishable by criminal (or civil or administrative) penalties?

Question eight relates to the applicable penalties and sanctions for offenders of bribery as incorporated in article 3 (1) OECD Convention. This provision requires State Parties to provide for effective, proportionate and dissuasive criminal penalties for the Bribery offence of article 1 (1) OECD Convention. The range of the penalties must be comparable with those applicable to bribery of national officials, but shall, in the case of natural persons, at least include 'deprivation of liberty' in order to enable effective mutual legal assistance.

According to the national reports, the anti-bribery provisions of all investigated states provide for a custodial sentence of at least 1 year for active bribery of a (foreign) public official (BE, HR, UK). In general, the applicable maximum prison sentence ranges between 5 – 10 years (BG, EE, DE, LV, LT, LU, FYROM, PO, PT, SK, FR). However, when also considering aggravating circumstances, the maximum prison sentence ranges from 10 – 20 years (BE, EE, EL, IT, PO, TR, UK[91]).

- The Turkish anti-bribery provision is probably the most severe with regard to the penalisation of regular active bribery of a (foreign) official. It provides for a maximum prison sentence of 12 years.
- When considering the applicable penalties, Italy provides for the highest maximum prison sentence, namely 20 years in case the bribe aims to influence a criminal trial that results into the imposition of an unfair prison sentence of five years or more.

Most aggravating circumstances are either based on the amount of the advantage obtained (AT, CZ, HU, PO), whether or not this resulted in a breach of duty (BE, FI, PO), or on the particular capacity of the official (BE, IT, SK).

Besides the penalty of imprisonment, the anti-bribery legislation of many of the investigated States provides for other types of penalties. The second most occurring penalty is the fine. According to the national rapporteurs, the legislation of 12 States explicitly provide for such a penalty in relation to active bribery of a (foreign) public official (BE, BG, HR, CZ, EE, DE, LV, LT, LU, SK, SE, UK, FR). Additionally, many investigated States also provide for auxiliary sanctions such as a prohibition to participate in public tenders or contracting with the public administration (AT, BE, BG, CZ, DK, DE, IT, LU, PO. RO, TR, FR), confiscation (BE, HR, CZ, DE EL, IT, LV, LU, PO, RO, SK, SI, TR, UK, FR), disqualification from obtaining a position in the public administration (EE, LV, HU) and/or disqualification from exercising a certain profession in general (BE, CZ, DE, HU, FYROM, SK, TR). In relation to civil law, the sanctions mentioned are: nullification of a contract affected by the bribe (BE, TR) and tort liability (SK, SE).

- Although the Bulgarian public procurement law prohibits the participation of tenderers who have previously been convicted of, inter alia, corruption, the national rapporteur indicated that a proper supervision mechanism is lacking. It is up to the participants themselves to declare that they have not previously been convicted of such an offence, but these declarations are seldom reviewed.

3.1.10. Liability of legal persons

Question 9 discusses the liability of legal persons for bribery of public officials. This question refers to article 2 OECD Convention which in itself leaves much to the discretion of the State Parties. It merely requires that State Parties provide national measures which attribute liability to legal persons for the bribery of a foreign public official. How this liability is attributed and what type of liability is provided for is up to the State Parties. However, for the purpose of this research, the rapporteurs

[91] Strictly speaking, the applicable penalty for bribery in the UK depends on whether or not the offender is tried on indictment, i.e. on procedural grounds. For the purpose of this comparative overview, this has been considered as an aggravating circumstance, compared to the possibility of a summary trial.

were asked to elaborate on this. The questions which have been asked to the national rapporteurs, and which will be discussed simultaneously, concerned:

9.1) Have measures been taken to ensure that all or specific types of legal persons can be held liable for the above mentioned offences when committed by persons in a leading position?

9.2) Please specify the nature of these measures; where appropriate specify the different types of measures taken for different types of legal persons.

9.3) Have measures been taken to ensure the liability of legal persons where the lack of supervision or control by a natural person possessing a leading position in the legal entity has made possible the commission of the above mentioned offences? If appropriate please make a distinction between different types of legal persons.

Most national rapporteurs stated that the liability of legal persons for bribery of (foreign) officials did not deviate from that of private sector corruption as has been discussed in the previous section. This means that all legal systems have adopted liability provisions for legal entities for the commission of such offences. Liability is at least attributed to the entity in case of actions performed by persons in a leading position within the entity or persons who are to be considered as the directing mind and will of the corporation. Some States attribute liability to the legal entity for actions of others than persons in a leading position, such as employees or agents (AT, BG, FI, HU, IT, FYROM).

The nature of these provisions is predominantly criminal, except for certain States that provide for administrative liability (BG, EL, IT, TR). Additionally, some rapporteurs also mention the applicability of civil law measures (FI, EL, SK).

Also the majority of national rapporteurs have indicated that, under their national legislation, a lack of adequate supervision or control within the corporation of superiors over their subordinates can give cause to attribute the offence to the legal entity (AT, BE, CZ, FI, DE, HU, IT, HU, IT, LT, FYROM, PO, PT, SK, SI, SE, TR, UK), however the legislation of Bulgaria, Estonia, Greece and Luxembourg, does not provide for this kind of liability.

- The disparity between the liability of legal entities for private corruption (which allows for attribution of liability based on a lack of due diligence) and bribery of a public official (which does not provide for this) in Greece is caused by the fact that liability for these offences is based on two different statutes. That is, liability of legal entities for private corruption is based on article 10 Law no. 3560/2007, whereas bribery of an official is based on article 2 Law No. 2656/1998.
- With regard to the U.K the answer to question A 3.2 (headed under chapter 3.1.3 Liability of legal persons) provides for a remarkable example.

3.1.11. Applicable penalties

Question A.10 discusses the applicable penalties for legal entities in case of a conviction for bribing a public official. This question is based on the same provision as question 8 (article 3 (1) OECD Convention), but also on article 3 (2) OECD Convention. The latter provides that, in case the national legal system of a State Party does not allow for criminal liability of legal persons, it must ensure that

other sanctions are provided for which are still effective, proportionate and dissuasive and cover at least monetary sanctions.

Question 10.*1) Have measures been taken to ensure that legal persons held liable are punishable by criminal penalties? Please specify the substance of the relevant provisions?*

10.2) In the event that criminal responsibility is not applicable to legal persons, have measures been taken to ensure that legal persons shall be subject to non-criminal sanctions, such as monetary sanctions?

According to the national reports, all legal systems provide for pecuniary sanctions for corporations that have been held liable for corruption offences. Four systems can be distinguished. First those legal systems which entail sanctions based on the income of the legal entity multiplied by a certain quantity of daily rates (AT, EL, HU, IT, SI). Secondly, those that provide for a penalty based on a percentage of the corporations' turnover (EL, HU). Thirdly those systems providing for a fixed amount of the fine (BE, BG, EE, FI, LV, LT, LU, FYROM, PO, SK, SE, TR). And finally, those systems which do not provide for an upper limit to applicable fines (DK, DE, UK).

In comparison with private sector corruption the overall applicable fines are slightly harsher for commissions of bribery of a foreign official. States that provide for a flexible penalty system often increase the height of the fine according to legally defined criteria while the height of the fines in States with a maximum financial penalty system varies between €400,000.- and €1,000,000.- (AT, BG, FI, FI, LV, LT, LU, FYROM, NL, PO, SK, SI, SE, TR).

- In this regard, Slovenia uses a hybrid financial penalty system. The maximum amount is, in principle, fixed on €625,935.-. However, in case the offence has caused any damage to a third party or when the corporation acquired any benefit from the offence, the maximum applicable penalty is 200 times the damage caused or the benefit obtained.
- The highest applicable fixed fine is provided by Lithuania, which is €1,884, 057.-.
- The lowest maximum fine is being applied in Belgium, which is €10, 000, - for the offence of active bribery of a public official with the aim of a lawful performance.

Also, in relation to the liability of corporations many of the investigated States provide for certain auxiliary sanctions which are applicable in addition to or independent from the primary sanction. Such measures constitute of: Confiscation (BE, CZ, DE, HU, LV, LU, SK, SI, TR, UK); disqualification of the entity to pursue certain activities, commercial or otherwise (BE, HR, CZ, EL, HU, LT, FYROM, SI, SE); exclusion from applying for public tenders (BG, CZ, EE, HU, LU, FYROM, FR); exclusion from subsidies or other public benefits (CZ, EL, FYROM, PT) and exclusion or revocation of permits (HR, LT, FYROM, SI, TR).

3.1.12. Jurisdiction

Question A. 11 relates to the jurisdictional requirements of the Convention on Combating Bribery of Foreign Public Officials. According to article 4 (1) OECD Convention, State Parties are required to establish jurisdiction over the offence of bribery of a foreign public official if the offence was committed in whole or in part on its territory, or (article 4 (2) OECD Convention) if the State

normally allows for prosecution of its nationals for offences committed abroad, it should also establish jurisdiction in relation to bribery of a foreign public official.

The first two questions relate to territorial and extra-territorial jurisdiction applicable to offences of bribery of a (foreign) public official).

11.1) What are the relevant national rules on jurisdiction with regard to legal entities committing one of the offences mentioned in question 7 in whole or in part within the national territory? (Article 4(1))

11.2) What are the relevant national rules on jurisdiction with regard to nationals possessing a leading position in a legal entity committing one of the offences mentioned in question 7 outside the national territory? (Article 4(2))

Like private sector corruption, all investigated States which provide for criminal liability of legal entities, have covered their jurisdiction for public bribery offences committed by legal entities on their territory (AT, BE, HR, FI, DE, EL, LV, LU, NL, PO, PT, SK, SI, ES, TR, UK). Again, the predominant criteria to determine whether the act has been committed on the territory of that state are based on the materialisation of a constituent element of the offence.

Some investigated States detach their jurisdiction from the place of commission and instead apply it to entities whose seat is on its territory (CZ, HU, IT).

Extra-territorial jurisdiction is applicable in a majority of the investigated States. Active personal jurisdiction is applied in AT, BE, HR, CZ, FI, HU, EL, IT, LU, NL, PT, SK, SI, ES, TR, UK. In these States the 'nationality' of the legal entity is usually determined by its place of registration, the location of their headquarters and/or the existence of an establishment on the territory of that State. Other States also apply passive personal jurisdiction (AT, CZ, LU, PT, RO, SK, SI, ES, TR) or jurisdiction when the offence infringes upon a specific interests of the State (CZ, LV, SK, SI, ESP, ESP, TR). However, in almost all cases dual criminality with the state on which soil the offence has been committed has to be established in order to get to a successful conviction (exceptions are LU and UK).

11.3) Can the Public Prosecutor initiate legal proceedings ex officio or only after complaints are brought by the concerned public official or a third party?

Contrary to the answers to question A. 5.3 which dealt with private corruption, all national rapporteurs have indicated that their national legal system allows for *ex officio* prosecution of bribery of a (foreign) public official. The only exception in this regard is the United Kingdom, whose system requires that prosecution is only allowed after consent of a senior public prosecutor.

11.4) Is distinction being made between public and private entities with regard to the applicable legal regime? Please specify what these differences.

The major difference between private and public entities with regard to the applicable legal regime is related to the immunity of public entities for certain sanctions. This is the prevailing view as reflected in the answers provided by the national rapporteurs. A majority reports that their system excludes the criminal liability for State or other public entities, at least in so far as the entity commits the offence in its public capacity.

- A notable example is the Austrian law, which provides for criminal immunity for State entities and religious entities to the extent that they are engaged in pastoral care.

3.1.13. Statutory limitations

11.5) Please identify the most relevant statutory limitations within national procedural law with regard to bribery.

According to the national rapporteurs, the majority of the investigated states provide for a statutory time-limitation of five years in cases of active corruption (AT, BE, EE, FI, DE, EL, HU, FYROM) or ten years (BG, LU, PT, SE). When considering aggravated forms of public corruption, the average time limit raises to ten years (also including: AT, BE, CZ, EE, FI, FYROM). The lowest time-limitation is applied by Croatia (two years).

- The longest time-limit is provided by Turkey, which could amount to 22 years and 6 months.
- Again the United Kingdom provides an exception to the general rule on time-limitations. According to the national rapporteur, bribery, when tried on indictment, is not constraint by fixed time-limitations. Instead, the duration of the trial is limited by the principles of due process and fair trial in which case it depends upon the specific circumstances of the case whether or not adjudication should be barred as a result of a lapse of time.
- In France, article 7 of the Code of Criminal Procedure fixes provides a term of 10 years within which the prosecution for crimes have to be initiated and article 8 establishes to 3 years the prescription of the prosecution for (minor) offences. Article 7 applies only to the case of passive corruption of a magistrate in a criminal case which constitutes a crime, while article 8 applies to the other cases of corruption. However, the aforementioned articles 7 and 8 envisage that every act of criminal instruction or prosecution interrupts the delay of prescription and make run a new delay. Resulting from Case law the delay of the prescription became even longer considering that for all secretive offences, the starting point of the prescription is established to the day of the discovery of the offence in conditions allowing the prosecution.

Additionally, many rapporteurs also mention immunity of criminal liability of the State and other governmental institutions as well as immunity for criminal prosecution of certain state officials.

- The Greek national report mentions a partial immunity of certain corporations from criminal sanctions in case the entity provides the society with an essential and vital service, such as electricity and public transportation companies.

3.1.14. Overview and analysis of the adequacy of the enforcement of bribery of public officials by legal entities.

12.1) Provide a statistical overview of cases brought against legal entities and/or their directors regarding bribery of (foreign) public officials in the period 2005-2010.

Question A.12 requires the national rapporteurs to discuss their national enforcement figures related to bribery of (foreign) public officials. While data regarding this offence was apparently easier to access than those relating private corruption, many rapporteurs had difficulty in obtaining this data. Again, the provided data proves to be highly diverse, meaning that some of it is provided in absolute numbers of cases prosecuted by the national authority, whereas other information concerned relative numbers of convictions etc. This is most likely due to the diversity in which crime-related data is being kept. Therefore, this comparative overview will discuss only the most significant figures provided.

- The Austrian rapporteur states that the provisions on active bribery of a public official, foreign and national, are considered to be a 'dead letter'. He notes only four convictions in the period 2002 – 2009.
- The German rapporteur notes a high number of cases concerning active bribery of officials: 7629.
- Relating to bribery of foreign public officials, the Italian rapporteur notes nine cases in 2009 and two cases in 2010. In comparison, authorities of England and Wales have prosecuted eight individuals and seven legal entities in the period 2006 – 2011 and Sweden only one. The Polish report notes five convictions for bribery of a foreign public official in 2011.

12.2) Additionally, provide an overview of the type of offences dealt with in cases brought against legal entities and/or their directors.

Most national rapporteurs indicate they could not obtain sufficient data on the types of offences dealt with in cases brought against legal entities and/or their directors. Often, national crime statistics do not distinguish prosecutions or convictions of legal entities and their directors from other offenders of bribery of an official.

- The Lithuanian rapporteur provides an overview of criminal cases brought against legal entities and their directors for offences in general. In 2009, six cases and in 2010, nine cases were brought before a court.

12.3) Provide a general assessment of the impact of the jurisprudence on the prevalence of bribery of (foreign) public officials.

The answers of the national rapporteurs to this question proved to be as diverse as those pertaining to the previous two questions. It is often stated that bribery of a public official and bribery of a foreign public official is considered to be a rare offence (AT, HR, CZ, EL). However, this does not mean that cases of corruption are rarely prosecuted. Instead, bribery of public officials is often prosecuted on the bases of other offences, such as tax offences (BE, NL, FI). According to the Finnish

rapporteur, tax and revenue authorities play a considerable part in the detection and investigation of corruption offences.

12.4) Please describe whether the prosecution strategy could be considered as adequate and effective with regard to the characteristic features of bribery in your country.

The final question relating to the bribery of (foreign) public officials requires the national rapporteurs to discuss whether or not they believe that their national legal system prosecutes public bribery adequately or not. Nine national rapporteurs believe that their system adequately addresses the issue of public bribery (CZ, DK, DE, LV, LT, PO, SK, TR, UK), while some other believe that the enforcement is inadequate (AT, BG, EE, EL , HU, FYROM, SI) and some national rapporteurs indicate that no adequate answer to this question could be given (BE, HR, FI, LU, PT, SE).

- The German report indicates that the reduction in manpower of the national law enforcement agencies has caused the enforcement and prosecution of bribery and corruption to be weakened in Germany.
- Both the Swedish and Austrian report indicate that the secretive nature of bribery makes it difficult to investigate this type of offence and to estimate the adequacy of the enforcement.

Organised crime committed in the framework of legal entities

3.1.15. The definition of organised crime

13.1) Which of the two definitions of organised crime, mentioned in article 1 of the Framework Decision, is being applied in national legislation? Is organised crime defined in another way, or is organised crime not defined at all? Please specify the main elements of the definition. (Article 1)

Question A.13 inquires as to which (of the two provided) definitions of organised crime are applied in the EU Member States and the three Candidate States. During the development of the Joint Action that preceded Framework Decision 2008, the biggest challenge was to unite the different concepts of 'participation in an organised criminal association' of the European continent (or in French criminal law: *une association de malfaiteurs*) and the 'conspiracy concept' as used in the Anglo-Saxon legal system.[92] The result of this compromise is now reflected in two different paragraphs of article 1 on *Definitions* of the current Framework Decision 2008.

Article 1.1 *'criminal organisation' means a structured association, established over a period of time, of more than two persons acting in concert with a view to committing offences which are punishable by deprivation of liberty or a detention order of a maximum of at least four years or a more serious penalty, to obtain, directly or indirectly, a financial or other material benefit;"*

[92] Calderoni F., *Organized Crime Legislation in the European Union* Dordrecht, Springer 2010, p. 27.

Article 1.2 " *'structured association' means an association that is not randomly formed for the immediate commission of an offence, nor does it need to have formally defined roles for its members, continuity of its membership, or a developed structure."* [93]

In other words, the definition of a criminal organisation as a 'structured association' provides for a rather stable association, over time as well in terms of close relationships directed at committing serious crimes. The conspiracy approach, provided in the second paragraph of article 1, is rather vague given the negative way of formulation ("not randomly formed" and "no formally defined roles, etc.") and the undefined level of seriousness of offences committed by the "association".

It should be noted that this Framework Decision, like most framework decisions, aims at minimum harmonisation. This means that EU Member States are not precluded from having broader definitions regarding these offences as long as they do not add extra elements which increase the burden the proof. However, providing for two different definitions of a criminal organisation in one instrument affects its harmonising qualities.

So, the main question is which of the two definitions of organised crime (i.e. criminal organisation or conspiracy respectively) is being applied in national legislation, and, if neither of the two definitions are applied, the subsequent question is whether organised crime has been defined differently or not at all?

Most investigated States apply the definition of the criminal organisation (AU, BE, BG, CR, CZ, DE, EL, EE, ES, FI, FR, HU, IT, LT, LU, FYROM, MT NL, PL, PT, RO, SI, SK, TR) and/or 'conspiracy' (AU, BG, DK, LT, LV, MT, NL, PL, RO) in their national legislation. Cyprus and Sweden do not have criminalised organised crime as a specific offence. Bulgaria has defined organised crime by using a compilation of the two definitions. Under Bulgarian legislation, the definition partly contains the main elements as mentioned in the Framework Decision. Furthermore, the Finnish definition of organised crime is fragmented and not univocal.

- The United Kingdom and Sweden seemed to be of the opinion that prior to the Framework Decision the offence of organised crime was (to a great extent) already criminalised appropriately by national law. Therefore further implementation in national legislation was (for the most part) considered not to be necessary. However, the relevant UK legislation uses the conspiracy model.

3.1.16. Criminalisation of participation in a criminal organisation or conspiracy

14.1) Have measures been taken in order to ensure that active participation in a criminal organisation is regarded as an offence? Please specify the substance of the relevant provisions. (Article 2(a))

14.2) Have measures been taken in order to ensure that a person who is conspiring to commit an offence related to participation in a criminal organisation, or a person providing information or material to a criminal organisation, can be regarded as taking part in that criminal organisation,

[93] Article 1(2) of the Framework Decision 2008.

even if this person does not take part in the actual execution of the activity? Please specify (Article 2(b))
Article 2 Framework Decision 2008 provides the EU Member States with two options. These are, either to criminalise:

"(...) (a) Conduct by any person who, with intent and with knowledge of either the aim and general activity of the criminal organisation or its intention to commit the offences in question, actively takes part in the organisation's criminal activities, including the provision of information or material means, the recruitment of new members and all forms of financing of its activities, knowing that such participation will contribute to the achievement of the organisation's criminal activities."

Or:

"(b) conduct by any person consisting in an agreement with one or more persons that an activity should be pursued, which if carried out, would amount to the commission of offences referred to in Article 1, even if that person does not take part in the actual execution of the activity."

To summarise, Member States are required to either criminalise participation in a criminal organisation or to criminalise the agreement between two persons to commit certain types of offences (the conspiracy).
Question A.14 asks the national rapporteurs to discuss various elements of their own national provisions on participating in organised crime on the basis of article 2 Framework Decision 2008/841/JHA.

Almost all national rapporteurs indicate that their system has criminalised the active participation in a criminal organisation (AT, BE, BG, HR, CZ, EE, DE, EL, HU, IT, LV, LT, LU, FYROM, NL, PO, PT, RO, SK, SI, TR). Only in four States (DK, FI, SE, UK) active participation is not considered to be an offence in itself. This often relates to the fact that these States have only adopted the conspiracy model and, hence, do not need to criminalise 'participation in a criminal organisation'. Instead, these four States and Lithuania and Bulgaria, have criminalised the conspiracy to commit offences.

- In Italy, it is not required that a specific offence has been committed provided that a group, consisting of more than three members, are promoting, constituting or organising crimes.
- In France, article 450-1 of the Criminal code enlarges the definition of the criminal association to "any group formed or any conspiracy established with a view to the preparation, marked by one or more material actions, of one or more felonies, or of one or more misdemeanours punished by at least five years of imprisonment." On a criminological plan, the objective of this provision is to allow for punishing "criminal conspiracies of white collars. This definition applies to corruption too, even though it was not meant for it at the beginning. The criminal liability of legal persons (article 450-4) applies to the newly defined offence.

  The inversion of the burden of proof in criminal association
  The French Law of 2001 has created a new offence, codified in article 450-2-1 of the Criminal Code, according to which " The inability by a person to justify an income corresponding to his way of life, while being habitually in contact with persons engaged in activities set out under article 450-1, is punished by five years' imprisonment and a fine of €75,000."

This article allows for punishing persons whose participation in a criminal association cannot be directly proven, but whose lifestyle and habitual relations with one or more members of this association let presume their involvement in this association.

3.1.17. Penalties and sanctions

15.1) Have measures been taken to ensure that the above mentioned offences are punishable by effective, proportionate and dissuasive criminal penalties? If yes, indicate minimum and maximum. (Article 3(1))

Question A.15 asks the national rapporteurs to discuss the applicable penalties for participation in a criminal organisation and/or the conspiracy to commit such offences. This relates to article 3 Framework Decision 2008/841/JHA that requires that the participation in a criminal organisation should be punishable by a maximum imprisonment term between 2 and 5 years.[94] In case of conspiracy, the maximum term of imprisonment should at least be the same as that of the offence at which the agreement was aimed for or punishable by a maximum imprisonment of at least 2-5 years. While the wording of these imprisonment terms is somewhat confusing, it is generally understood that EU Member States are still allowed to allow for imprisonment terms exceeding five years. This is because Framework Decision 2008/841/JHA is considered to be minimum harmonisation. Harsher penalties are thus still allowed for.

In all (Candidate) EU Member States the type of penalty is to be regarded as criminal. The maximum prison sentence provided for in relation to participation in a criminal organisation is, in many States, punishable with imprisonment of at most, five years and in case of leading such an organisation, a prison sentence of at most ten years (AT, BE, BG, FR, DE, LU, FYROM, NL, PL, PT, SI, PT).

Some of the offences of the States that have been investigated, provide for aggravating circumstances in case of some type of participant (CZ, DK, EE, EL, LT, NL, RO, SL, UK), i.e. those that have decision-making power within the criminal organisation (BE, BG) or are a leader of the organisation (BE, BG, EE, EL, IT, LT, PL, PT, TU, NL).

Some noteworthy comments made by the national rapporteurs are reflected below.

- sentences longer than five years are specifically provided for.
- In Italy, participants in a mafia type criminal organisation may be sentenced to 12 years imprisonment.
- In The Netherlands, participants (including those who merely give financial or material support, or recruit persons or money) in an organisation with the intention to commit a crime, may be sentenced to six years. Leading members may face an additional sentence of one third.

15.2) Is partaking in a criminal organisation considered an 'aggravating circumstance' in the national legal system during the prosecution of other crimes? Please specify the substance of the relevant provisions. (Article 3(2))

[94] Article 3(1)a of the Framework Decision 2008.

Unlike 'participation in a criminal organisation' and 'conspiracy', this particular provision of the Framework Decision requires the actual commission of the offence to which the organisation or the agreement aimed for. In such case, the fact that the offence was committed in the framework of the organisation or as a result of the criminal agreement should aggravate the punishment for that offence.
Most national rapporteurs indicate that the commission of offences in the framework of and criminal organisation or organised group aggravated the penalty of the predicate offence (AT, BG, HR, CZ, DK, EE, FI, DE, El, IT, LV, LT, FYROM, NL, PO, PT, RO, SK, SI, SE, TR). The national rapporteurs of States that do not provide for such measures often mention that the commission of offences in the framework of a criminal organisation results *de facto* into an aggravation of the offence since the offence of participation in a criminal organisation can be prosecuted successively with the predicate offence (BE, HU, LU).

- In Italy, partaking in a mafia type organisation is considered to be an especially aggravating factor which will accordingly be applied to the particular crime (excluding life imprisonment).
- In BE, HU, LU, UK, partaking in a criminal organisation is specifically not considered to be an aggravating circumstance. However, in HU it is regarded as a *sui generis* criminal offence whereby the non-individual performance of offence is considered as an aggravating circumstance.

3.1.18.Applicable penalties.

15.1) Have measures been taken to ensure that the above mentioned offences are punishable by effective, proportionate and dissuasive criminal penalties? If yes; Indicate minimum and maximum. (Article 3)

Article 3 of the Framework Decision 2008/841/JHA requires the EU-Member States to penalise active participation in a criminal organisation with a maximum term of imprisonment of at least between two and five years or, in case of conspiracy, "the same maximum term of imprisonment as the offence at which the agreement is aimed or by a maximum term of imprisonment between two and five years."

An analysis of the national reports shows that the legislation of most of the investigated States provide for aggravation of the penalty based on either the degree of participation (like leading, organising or just participating) or the particular serious nature of the organisation. According to legislation of these States, participating in Mafia like organisations, organisations using violence or (planning) subversive actions against the state, is considered to be an aggravated circumstance.

Under the legislation of most investigated States, participation in a criminal organisation is punishable by an imprisonment of, at most, three years (AT, BE, HR, FI, LU, FYROM, TR) or five - seven years (BG, DE, IT, NL, SI). Leaders often face a maximum prison term of 10 years (BE, BG, CZ, LV, NL, SK, SI) as well as participants of the above mentioned criminal organisations which are considered to be of a more serious nature (BG, TR). Commanding such more serious criminal organisations is punishable by a maximum prison term rising to 15 years (BE, BG, CZ, EE, IT, LU, TR). In DK, LV, RO, SE and the UK the applicable maximum penalty is dependent upon the offences which the organisation or group aims at or has committed.

- The legislation of Lithuania provides for the most severe prison penalty as regards participation in a criminal organisation. Leaders of a criminal organisation face a maximum term of imprisonment of 20 years of to life imprisonment.
- Participants in a criminal organisation in Croatia face the lowest penalty, which is, at most, one year.

As regards partaking in criminal organisations, most national rapporteurs indicate that the aggravation depends upon the specific offence. However, an analysis of the national reports shows that, in general, the maximum applicable term of imprisonment increases by 1/3 to 1/2 of the maximum term applicable to the predicate offence (see for example: CZ, IT, PO).

- The Finnish report indicates that the prosecution of the offence of partaking in a criminal organisation precludes prosecution of the accused for the commission of the predicate offence.

The legislation of some of the investigated States, although fewer than with regard to private corruption and bribery of a (public) official, also provide for the application of a financial penalty (BE, HR, DE, FI, LV, LU, NL). For some States, the reason that financial penalties are not provided for, is because in those jurisdictions participation in a criminal organisation or conspiracy is not considered a separate offence, but rather an aggravation of the predicate offence.

According to the national rapporteurs, the maximum applicable fine ranges between €10,000.- - €80,000.- (FR, LU, NL, LV).

- In Belgium, the maximum financial penalties range from €5,000.- for mere participation in a criminal organisation, €100,000.- for those who have taken part in the decision-making process of the criminal organisation, to €200,000.- for the leaders of the criminal organisation.
- In Germany, the maximum applicable fine can, depending upon the financial situation of the offender, range from €5. - - €10,800,000.-.

Additionally, many reports indicate that, in addition to a prison sentence or the fine, offenders are liable to confiscation (BE, DE, LV), revocation of certain civil and political rights (BE), community service or judicial supervision (LV).

- Notable is Belgian law, which provides for the revocation of academic credentials, hereditary titles and decorations and medals.

3.1.19. Liability of legal persons

16.1) Have measures been taken to ensure that legal persons can be held liable for the above mentioned offences when committed by persons in a leading position? Please specify. (Article 5)

Question A.16. refers to the liability of legal persons for the participation in a criminal organisation or the conspiracy to commit offences, as the legislation of EU Member States are required to provide for under article 5 Framework Decision 2008/841/JHA. According to article 5 (4) of the Framework Decision, a legal person is defined as:

"(…) any entity having legal personality under the applicable law, except for States or public bodies in the exercise of State authority and for public international organisations. "

Legal entities should at least be held liable for participation in a criminal organisation or the conspiracy, committed for their benefit by a person with a leading position within that entity. It thus refers to actions of those who are 'the directing mind and will' of the legal person and who had the aim of committing the offence for the benefit of the legal person. Article 1 (a), (b) and (c) describe on which criteria such leading position should be based, which is a) the power to represent *the legal person; (b) an authority to take decisions on behalf of the legal person; or (c) an authority to exercise control within the legal person.*
The national reports show that almost all investigated States provide for liability of legal entities for commissions of organised crime, except for Slovakia. While in most investigated States, the nature of the liability is criminal, BG, EL, SE, TR use administrative liability, whereas IE provides for administrative and criminal liability.

- The Hungarian legislation attributes liability to legal entities based on a hybrid of administrative, criminal and civil liability.

As indicated under the sections regarding private corruption and bribery of a (foreign) public official, the benchmark for the attribution of liability to a legal entity are the actions or performances of those who could be considered as the directing mind and will of the entity, i.e. those in a leading position. However, the legislation of some States attributes the actions of other employees to the corporate entity as well.

Article 5 (2) Framework Decision also requires Member States to provide for liability of the legal entity in case a person in a leading position as defined in paragraph 1 of the same article has taken insufficient due diligence measures to prevent the offence from being committed by someone under their authority. Because of that, the provision is not limited to actions of employees alone, but covers anyone under the authority of those in a leading position of the entity, including those otherwise contracted by the entity.
Paragraph 3 of article 5 additionally requires that the law of the EU Member States should not preclude the successive prosecution of the natural persons participating in the criminal organisation or involved in the conspiracy, including any accessories.

Except for BG, LU, RO and UK, the legislation of all investigated countries provide for liability based upon the inadequate supervision or control by the senior management over their subordinates.

3.1.20. Applicable penalties

17.1) Have measures been taken to ensure that legal persons held liable pursuant to Article 5 are punishable by criminal penalties? Please specify. (Article 6)

Like the questions regarding the criminalisation of natural person, question A.17 seeks to discuss the applicable penalties and sanctions for legal persons who are held liable pursuant to article 5 Framework Decision. This is based on article 6 Framework Decision 2008/841/JHA. In case of liability based on the situation referred to in article 5 (1) Framework Decision 2008/841/JHA, EU Member States are required to:

" (…) take the necessary measures to ensure that a legal person (…) is punishable by effective, proportionate and dissuasive penalties, which shall include criminal or non-criminal fines and may include other penalties. (…) "

According to this, the penalty does not necessarily have to be criminal, but must at least be effective, proportionate and dissuasive. It should also at least cover a fine, but may also include: (a) exclusion from entitlement to public benefits or aid; (b) temporary or permanent disqualification from the practice of commercial activities; (c) placing under judicial supervision; (d) a judicial winding-up order or; (e) temporary or permanent closure of establishments which have been used for committing the offence.
As regards liability of the legal entity based on the situation referred to in article 5 (2) Framework Decision 2008/841/JHA, EU Member States are only required to apply penalties or measures which are effective, proportionate and dissuasive.[95]

- In Denmark and the UK there is no maximum fine in this respect.

As regards the auxiliary sanctions, most national reports indicate that, with regard to organised crime, legal entities are additionally liable to be winded up (BE, CZ, EE, HU, LT, LU, FYROM, RO) or at least be prohibited to exercise certain activities, commercial or otherwise (BE, CZ, EL, HU, IT, LT, FYROM, PT, RO, SI, SE). Other sanctions that are often mentioned are: confiscation or forfeiture of the illegally obtained benefit(BE, CZ, DE, IT LV, LU, RO, SI); exclusion from public orders or the prohibition from contracting with the public administration (DE, HU, LU, FYROM, RO); exclusion from or revocation of public aid and subsidies (EL, HU, FYROM, PT); the withdrawal of licenses (EL, LT, FYROM, SI); and the publication of the convicting judgment (BE, CZ, EE, IT, PT, RO, SI).

- It should again be reiterated that only the national rapporteurs of Portugal and Spain mention the possibility to place a convicted legal entity under judicial supervision, as is suggested in art. 5 (1) (b) of the Framework Decision 2008/841/JHA.

3.1.21. Jurisdiction

18.1) What are the relevant national rules on jurisdiction with regard to criminal organisations active inside the national territory, and with regard to nationals committing one the offences mentioned above outside the national territory? (Article 7(1))

Article 7 Framework Decision 2008/841/JHA requires Member States to establish their jurisdiction over the offences referred to in article 2 Framework Decision 2008/841/JHA. Question A.18 of the questionnaire refers to this provision. Article 7 Framework Decision 2006, considered as a whole, only requires applying jurisdiction over the offences of article 2 Framework Decision 2008/841/JHA in case these are committed on a State's own territory (territorial jurisdiction). Although the provision also promotes the application of jurisdiction over their own nationals and legal persons established in their territory, Member States are still allowed for not to apply the latter types of jurisdiction or only to apply these under strict circumstances.[96]

[95] Article 6(2) of the Framework Decision 2008.
[96] Article 7(1) of the Framework Decision 2008.

Like the answers to the questions relating to private corruption and bribery of (foreign) public officials, almost all rapporteurs indicate that their national legal system applies its jurisdiction over commissions of organised crime committed on its territory. A few exceptions remain as regards organised crime committed by legal entities, since some investigated States only have jurisdiction over legal entities which are registered or seated in that State (for instance, Hungary). Similar to private sector corruption, the common denominator to determine whether the act has been committed on the territory of that state is based on the materialisation of a constituent element of the offence. This means that one of the constituent elements of the offence must be carried-out or materialised on the territory of the State concerned.
Besides territorial jurisdiction, many of the investigated States also apply their jurisdiction over offences committed abroad, either based on active personal jurisdiction (AT, BE, BG, HR, CZ, EE, FI, DE, EL, HU, IT, LV, LT, LU, FYROM, PO, PT, SK, SI, TR), passive jurisdiction (BG, EE, FI, EL, FYROM, PO, PT, SK, SI, TR) and/or based on the infringement of State interests (BG, CZ, FI, EL, LV, FYROM, SI, TR).

- The national rapporteur of the UK has indicated that British jurisdiction is applicable in the case of conspiracies formed in the UK to commit offences abroad or, vice versa, to conspiracies formed abroad to commit offences in the UK.
- Two investigated States allow for the application of universal jurisdiction, but only as long as this is stipulated by international measures (DE, LV).

18.2) What are the relevant provisions on international cooperation with regard to prosecuting criminal organisations? (Article 7(2))

Article 7 (2) Framework Decision 2008/841/JHA is aiming at promoting the co-ordination of prosecution of organised crime between the various EU Member States. Inter alia, it states that the States may have recourse to Eurojust or other mechanisms established in the EU (for instance in the framework of Europol or OLAF). After all, successful international cooperation can't do without a good national legal framework.

Regarding this question, many rapporteurs mention their national legislation regarding international co-operation in criminal matters, which is often incorporated into their national criminal procedural code (AT, CZ, DK, EE, DE, IT, LV, LU, FYROM, PT, SK, SI). Additionally, some rapporteurs mention the possibility of enacting specific legislation regarding mutual legal assistance with EU Member States into their legal system (AT) or the participation of the State in the UNTOC (BE, TR).

- Hungary has special legislation in force to regulate its cooperation with Eurojust regarding the exchange of data.

18.3) Can the Public Prosecutor initiate legal proceedings ex officio or only after a complaint by a victim of organised crime?

Like the prosecution of bribery of (foreign) public officials, all investigated states allow for *ex officio* prosecution of organised crime. Prosecution is even mandatory in Germany, Poland and Slovakia.

18.4) Please identify the most relevant statutory limitations within national procedural law with regard to organised crime.

The time-limits relating to organised crime provisions are, on the whole, of a longer duration than those applicable to bribery of a (foreign) public official or private corruption. The duration is often dependent upon the degree of participation in a criminal organisation (either as a regular participant or as a founder or leader) or the nature of the criminal organisation/organised criminal group and whether or not the organisation's usual modus operandi includes violence and/or coercion. Since these criteria often aggravate the offence, the duration of the corresponding time-limit increases accordingly.

In seven States, the duration of the time-limit for regular participation or membership of a criminal organisation is five years (AT, BE, HR, FI, HU, IT, SI), However, in cases of founding or leading a criminal organisation or organised group, the duration increases to ten years (BE, HR, FI, IT, SI). For criminal organisations which use violence, coercion or firearms, the time-limit is usually 15 years (CZ, EL) or twenty years (IT). Other investigated States adjust the time-limit correspondingly to the seriousness of the offences to which commission the organisation or conspiracy is aimed for (FYROM, UK).

- Italy, by far, applies the longest duration of the time-limit, which amounts to 35 years and is applied to persons leading a 'mafia-type' criminal organisation.
- Croatian legislation provides for the lowest duration, two years in case of membership of a criminal organisation.

3.1.22. Overview and analysis of the adequacy of the enforcement of organised crime committed in the framework of legal entities

20.1) Provide a statistical overview of cases brought against legal entities and/or their directors in the period 2005-2010.

20.2) Provide an overview of the type of offences dealt with in cases brought against legal entities and/or their directors.

Whereas the enforcement figures related to organised crime provided for this comparative study, proved to be as diverse as those relating to private corruption and bribery of (foreign) public officials, only some general comments can be made.

- Turkey has seen a rapid increase of convictions related to organised crime since 2009. Between 2006 and 2008, about 3000 convictions were passed for offences relating to organised crime, which increased to approximately 8,000 in 2009.
- The German rapporteur notes that approximately 10, 000 cases of organised crime are investigated each year.
- Belgium notes each year between 160 – 200 cases of participation in a criminal organisation.

20.3) Provide a general assessment of the impact of the jurisprudence on organised crime

An analysis of the national reports shows that the judiciary has an important role in the interpretation and development of the organised crime offences. Its influence often extends to the interpretation of the constituent elements as well as defining different degrees of participation (AT, IT, PO, TR). However, the Finnish rapporteur has indicated that cases of organised crime are often difficult to prove. On the other hand, because participants or members of a criminal organisation are often held accountable for the offences committed by the organisation as a whole, the penalty imposed to the participant is sometimes disproportionate to the level of his/her involvement in the organisation. The collectiveness in which the organisation is prosecuted sometimes diminishes the assessment of individual guild of each member.

- The rapporteur of the United Kingdom notes that investigations into organised crime often result in the collection of a huge amount of data which subsequently can cause logistical difficulties in, for example, the disclosure of this material to the defendant at the trial stage.

20.4) Please describe whether the prosecution strategy could be considered as adequate and effective with regard to the characteristic features of organised crime in your country.

A majority of the rapporteurs believes that the prosecution strategy of their national legal system regarding organised crime should be considered adequate (AT, DK, EE, DE, El, LV, LT, FYROM, PO, TR, UK). It is often argued that good co-ordination and communication amongst the different law enforcement agencies and the prosecution service is an important feature of an adequate enforcement (LT, FYROM, PO). National rapporteurs of States that are lacking adequate communication channels frequently mention this as the main cause of the inadequacy of the enforcement (CZ).

The Hungarian rapporteur states that Hungarian enforcement against organised crime is too heavily focused on punishment and retribution, whereas an adequate enforcement strategy requires a 'holistic approach' that is aimed at prevention as well.

4. Part B: Application of preventive strategies and measures

Part B of the Questionnaire is titled "Application of preventive strategies and measures". In this chapter, the findings of the national rapporteurs are presented and commented upon.

Corruption and bribery

4.1.1. Establishment of national preventive policies with regard to corruption in the private sector and bribery

1.1) Please indicate whether specific and well elaborated national preventive policies with regard to corruption in the private sector and bribery of (foreign) public officials, have been established. (Article 5 UNCAC)

Thirteen of the investigated States confirm they have preventive policies with regard to corruption in the private sector and bribery of (foreign) public officials in place (AT, BG, CZ, DK, EE, LT, LU, FYROM, PO, PT, RO, SK, UK, FR). Some States indicate that this policy area is part of a more general criminal prosecution policy incorporated in national criminal law, and that corruption cannot be seen as an isolated phenomenon (FI, HU). Furthermore, some rapporteurs state that such initiatives are mainly the responsibility of the private sector to deal with (see for example: NL).
The Belgian national report, for example, states that several institutions deal with the prevention of corruption (either on private or public level), and that there are no general, all-encompassing policy guidelines. Consequently, each institution has more or less created its own strategy. Of course, not having a well elaborated national preventive policy does not mean nothing is being done about the issue. The Greek national report, for example, indicates that a 'laboratory' has been established by the National Centre of Public Administration in cooperation with the Prime Minister's Office, with a view to, among others, develop new practices and methods to fight corruption including corruption in the private sector. Furthermore, the Greek national report states that most of the work done in this particular area has been performed by Transparency International Hellas, which aims at stressing the importance of the role of the private sector, the need to develop 'best practices', and at engaging the public in a more effective way.

Another prevalent comment made by the national rapporteurs is that the established policy is composed of 'reactive' and 'oppressive' measures through criminal law, rather than of 'preventive' measures through other policy areas (See for example: National report Bulgaria). Noteworthy in this respect is an observation made in the German national report. Already in 1986, Tiedemann the at that time leading German academic in business criminal law, pointed out that civil law reforms - especially within the law of associations- have better prospects of success than reforms through substantive or procedural criminal law.[97] Consequently, the German legislator increased civil

[97] Tiedemann K., *Die Bekämpfung der Wirtschaftskriminalität durch den Gesetzgeber - Ein Überblick' aus Anlaß des lnkrafttretens des 2. WiKG am 1. 8. 1986 -,* JZ 1986, pp. 865-912, *See also:* Bowles R., M. Faure and N. Garoupa, *The scope of criminal law and criminal sanctions: An economic view and policy implications* in: Working Papers Series in Economics and Social Sciences, 2008/03, February 2008, available at: http://repec.imdea.org/pdf/imdea-wp2008-03.pdf (retrieved August 2012). This publication explores methods of striking the right balance between criminal law measures and measures from administrative and civil law to address conduct in need of public control. It

liability, expanded means of control within the legal entities and introduced measures of situational prevention.

Another general observation is that anti-corruption policies, if in place, tend to be focussed on the public sector or companies which are in majority state-owned rather than the private sector. The Croatian national report, for example, mentions the Croatian 'Strategy regarding the fight against corruption'. This action plan, adopted in 2008 and revised in 2010, has as its main elements: creating a legal and institutional framework; prevention of corruption; criminal prosecution and sanctioning of corruption; international cooperation; and spreading the public awareness about how damaging corruption is. However, as in many other States, the focus of this Strategy is on prevention of corruption in government institutions, the misuse of public funds and avoidance of conflicts of interest of public officials.

1.2) What are the main elements, policy objectives and main instruments, e.g. specialised corruption and bribery prevention bodies, of the above meant policy, particularly in the private sector?

In this paragraph some examples are presented of noteworthy elements of national preventive policies and specialised corruption and bribery prevention bodies which form part of such national preventive policies as indicated in the national reports by the rapporteurs.

- The Austrian Federal Bureau of Anti-Corruption (*BAK)* is an organisational unit of the Federal Ministry of Interior Affairs set up outside the Directorate General for Public Security, with nationwide jurisdiction for preventing and combating corruption. BAK is entrusted with preventive tasks (to analyse corruption phenomena, gather information on preventing and combating corruption and develop appropriate preventive measures) and with criminal investigations in the framework of international police cooperation, mutual assistance and cooperation with the competent institutions of the European Union and the investigative authorities of other EU Member States. BAK is also designated as the central national contact point for OLAF, Interpol, Europol and other comparable international institutions in the range of its competences.
- Some of the 'newer' EU Member States have very elaborate National Strategies. The objective of the Estonian Anti-Corruption Strategy 2008-2012, for example, is "to reduce and prevent corruption in the public and private sectors and increase society's awareness of corruption and ethics." First, an analysis of the current situation in Estonia is provided. Then, eight strategic objectives are stated including measures and activities to be carried out necessary in order to meet them. Furthermore, methods to assess success are mentioned. With regard to the private sector, for example, the establishment of a leniency-program is mentioned as an important pillar of the Strategy to ensure sufficient protection for entrepreneurs who come forward to report (attempted) bribery or corruptive practises and decide to cooperate with the State.
- Finland has a separate horizontal working group, the Anti-Corruption Cooperation Network, which consists of all the most important authorities and private sector bodies related to

underscores that an analysis of economic dimensions involved may help to establish the appropriate scope of criminalisation and about the choice of the legal form.

combating corruption. In conjunction with the appointment of a new Government during the summer of 2011, the Network proposed that the official Government program should include the objective of drafting of an anti-corruption strategy. The Government made the political decision not to draft such a programme.
However, it did call for the preparation of an overview of corruption-prone areas, a task that was then assigned to the Network. However, the Network does not have any execution or decision making powers and the concrete results of anti-corruption efforts are yet to be seen.

- The French Central Service for the Prevention of Corruption (SCPC-F)[98] is an inter-ministerial Government Agency residing under the Minister of Justice. It was created in January 1993 to enhance the prevention of corruption and the transparency of economic life and public procedures in France. The French authorities consider it a unique tool in combating corruption. Its function is not investigative, but rather focussed on the centralisation and exploitation of information and thus to raise awareness of the phenomenon of corruption in France. The SCPC communicates data which could lead to criminal prosecution to the competent prosecutors. Of particular relevance to this comparative overview, is the fact that the SCPC also provides expertise for the French private sector. The SCPC assists both public and private bodies whose objectives are, amongst others: enhancing information exchange on corruption; developing codes of conduct; and providing anti-corruption training. Noteworthy is furthermore the fact that they also have as an objective to secure French investments in countries that have not signed or adopted the OECD Conventions. The SCPC participates in multiple international *fora*, such as: GRECO; the Council of Europe; OLAF; EACN; EPAC; Eurojust; the UN Convention on Drugs and Organised Crime; the OECD; the G20; and in various working groups on the subject matter.[99]
- The Hungarian National Strategy on Crime Prevention passed Parliament in 2003. This national strategy was based on a previously executed SWOT-analysis,[100] and both social and statistical data determined the main aims, instruments and organisations horizontally (amongst governmental agencies, social and justice policies, civil organisations) and vertically (from Parliament to regional authorities). For instance, it provided for the further operationalization of the National Crime-prevention Council, the National Crime-prevention Programmes, its Public Foundation and the protection system for victims. It is a good example of a preventive strategy, not specifically aimed at combating corruption. The term 'corruption' as part of crime-prevention was mentioned only in the context of international cooperation and the document urged only to 'stabilise' the responsibility for anti-corruption policy (which was moved from the Ministry of the Interior to the Ministry of Justice) in the future.
- In the FYROM, the State Commission for Prevention of Corruption (SCPC-M) has been established. This Commission adopted the State Programme for Prevention and Repression of Corruption and the State Program for Prevention and Reduction of Conflict of Interests for the period 2011 - 2015, which outlines specific and preventive policies with regard to corruption. The main objective of the Program is to establish a long-term, sustainable and complementary system of prevention and repression of corruption, and pursuing continuous adaptation and development of the strategy to fight against corruption to ensure the best

[98] French: Service Central de Prévention de la Corruption.
[99] French Ministry of Justice, http://www.justice.gouv.fr/le-ministere-de-la-justice-10017/service-central-de-prevention-de-la-corruption-12312/ (retrieved 19 June 2012).
[100] SWOT: Strengths, Weaknesses, Opportunities and Threats Analysis.

possible response to pressing national needs. More specifically, the aims of the program are: to achieve efficiency in the application of the normative framework for prevention and repression of corruption and conflict of interest in practice; to strengthen the institutional capacities; to improve the integrity of state and public administration; to ensure efficient and effective inter-institutional cooperation at national and international level and to raise the public awareness about the harmfulness of corruption and conflict of interest. The efforts of the Program in combating private sector corruption are focused on creating and strengthening long-term and sustainable business practices. To that effect, the Program proposes various activities such as the preparation of manuals, codes of ethics, guidelines and the publishing of information on the prevention of corruption on websites of the relevant institutions.

- The Research Network of Anti-Corruption Agencies (ANCORAGE-NET) was set up at an international conference held in Lisbon, Portugal, in 2006. It is a network composed of multiple anti-corruption agencies whose primary aim is to provide comprehensive and easily accessible information about the functioning of these bodies to practitioners in the field of prevention of corruption. The network represents the first attempt to provide an internet database with substantive country-based and comparative institutional information on various anti-corruption agencies in Europe and other parts of the world. Further to the primary data collected and analysed and the direct links to the agencies' websites, the ANCORAGE-NET portal also offers an easily accessible country-based repository of anti-corruption legislation, news, survey results, reports, and research directly or indirectly related to Anti-Corruption Agencies.[101]
- The Romanian Government recently approved a new National Strategy Against Corruption for the period 2012-2015. It includes, amongst others, an 'Inventory of Preventive Measures Against Corruption' and 'Assessment Indicators'. Furthermore, a National Action Plan for implementing this Strategy was adopted. Its main objectives with regard to the private sector are: (1) the decrease and prevention of corruption pursuant to applying the legal and institutional framework in order to maximize the impact of anti-corruption measures; (2) the increase of anti-corruption educational activities; (3) the combat of corruption through administrative as well as criminal measures.
- The Slovakian Minister of the Interior, in cooperation with the Head of the Governmental Office decided to install an inter-departmental expert commission for the monitoring, controlling and the assessing of the implementation of the Strategic plan and continuously co-ordinate the activities of this 'Expert Group'. The Chairman of this Expert Group is the Minister of the Interior and the vice-chairman is the head of the Governmental Office. The members of the Expert Group are: two representatives of the Ministry of Interior; one representative for the other ministries; the Governmental Office; one representative from the office of the attorney general and one from the Association of Slovak municipalities and communities. As observers to this expert group are included representatives from 'Transparency International Slovensko' and 'Aliancia Fair-Play'.

[101] ANCORAGE-NET, Mission Statement, http://ancorage-net.org/index.jsp (retrieved 25 June 2012).

4.1.2. Adequacy and effectiveness

1.3) Please describe whether these national preventive policies could be considered as adequate and effective with regard to the characteristic features of corruption in your country.

Eighteen States indicate that their current methods to deal with corruption are functioning rather well and show good results, but that there is still room for major improvements (CY, DK, EE, FI, FR, DE, EL, LT, LU, FYROM, MT, NL, PL, RO, SK, SI, ES, SE). This number also includes some States which do not have a separate 'Strategy', but nevertheless combat corruption via other channels. Amongst those, many also indicated that adequacy and effectiveness hardly can be measured, and that, considering the undeniable presence of private sector corruption in the different European States investigated, conclusions on this matter are hard to draw. Seven national rapporteurs state that the current policy on combating corruption can be characterised as unsatisfactory (BE, BL, HR, CZ, LT, PT, TR). Four national rapporteurs state that they are not able to give an assessment on adequacy and effectiveness (AT, HU, IT, UK). The Irish national rapporteur indicates that recent amendments to the anti-corruption legislation have yet to show results, and that it is likely that the effects of the amendments will be immensely positive. A proper assessment can, logically, not yet be provided.

4.1.3. Exchange and analysis of information on prevention of corruption and bribery

1.4) Does collection, exchange and analysis of information on prevention of corruption form an integral part of such a policy (Article 61 UNCAC)?

Most national reports, except eight (HR, HU, IT, LV, LT, PO, SI, TR), indicate that some form of data exchange takes place on a regular basis. Obviously, acquiring an exhaustive oversight of all data-exchange practises between anti-corruption Agencies is impossible, and five reports (EI, HU, IT, LV, LT) admit to not being able to verify the existence of such practises. This, however, certainly does not mean that no inter-Agency data-exchange takes place at all.

Some of the 'newer' EU Member States and Candidate States indicate that these processes are in a developing stage, and that much work still needs to be done. The Croatian national report mentions that currently the so called "informatization" is being developed. Databases from other State authorities (mostly Ministries) will be connected with the USKOK-database. Much work needs to be done still on this matter.
Similarly, in Poland there are no particular regulations governing information exchange between institutions authorised to investigate prosecute corruption offences yet. However, as transpires from the Government Corruption Counter-measures Program for 2012-2016, one of the planned measures is to develop a mechanism for inter-institutional information sharing, coordination of activities and cooperation between the bodies tasked with fighting corruption, to analyse the needs in terms of knowledge and experience sharing between the state prosecutor and the courts, and to take appropriate steps to respond to these needs.
In Italy, the exchange of information related to the fight against tax evasion has recently been improved by means of the adoption of the new powerful computer system called 'Serpico'. However due to the novelty of such an implementation it is not currently possible to give a general assessment on its adequacy and effectiveness.

1.8) Please describe whether current practise on the exchange of information could be considered adequate and effective with regard to prevention of corruption in the private sector.

Eleven national reports indicate that current practise on the exchange of information with regard to prevention of corruption in the private sector could be considered adequate and effective (AT, CY, DK, FR, DE, EL, MT, NL, PT, SK, SE). Another 12, however, indicate that the systems of information exchange display flaws, and that improvement in effectiveness and adequacy needs to be implemented (BE, BG, HR, CZ, EE, EI, FI, HU, FYROM, PO, ES, TR). The most prevalent inefficiency mentioned is a lack of coordination between the different Anti-corruption Agencies (see for example the FYROM), and some of the national rapporteurs indicate that improved mechanisms are being put in place, but are not yet implemented and therefore not assessable (PO, TR). Seven national rapporteurs claim that a proper assessment on the effectiveness of the exchange of information could not be provided (IT, LV, LT, LU, RO, SI, UK).

- The Austrian national rapporteur states that recent progress in the exchange of information, especially in the international context (through Europol, Interpol, OLAF, EPAC, EACN), has to be estimated as very positive. However, replies to the requested information still are communicated too slowly due to bureaucratic obstacles in the implemented international cooperation systems. In many cases the answer to the request is refused because of certain formalities. According to the Austrian rapporteur, a solution for this could be to stimulate specialised prosecution bodies in Europe to get to know each other personally to intensify informal connections.
- The Greek national report states that Greece heavily draws on the information provided and the experience gathered by Transparency International Hellas, and it states that this is the organisation which mainly ensures that Greece complies with the latest European and international developments in the area of information exchange.
- In Germany, difficulties in the exchange of information arise due to the federal structure of the State. The different regulations within the different countries of the German Federation (*Bundesländer*) make it sometimes difficult even for specialised lawyers to get an overview of the different instruments. In the end, it would probably be better if these regulations where further harmonized within Germany. Besides this, police, prosecutors and tax authorities cooperate in general very closely with the prosecutors providing the legal framework and the police as well as the tax authorities providing the manpower. The same databases are used by the police, the financial intelligence unit and the prosecutors.
- The Romanian national report stresses that, pursuant to the approval of the National Strategy against Corruption, information exchange and the sharing of 'best practises' is a particular effective method to promote a competitive, fair and incorruptible business environment. Furthermore, in view of facilitating the dialogue and the exchange of information on corruption, the National Strategy provides for the organisation of public consultations between public and private sector representatives with respect to the national anti-corruption agenda and those public policies having a financial and economic impact.

4.1.4. Involved national and international authorities

1.5/1.7) Please indicate which national/international (e.g. EU Anti-Corruption Network (EACN), Eurojust, Europol, and Member States) authorities and bodies are involved in the activities mentioned under question B 1.4.

Below is provided an overview of national and international authorities and bodies involved in the collection, exchange and analysis of information on prevention of corruption as indicated by the National rapporteurs.

Table 4.1

Country	National authorities	International authorities
Austria	• Federal Bureau of Anti-Corruption (BAK) • Public Prosecutor's Office against Corruption (WKStA)	• OLAF • Interpol • Europol • EACN • International Anti-Corruption Academy (IACA)
Belgium	• Directorate for Economic and Financial Crime • Central Office for the Fight against Corruption (OCRC) • Committee of Prosecutors-General • Network of Expertise on Corruption • Bureau of Civil Service Ethics	• OLAF (mainly OCRC) • GRECO • OECD • Transparency International - (mainly OCRC) • Interpol
Bulgaria	• Directorate General Combating Organised Crime (GDBOP) • International Operative Cooperation Directorate • Anti-Fraud Coordination Service (AFCOS) • International Operative Cooperation Directorate • Centre for Preventing and Combating Corruption and Organised Crime (BORKOR)	• Europol • Interpol • Eurojust
Croatia	• UNKOK (if realised) • Croatian Ministries	• Eurojust • Europol • Interpol • OLAF
Cyprus	• Cyprus Police	• Interpol • Europol • European Union • International Police Cooperation Directorate
Czech Republic	• Government Committee for the Coordination of the Fight against Corruption • Ministries of the Interior, Justice and Finance • Unit for Combating Corruption and Financial Crime (ÚOKFK)	• Open Government Partnership

Denmark	• Ministry of Foreign Affairs • Police • Prosecution authority	• Europol
Estonia	• Ministry of Justice • Korruptsioonivaba Eesti [102] • Ministry of the Interior • Office of the Prosecutor General • Police and Border Guard Board • Security Police Board	• Not indicated in National Report
Finland	• National police force • Ministry of Justice	• EACN • Eurojust • Europol • Other Member States • OLAF • GRECO • Council of Europe • OECD anti-bribery working group • UNODC
France	• General Directorat of the National Police (Direction générale de la police nationale (DGPN) • General Directorate of Judicial Police, Central Squad against Corruption • Central Service For Prevention Of corruption (Ministry Of Justice) • General Directorate of the National Gendarmerie (DGGN) • Court of Accounts	• GRECO • CSPC • OLAF • EPAC • EACN • G20 Working Group against Corruption • UNCAC Working Group on the Prevention of Corruption • Europol • Eurojust • UNODC
Germany	• Bundeskriminalamt (BKA)[103] • SIRENE • Local state authorities • Central Trade Register	• Europol, especially its Europol-Liaison Officers, ELO) • Interpol
Greece	• State's Attorney • Division of Internal Affairs, Hellenic Police • Bureau of Economic Police and Electronic Crime • Financial and Economic Crime Unit, Ministry of Finance • Inspectorate Government Auditors, Ministry of Administrative Reform and E-Government • General Inspector of Public Administration • Hellenic Financial Intelligence Unit (National Authority to fight money laundering)	• GRECO • OECD Working Group on Bribery in International Business Transactions • Intergovernmental Working Group to create a mechanism for evaluating the UN Convention against Corruption
Hungary	• International Centre of Criminal	• Europol

[102] Corruption-free Estonia. This is a non-governmental organisation and subsidiary of Transparency International.
[103] Federal Police Agency.

	Investigation (NEBEK) • National contact point of Europol • National Office of Interpol • SIRENE Project Office • Other unit to be set up by Police Head Quarters	• EUCPN • EUROJUST • Interpol • EUCPN
Ireland	• Garda Bureau of Fraud Investigation • Garda Síochána • Criminal Assets Bureau • Department of Justice, Equality and Law Reform	• Europol • Eurojust
Italy	• Not indicated in National Report	• General frame of rules provided for international cooperation in criminal matters
Latvia	• Corruption Prevention and Combating Bureau (KNAB) • Prosecutor's office (Prokuratūra)	• Eurojust • Europol • EACN • Interpol
Lithuania	• Division of Organised Crimes and Corruption Investigation (OCCI) • Financial Crimes Investigation Office	• Not indicated in National Report
Luxembourg	• Copreco (Ministry of Justice)	• Not indicated in National Report
FYROM	• State Commission for Prevention of Corruption • Pubic revenue office • Public Prosecution • State Defence office • Judicial Council • Ministry of Interior • State Audit Office • Customs administration • Administration for the prevention of money laundering and terrorism financing • State Authority for Geodetic Works • Financial Police • Council of Public Prosecutors • Broadcasting Council • Securities and Exchange Commission • Public procurement bureau • Second instance commission for public procurement	• European Commission • Council of Europe • UNDP • Europol • Eurojust
Malta	• Permanent Commission against Corruption • Economic Crime Unit Malta Police Force • Attorney General • Malta Financial Services Authority (MFSA) • Financial Action Task Force (FATF) • Financial Intelligence and Analysis Unit (FIAU)	• GRECO • Europol • Eurojust
Netherlands	• Bureau for stimulating integrity in the public sector • Corporate social responsibility The Netherlands	• Europol • Eurojust

	• International chamber of commerce • Government Platform on Fighting Corruption	
Poland	• Central Anti-Corruption Bureau (CBA) • Supreme Chamber of Control • Police	• SIRENE • Europol • Eurojust • Cooperation with the network of Polish police liaisons in other EU Member States • One Stop Shop
Portugal	• National Unit for the Fight against Corruption • Council for Prevention of Corruption • Criminal Police • Public Prosecution Service	• Europol • Interpol • Other EU Member States
Romania	• The individual agencies of the Ministry of National Defence, Ministry of Justice, Ministry of Administration and Interior • National Agency for Integrity (ANI) • DNA	• EU Member States • Aspiring EU Member States (i.e. Turkey, FYROM, Serbia, Croatia etc.) • OECD • Eurojust • Europol • EACN • OLAF
Slovakia	• Ministry of Interior • Anti-corruption authority national police • Anti-organised crime authority • Information service • Prosecution office • Public administration and local territorial administration • Private sector	• Eurojust • Europol • OLAF
Slovenia	• The Commission for the prevention of Corruption	• OECD • UN • Council of Europe • GRECO • EPAC/EACN • IACA
Spain	• Special Prosecution's Office against Corruption and Organised Crime • Support Unit of the State Tax Authorities • Support Unit of the General Intervention Board of the State Administration (IGAE) • Attached Unit of the Judicial Police of the National Police Force • Attached Unit of the Civil Guard • Spanish Financial Intelligence Unit (SEPBLAC)	• OLAF • International Association of Anti-Corruption Authorities (IAACA) • European and international prosecution offices • European Judicial Network • Eurojust • Europol • GRECO • EPAC/EACN • OECD
Sweden	• Police Authority • National Anti-Corruption Unit at the Swedish Prosecution Authority	• EACN • Eurojust • National Bureau of Investigation

	• Courts • Swedish National Council for Crime Prevention • Swedish Anti-Corruption Institute	(NBI)
Turkey	• Prime Ministry Inspection Board	• OLAF
UK	• Serious Organised Crime Agency (SOCA)[104] • Serious Fraud Office (SFO) • Financial Intelligence Unit • Financial Services Authority • Office of Fair Trading • National Fraud Reporting Centre • National Fraud Authority	• Interpol • Europol • EU Member State Police forces

- In the Czech Republic, the Open Government Partnership (OGP) has been established. This is an international initiative from the US Department of State supporting openness, transparency and the fight against corruption. Its objective is for governments to deliver concrete commitments to support budget transparency, empower citizens, fight corruption and transform into more open, effective and responsible institutions. As far as the private sector and increasing corporate responsibility is concerned, the initiative helps businesses to deal with issues such as anti-corruption, consumer protection, and community engagement.[105]
- The Polish Police has established a point of contact where all international police information-exchange channels converge. It is colloquially called 'One Stop Shop' and its duties are exercised by the Bureau of International Police Cooperation of the Polish Police National Headquarters. This unit coordinates and supervises all activities conducted within the framework of international non-operational, operational and training cooperation.

4.1.5. Establishment of special training programs

1.6) Do the officers of these national authorities and staff of these bodies receive specialised training in order to prevent corruption in the private sector? Please specify. (Article 20 Council of Europe Criminal Law Convention on Corruption)

The majority of investigated States indicates that some form of specialised training is provided for the staff of anti-corruption agencies. Nine national rapporteurs indicate that they are not aware of any of such special programs (BE, HR, DK, DE, IT, LV, LU, MT, TR). Some noteworthy comments made by the national rapporteurs are reflected below.

- The Austrian International Anti-Corruption Academy (IACA) is a joint initiative by the United Nations Office on Drugs and Crime (UNODC), the Republic of Austria, the European Anti-Fraud Office (OLAF) and other stakeholders. IACA is a pioneering institution that aims to overcome current shortcomings in knowledge and practice in the field of anti-corruption. In pursuing this aim, the Academy functions as an independent 'centre of excellence' in the

[104] This agency will be replaced by another called the National Crime Agency in June 2013.
[105] United States Department of State: *Diplomacy in action*, http://www.state.gov/documents/organization/168257.pdf (retrieved 21 June 2012).

field of anti-corruption education; training; networking and cooperation; as well as academic research. It pursues a holistic approach which is international, inter-disciplinary, inter-sectorial, integrative and sustainable.

- In Germany, neither corruption, nor bribery of foreign officials, nor the criminal liability of legal entities forms part of the regular formation of a lawyer in Germany. Official authorities will probably mention that their officers receive special in-house training and that they will do 'training on the job'. Yet there is no program available that shows that such training is made systematically and of a consistently high quality. Traditionally the fundamental formation within the German system is provided in University and the reduction of financial means in this area is dramatic. Special institutions engaged in the formation of police officers do exist though. An example which could be mentioned is the Central European Police Academy (*Mitteleuropäische Polizeiakademie*), an academy of eight European countries dedicated to the prosecution of cross-border-crimes.
- In June 2011, the Slovakian 'Authority of the Anti-corruption Campaign', resorting under the Presidium of the Police Force signed a Memorandum of Understanding (MoU) with the Austrian Federal Anti-corruption Authority (BAK), the Slovenian Commission for Corruption Prevention (KPK), and the Slovenian National Investigation Authority (NPU). Together they initiated a project under the name: 'European Anti-corruption Training' (EACT). Participants are drawn from the Member States of the European Union and the Western Balkans. The termination of the project is planned for 2013.

4.1.6. Accounting misconduct

1.9) To what extent does accounting misconduct, in particular misconduct for corruptive purposes or the bribing of foreign public officials or concealing bribery, constitute an issue in your country? If possible, please provide examples of off-the-book accounts, inadequately identified transactions, use of false documents and non-existent expenditures (Article 8(1) OECD Convention)

Irregularities in the financial records of businesses are discovered on a regular basis throughout the investigated States. The majority of States, however, indicates that such practises are not particularly aimed at covering up paid bribes and that general accounting rules suffice in combating these more specific offences (AT, BE, CZ, DE, DK, EE, EI, EL, HU, IE, IT, LV, LT, FYROM, MT, NL, PO, RO, SK, SI, ES, SE, UK, TR). The German National Report states that a trend can be perceived in the prosecution of such malpractices in Germany; namely to indict individuals not for the act of bribery or corruption itself, but primarily for committing a 'breach of trust'.
Some States indicate that accounting misconduct does not constitute a major issue or that no information is available (BU, HR, CY, FI, FR, PT). Some interesting comments of National rapporteurs are reflected below.

- Accounting misconduct regarding bribes abroad is a prevalent practise within Austrian companies. This is a recent phenomenon. Formerly, bribes which had a direct connection with exports were explicitly exempted from non-deductibility. Since the abolishment of this possibility, accounting misconduct has increased substantially. A common strategy by Austrian companies was the practise of bribing through middlemen which subsequently stated accounts for fictional services. A newer strategy is the use of subcontractors, especially in the construction sector which state accounts for real services, but executed for excessive

prices. This practice is difficult to reveal. In fact, disclosure by whistle-blowers is nearly the only chance.

- In Croatia, only about nine companies have an internal system of reporting fraud within a company anonymously. In four of these companies an anonymous report did not lead to strong evidence of accounting misconduct. In two companies anonymous reports lead to the discovery of accounting misconduct. The national rapporteur recommends that these internal control mechanisms should be further developed.
- A commonly applied financial misdeed in Poland consists of using phony invoices (so-called "empty" invoices). They do not document any actual economic event but, instead, fraudulently inflate the costs of doing business. The use of empty invoices occurs in all business-sectors. The universality of this occurrence can be confirmed by the fact that entire companies are established for the sole purpose of creating fictitious cost documentation. The enormous scale of these operations suggests the involvement of organised criminal groups therein.[106]

1.10) Have these issues been addressed by measures aimed at improving the regulating of the maintenance of books and records? (Article 8(1) OECD Convention)

None of the States investigated indicate that accounting misconduct, in particular for corruptive purposes or the bribing of foreign public officials or concealing bribery, has been specifically addressed by measures improving the regulation of the maintenance of books. However, a great majority claims that such rules are already in place, and that it is not necessary to adopt specific accounting rules.
This flows forth, for example, from the Latvian answer, which states that : 'There is no specific accounting misconduct offence under the applicable law of the Republic of Latvia that would explicitly prohibit and penalise maintaining financial and accounting books and records in such a way as to [pay] bribes or hide bribery. However, it is a requirement to abide by accounting rules and there are also special reporting requirements and limitations [to] cash transactions.' Similarly, the Danish answer states that 'it would be against the general rules [with which] auditors and accountants should [comply].

- In 2008, the Belgian legislator introduced a requirement for listed companies and financial entities to appoint an audit committee. This committee is responsible for the monitoring of the financial reports, of the efficacy of the external control, the internal audit, and of the statutory control of the annual accounts. A remarkable aspect of the Belgian regulations concerning accountants and auditors is that members of these committees, notwithstanding the fact that they are perfectly placed to track mismanagement, cannot report misconduct to external law enforcement authorities due to their professional confidentiality. Auditing standards, however, regulate the reporting of accounting misconduct to the board of the company in question. In 2009, Germany adopted the Accounting Law Modernisation Act (BilMoG), which constitutes the most extensive reform of accounting law in Germany since 1985. Under the BilMoG, listed companies must include in their management reports the main features of the internal control and risk management system that are of relevance for

[106] In The Netherlands this is also an offence that occurs often. *See: NRC Handelsblad, Bijna tienduizend meldingen van spooknota's,* 26 June 2012.

the accounting process. These changes in accounting and auditing requirements will also be helpful in the fight against corruption. The new law will stimulate the importance of developing and implementing strong internal financial controls. Auditors receive special training provided by the profession's training institute (*IDW Akademie*) which covers the detection of fraud-risk factors and potential fraud. However, there is no special training dedicated to anti-bribery or detecting "red flags" for foreign bribery in a company's accounts.

- Electronic registration of financial records at courts was introduced in Hungary in 2005-2006. The system supports the judicial review of businesses and ensures that financial records of these corporate entities are publicly available.
- In Spain offences are often committed through small companies which are set up under the legal form of limited liability companies, or companies which are constituted as self-employed persons, in order to benefit from the advantages and opacity offered by the flat tax system. Spanish legislation allows small businesses to file model balance sheets, and profit and loss accounts which are a lot simpler and which provide very scarce information, even though new accounting legislation now requires all companies to supply much more detailed information.
- In France, the SCPC tied contacts with the Haut Conseil du Commissariat aux Comptes (H3C) which is in charge of controlling the activities of the auditors, professionals whose mission is the control of the accounts of companies. According to the article L. 823-12 of the Commercial code, these persons have the obligation to reveal to the prosecutor of the Republic the criminal facts that they know about as part of their activity.
  H3C pointed out that if the auditors are naturally sensitised at risks of fraud that can denature the accounts of companies, fraud in general, and corruption specifically, are not necessarily translated by an accounting irregularity.

4.1.7. Cooperation between public authorities and private entities

1.11) Have specific measures been taken in order to promote, in accordance with domestic law, cooperation between national investigating and prosecuting authorities and entities of the private sector (Article 39 UNCAC)? Please specify.

In many States, specific measures to promote cooperation between the government and the private sector still have to be developed. Sixteen of the investigated States indicate that some form of cooperation is taking place (AT, BE, CY, CZ, DK, EE, FR, DE, EL, HU, LT, FYROM, NL, PT, RO, SE). In general, businesses are willing to cooperate to enhance the anti-corruption framework.
For example, in Belgium, the business sector expressed its willingness to cooperate more closely in the future, although some mistrust towards the federal government has to be taken away first. Companies seem to be reluctant to engage in obligatory structures, which might end up being very expensive, as has happened in the past in Belgium.[107]

[107] Transparency International *Evaluatie van het Nationale Integriteits Systeem*, Belgium, Transparency International, 2012, p. 298. Available at: http://www.transparency.org/whatwedo/pub/belgium_national_integrity_system_assessment_2012_dutch (retrieved 26 October 2012).

- In Poland, there are no legal mechanisms or other measures that would promote cooperation between national investigating and prosecuting authorities and private sector entities. The private sector is actually reluctant to cooperate with these authorities because of the latter's approach to corporations. Recently and contrary to Belgium, a discussion on possibilities for cooperation has started in Poland on the initiative of private corporations.
- A good example of cooperation between the private and public sector is the Confederation of Danish Industry; a private organisation funded, owned and managed entirely by 10,000 companies within manufacturing, trade and service industry. It aims to enhance the position of Danish businesses throughout the world, and amongst its policy objectives is the prevention of corruption.
- In Germany, some courts have considered the degree to which a company is cooperating with the authorities in an on-going investigation as mitigating factor reducing the fine to be imposed on the company. Such cooperation can consist of internal investigations within the company itself, the voluntary disclosure of information and the releasing of the company's employees from their confidentiality obligations in order to assist the authorities. Besides this, measures of Cooperation are laid down in several laws concerning special subjects, e.g. the law against money laundering (*Geldwäschegesetz, GWG*). Another example is the cooperation between the inter-trade organisation and the State Office of Criminal Investigation of North Rhine-Westphalia. They decided to increase their cooperation by arranging a workshop on the topic of white-collar crime and the Internet. Also the Federal Criminal Police Office introduced in 2005 an annual meeting of the largest companies in Germany to exchange information.
- Corporate Social Responsibility Netherlands was established by the then Dutch Ministry of Economic Affairs in 2004. Amongst its objectives are the stimulating of the development of codes of conduct and the enhancement of transparency in the business sector. CSR Netherlands also provides a platform for entrepreneurs with questions regarding corrupt behaviour of employees; the situation 'on the ground' in other States; questions on product chain-responsibility and a toolkit for entrepreneurs to self-assess their CSR-performance.[108]
- In France, *Brigade Centrale de la Lutte contre la Corruption* (BCLC), an investigative anti-corruption body which deals with all forms of public and private corruption, establishes some links between public and private entities. Whereas the BCLC has a particular focus on corruption of foreign public agents, it also deals with infringements of company law. In the area of corruption, the BCLC provides training programs for the *gendarmerie* and police academies. The BCLC also organises seminars in other countries within the framework of the UNCAC. Furthermore, close collaboration has been established between the French prosecution authorities and some financial institutions. In December 2009, Transparency International organised a seminar called: "Work against corruption - What policy for more efficient justice", where representatives from both the prosecution authorities and the financial institutions exchanged their views on how to strengthen the fight against corruption.
- Many actions were conducted in France to raise the awareness towards the private sector, especially by the Ministry of Finance and the SCPC, with which were often associated trade associations, such as the Movement of the Firms of France (MEDEF) or the Chamber of Commerce of Paris (training activities notably). Moreover sectorial awareness raising actions were conducted by the SCPC towards firms or representative organisations, eager to work out

[108] MVO Nederland, Corruptie, http://www.mvonederland.nl/thema/corruptie (retrieved 21 June 2012).

internal codes of ethics and to set up programs of compliance. In parallel to these initiatives the heads of the economic services of the embassies were recently asked to organise meetings with a significant number of firms / companies with a view to inform them on French criminal law and the guide of good practices of the OECD (2009).

Transparency International: *"Private sector is not playing a significant role"*

The efforts undertaken by the private sector to scale up regular contact with the public itself were assessed by Transparency International. A rapport that was presented in June 2012 concluded that the private sector is not playing a meaningful role in preventing and combating corruption in Europe. The advice of Transparency International, for the private sector to play its part, is that it should engage with both the government and civil society more actively on the enactment of anti-corruption measures. Moderate to weak scores were the norm across Europe. In Spain, many corruption issues are concentrated at the regional and local levels of public administration, but in central administration the problems relate more to inefficiency and lack of transparency. TI further indicated that the codes of conduct in the business sector are weak, and ends by pointing out that, given the importance and influence of the business sector in European countries, change in attitudes and behaviour towards corruption in the sector will be crucial to strengthening the overall integrity systems of the region.

Source: Transparency International, *Money, politics, power: corruption risks in Europe*, Berlin, 2012, p. 21.

4.1.8. Development of 'codes of conduct'

1.12) Have specific measures been taken in order to promote the development of standards and procedures designed to safeguard the integrity of relevant private entities, including an anti-corruption code of conduct (Article 12(2) sub b UNCAC)? Please specify

In the majority of States investigated, no specific measures have been taken in order to promote the development of standards and procedures designed to safeguard the integrity of relevant private entities, including an anti-corruption code of conduct. However, in many States, such initiatives are left to the private sector itself. Examples have been provided by the national rapporteurs of AT, BE, BU, DK, EE, FI, FR, DE, EL, HU, LV and TR.

- An example where private initiatives in a later stage are 'adopted' by public authorities can be perceived in Austria. The introduction of the Austrian Code of Corporate Governance was a voluntary self-regulation measure of joint-stock companies and has become an indispensable part of the Austrian corporate governance system and is viewed by investors as well as by issuers as an effective instrument for building confidence. It is a benchmark for good corporate governance and corporate control on the Austrian capital market. The Corporate Governance Report, which was made mandatory by the Austrian Business Code Amendment Act 2008 (*Unternehmensrechtsänderungsgesetz*) for all exchange-listed companies, also provides for the inclusion of a declaration on any deviations from the recognized Corporate

Governance Code thereby underpinning the significance of the Austrian Code of Corporate Governance. The Code also contains detailed rules regarding transparency and auditing and is therefore an important instrument in the fight against corruption in the private sector.

- An exception to the conclusion that codes of conduct are mainly the territory of the private sector itself, and perhaps a good example of a 'best practise', can be found in Belgium. There, a Code has been made mandatory for all 'stock exchange' listed companies. The code emphasizes the monitoring of systems of control, the management of potential conflicts of interests and the introduction of an adequate supervisory system for the prevention of abuse of power. Transparency and disclosure are important elements of the Code 2009 as well. Further, the code is based on the 'comply or explain- principle' which has been devised by the European Commission. According to that principle, companies that do not comply with (part of) the Code 2009 have to give a reasonable explanation for this deviation.
- In Poland, there is no obligatory compendium of behavioural standards that would protect against the risk of private sector corruption. Increasingly, businesses adopt their own codes of professional ethics. However, an initiative has been developed by the Central Anti-Corruption Bureau, which in May 2011 published the Anti-Corruption Guide for Businesspeople. The guide describes the phenomenon of (particularly economic) corruption, indicates legal consequences of corruption, gives examples of corruptive conduct and suggests solutions in terms of anti-corruption policy in a corporation and methods of behaving in a corruptive situation. The Government Corruption Countermeasures Program for 2012-2016 anticipates a discussion with the private sector aimed at working out joint anti-corruption solutions in businesses, joint development of standards of ethical conduct of the private sector in relations with the public sector and within the private sector itself, and reinforcement of mechanisms that enhance businesses' transparency.
- The Slovenian 'Resolution on the Prevention of Corruption' was developed in cooperation with the Chamber of Commerce of Slovenia, and requires the development of a number of preventive measures, such as the introduction of anti-corruption clauses, integrity pacts and certificates, establishment of internal mechanisms for reporting of instances of corruption, and regular education about the risks of corruption in companies. The implementation of these measures has yet to be initiated. The Chamber of Commerce has also developed the 'Code of Entrepreneurial Culture', which contains provisions on corruption. Furthermore, the Ljubljana Stock Exchange, the Association of the Supervisory Board Members and the Managers' Association of Slovenia developed a Corporate Governance Code (2007). This Code aims to define management principles for publicly listed companies, and covers such issues as independence, conflict of interest, insider information, transparency, and audit committees.

4.1.9. Disqualification of persons in a leading position

1.13) Have specific measures been taken in order to disqualify persons convicted of corruption or bribery from acting as directors of legal persons by court order or any other appropriate means?

Almost all national rapporteurs indicate that legal remedies can be sought in case of a desired disqualification of a director of a legal entity. However, specific legislation is generally regarded as redundant, whereas general rules on the employment of individuals with a criminal record usually apply or internal ethical codes prevent such persons from obtaining such a (leading) position. To

illustrate, the Luxembourg national report states that there is no such specifically applicable legal provision. However, directors of highly regulated organisations such as banks and insurance companies must obviously be 'approved' in advance by the respective supervisory authority. In this respect, convicted individuals will likely see their application rejected. The Greek national report states that disqualification measures can only be taken if: for the practice of a profession a special license is required issued by a public authority (e.g. a lawyer or a notary); and on the condition that he has been punished with imprisonment of at least three months. If this is the case, the individual could be held incompetent of practicing his profession for one to five years by a court of law.
Interestingly, there is a difference detectable in the scope of the comparable national rules in the investigated States. In the Czech Republic and Turkey, for example, generally applicable measures do exist, which only provide for the possibility of a temporal ban for convicted individuals to hold certain positions. Romanian rules, on the other hand, go beyond such sanctions and provide that persons who have been convicted of active and/or passive corruption cannot be founders of Romanian companies ever again. Moreover, the abovementioned persons cannot be appointed as administrators, directors, members of a supervisory or management board, or censors or financial auditors.

- In Ireland, a person convicted of any indictable offence in relation to a company or involving fraud or dishonesty shall, during the period of five years from the date of conviction or such other period as the court may order: (a) not be appointed or act as an auditor, director or other officer, receiver, liquidator or examiner, or be in any way, whether directly or indirectly, concerned or take part in the promotion, formation or management of any company or any society registered under the Industrial and Provident Societies Acts, 1893 to 1978; and (b) shall be deemed, […], to be subject to a disqualification order for that period.
- In France, the Criminal code provides supplementary penalties of interdiction to exercise some professions, as for example company director, for the persons condemned for facts of corruption. Article 131-9 of the French Criminal code provides that any legal person condemned for facts of corruption can also be forbidden to exercise some activities.

4.1.10. Awareness-raising programs

1.14) Are awareness raising programs regarding the existence, causes and gravity of and the threat posed by corruption being set up within (different parts within) the private sector (source: article 13 UNCAC)? Please specify

The majority of the national rapporteurs indicates that some form of awareness-raising programs regarding the existence, causes and gravity of and the threat posed by corruption has been or is being executed. Ten national reports state that such programs are non-existent in their respective States (BU, HR, CY, FI, HU, IT, LV, MT, ES, TR).
The Estonian Anti-corruption Strategy 2008-2012 indicates that a difference could be detected between public sector personnel on the one hand, and entrepreneurs or 'ordinary citizens' on the other. The former are namely far more aware of corruption than the latter. The survey revealed that entrepreneurs deemed the lack of qualified labour and overly bureaucratic proceedings as the main obstacles to gain knowledge in this particular area. Awareness of the public at large and, entrepreneurs in particular, of the existence of, for example, leniency programs, is vital to the operation of anti-corruption strategies in general. Some other comments of the national rapporteurs are reflected below.

- In Austria important activities in this field are being initiated only at the non-governmental side.[109] Especially the International Chamber of Commerce has to be mentioned. Transparency International Austria is active in this area with organising discussion rounds, presentations and working groups. Occasionally law firms and audit companies are involved as well.
- The Dutch National Contact point educates and informs the private sector about the OESO-guidelines and corporate social responsibility.[110] Other organisations concerning private legal persons give information and advice as well. An example is MVO Nederland (Corporate Social Responsibility Netherlands), established by the Dutch Ministry of Economic Affairs which provide several sources of information for the business sector (see section 1.2.1).
- The Romanian National Report identifies a difference between Romanian businesses and companies set up by foreign investors, which have implemented corporate governance training and awareness-raising programs more often.
- In France, ethics makes part of the public agents' programmes of training and of the judiciary; it is integrated in both initial training and continuing professional education, for example, with respect to budgetary and accounting rules or specific obligations of some public officials, such as the medical staff members of public agencies.

4.1.11. Abolishment of tax-deductibility of expenses constituting bribes

1.15) Have specific measures been taken in order to abolish tax deductibility of expenses that constitute bribes (Article 12(4) UNCAC)? Please specify

All States, except five (HR, CY, FR, ES, TR)[111] indicate that some form of measure to deal with deductibility of bribes has been taken. As has been repeatedly the case throughout this part of the questionnaire, general rules which were already in place usually are perceived as adequate to deal with the matter at hand and make the enactment of new, specific legislation as meant by the UNCAC redundant according to the States investigated.

- The Belgian national rapporteur, quite exceptionally, states that 'specific' measures to abolish tax deductibility have indeed been taken. The amendment, which was enacted in 2007, stipulates that: remunerations or advantages of any kind which are granted to a person, directly or indirectly in the framework of an offence of public bribery; private bribery; bribery of a person holding a public office; or working at an international public organisation cannot be considered as professional costs.
- In Turkey there is no special provision which provides such deductibility. The national rapporteur indicates that tax-payers involved in export, construction, reparation, installation or transportation abroad, have a right to tax deductibility of certain expenses. This provision is considered as contrary to international obligations.

[109] A similar comment was made in the Greek national report, which states that 'International Transparency-Hellas, the Global Network Hellas and the Hellenic Network for Corporate Social Responsibility' are active in this area.
[110] OESO-Guidelines, Dutch National Contact Point, http://www.oecdguidelines.nl/english/ncp-national-contact-point/ (retrieved 21 June 2012).
[111] This can also imply that no information was available to the National Rapporteurs of these States.

– The principle of non-deductibility of bribes is in the French system written in article 39-2 bis of the General Code of Taxes (CGI) and also concerns the French territories and overseas departments, except for French Polynesia and Saint-Pierre et Miquelon.
Between 2008 and 2011 18 operations have been the object of correction by the taxation authorities on the basis of article 39-2 bis of the CGI.
Moreover article 40 of the criminal procedure code applies to foreign public officials' corruption. A State's circular from November 2010 has reminded how to deal with formal complaints by tax officials on the basis of article 40 of the Code of criminal Procedure, in case of corruption of foreign public agents.

4.1.12. Protection from retaliation or intimidation for witnesses

1.16) Have specific measures been taken in order to provide effective protection from potential retaliation or intimidation for witnesses involved in the criminal proceedings? Please specify to measures related to physical protection, and to measures related to ensuring the safety of the witness during trial through the use of communications technology (Article 32(2) sub a and b UNCAC)

All but one (IT) of the investigated States have enacted measures in order to provide some form of protection from potential retaliation or intimidation for witnesses involved in the criminal proceedings related to corruption or bribery. The Italian national rapporteur indicates that Italian criminal procedure does not provide for any specific rule concerning the protection of witnesses involved in criminal proceeding, but for proceedings related to organised crime.

– The Croatian law regarding the protection of witnesses provides a reflection of a 'standard' law, according to most national reports, dealing with this topic. According to this law the following elements regarding the protection of the witness are provided for: physical and technical protection; moving the witness to another place (both in Croatia and abroad); hiding the identity and property of the witness; change of identity. A witness can also be put in a special protection program where the best measures to protect the witness are discussed by taking their specific circumstances into account. Furthermore, the law provides for different communication methods during trial to ensure the safety of the witness.

Organised crime

4.1.13. Establishment of preventive policies and their main elements

2.1) Please indicate whether specific and well elaborated national preventive policies with regard to organised crime, committed within or through the private sector, have been established.

2.3) Please describe whether the national policy on the prevention of organised crime committed within or through the private sector could be considered as adequate and effective with regard to the characteristic features of this type of organised crime in your country.

Twelve of the investigated States report that a national preventive policy with regard to organised crime is in place (AT, BG, CZ, DK, FR, EI, EL, PO, PT, RO, ES, SE). The Luxembourg and Belgian national reports both indicate that, in combating organised crime, the government is focussing on repression (thus targeting organised crime through criminal law when the offence has already taken place) rather than prevention. Sixteen national rapporteurs indicate that these policies can be considered adequate and effective, and that good results are being achieved. Eleven national rapporteurs perceive their national policy as yielding little to no positive results, and three national reports deem a conclusion on adequacy and effectiveness too difficult to establish. Underneath is reflected a brief overview of some of the contributions of the national rapporteurs.

- The Polish national report states that successes in crime detection and countermeasures within the existing system have been achieved, but it is argued that the current system does not fully ensure its expected effectiveness. One of the reasons for this is that too many bodies and institutions have been appointed to fight organised crime in a situation where there is no mechanism for coordination and consolidation of that effort and no uniform procedural rules. The Polish National Program of Counteracting and Combating Organised Crime draws attention to this problem and postulates development of joint procedures, system of information and experience sharing, as well as joint training. There should be one institution tasked with marking out the direction of activities and developing a strategy for countering and combating organised crime. This will contribute to the development of a consolidated system of fighting organised crime and will improve the effectiveness of this endeavour.
- Hungary is preparing a new national strategy to combat organised crime. Up until now the State relied on bilateral agreements to ensure international cooperation with numerous states. These agreements institutionalise data-exchange, help sharing experiences and methods in organised crime prevention, and help to pinpoint what the focus of organised crime prevention should be in a specific State.
- Denmark employs, amongst others, the 'Al Capone-method' in fighting organised crime. This basically means that, instead of prosecuting the actual underlying crimes generating criminal money, investigations are focussed more on the failure to remit taxes to the fiscal service or fraudulent practises with social security.
- The 'Garda' units in Ireland, in collaboration with the Criminal Assets Bureau, use civil processes and standards of proof to confiscate criminally obtained assets. This is working well, and deters and substantially hinders organised crime.
- Since December 2009, there has been a new provision in the Luxembourg Criminal Procedures Code regarding observation and infiltration of criminal organisations, which are only allowed for some types of organised crimes (including money laundering and all types of corruption). In this context, infiltration means the observation of presumed criminals by placing informants into the organisation or presumed site of the criminal activity. These informants, who pretend to be authors of criminal acts or accomplices, have the possibility to use an assumed identity.
- Whereas the initial European money-laundering directives were formally limited to organised drugs crime, the Dutch government took a broader approach, namely only pertaining to money-laundering in general. The Dutch anti-money laundering intervention targets all financial transactions involving illegal proceeds, irrespective of the nature of the crimes connected with them. Though this Dutch intervention is not aimed exclusively at organised crime, the Dutch policy explicitly states that the anti-money laundering measures

are initially targeted at preventing different forms of organised crime. These interventions are not restricted to the origin of criminal money only; they encompass the criminal purposes of funds as well. Furthermore, unusual transactions have to be reported to the Dutch Finance Intelligence Unit.

- The Spanish Strategy against Organised Crime 2011-2014, which identifies organised crime as the third biggest threat to the nation's security and its citizens after armed conflicts and terrorism, takes a multidimensional and multi-agency approach. That is, it seeks to involve all domestic, European and international public and private stakeholders, and to harness all of its powers, which, although not specifically found in the private sector, are expressed through the following priority lines of action: (1) Intelligence regarding organised crime must be strengthened; (2) The economy of organised crime must be addressed by fighting against its financial activities and seizing its assets; (3) The principal organised crimes must be dealt with; (4) The operational powers of the Police and the Civil Guard must be strengthened; (5) The involvement of the public and private sectors in the fight against organised crime should be promoted, particularly to prevent corruption; (6) International coordination and cooperation with the European Union and other strategic partners should be promoted.
- Noteworthy in this regard is also the remark of the Austrian national rapporteur, stating an especially effective way of dealing with organised crime. The Austrian Federal Police adapts its procedures rapidly and in a flexible way if new forms of organised crime are arising. In this context the catchphrase "*ad hoc*–strategies" is appropriate. In order to adapt in a quick way, the investigation teams are trying to cooperate in each case with every possible partner. For this, they have been provided with a vast array of possible actions and a wide scope of decision-making power by the superior authorities. However, these are internal arrangements which could be revoked easily.
- In Sweden, a particularly successful strategy followed by the authorities has been to increase the pressure on organised crime by hitting hard where it hurts the most. Accordingly, different measures have been taken which facilitate the confiscation of the economic resources of criminal networks; a strategy popularly called 'follow the money'. The Swedish Economic Crime Authority, through this strategy, has become one of the central players in the fight against organised crime. The strategy is generally assessed to be quite successful according to several sources, since it is assumed that punishment by imprisonment for a certain category of criminals is not as deterrent as one should think. By confiscating the earnings of the criminality, criminal behaviour itself becomes meaningless.

An interesting observation was also made in the German national report, which states: "As there is no specific information available, it is hard to say whether the measures of secret prosecution are sufficient especially in order to prosecute the organised crimes committed within closed groups of foreign offenders. Following the dominant literature within criminal law and procedural criminal law the government has already gone much too far. This opinion corresponds with several decisions of the federal constitutional court saying that "… the government has to take the limitations resulting from the fundamental individual rights (*Grundrechte*) more serious."

4.1.14. Exchange of information

2.4) Does collection, exchange and analysis of information on prevention of organised crime committed within or through the private sector form an integral part of such a policy? (Article 28 UNTOC)

Information on data exchange regarding organised crime will not always be easily found, whereas not everything on this subject will be publicly available. Still, all but six investigated States (HR, EE, IT, LU, MT, SI)[112] indicate that it is safe to say that at least some form of collection, exchange and analysis of information on prevention of organised crime takes place. Some comments on data-exchange made by the National rapporteurs are reflected below.

- Austria is involved in the administration of the project 'ILECU' of the EU, which has the aim to intensify police cooperation between the EU and the countries of the Western Balkans. Law Enforcement Coordination Units (ILECUs) are established in Albania, Bosnia and Herzegovina, Croatia, FYROM, Kosovo, Montenegro and Serbia, with the aim to enhance cooperation between the respective prosecution authorities. The project is supported by Europol, Interpol, Eurojust, Seci-Center, OLAF, RCC, Slovenia and France. The Federal Offices of Criminal Investigation of Austria and Germany are responsible for the implementation. The project embraces four main columns: (1) Strengthening of the strategic and operative cooperation and the implementation of networks (2) Analysis, information exchange and prevention of terrorism; (3) Intensifying the instruments for the fight against organised crime; (4) Amplification and establishment of the project to Kosovo.
- The only criminal information database common for all bodies occupied with combating organised crime in Poland (which are many) is the National Centre of Criminal Information (KCIK). The main source of information collected by KCIK is the National System of Police Information, which is also important at the level of international cooperation as it constitutes the principal source of information for the 'National Information System'; the main Polish database used for international information sharing.
- In The Netherlands, the 'Monitor on Organised Crime' proves a useful tool. The primary goal of the Monitor is to optimize the use of knowledge gained during large-scale investigations and to develop an insight into the nature of organised crime in the Netherlands.[113] In the course of its existence 120 large police investigations concerning organised crime have been analysed since 1996 by the Research and Documentation Centre of the Dutch Ministry of Justice (WODC). The results of these analyses have been gathered in three major reports that are open for the general public and can be downloaded free of charge.

2.8) Please describe whether current practise on the exchange of information could be considered adequate and effective with regard to prevention of organised crime committed within or through the private sector.

Seventeen States indicate that current practise on the exchange of information with regard to the prevention of organised crime is effective and adequate (AT, CY, DK, FI, FR, DE, EI, EL, FYROM,

[112] This can also imply that no information was available to the National Rapporteurs of these States.
[113] *Monitor georganiseerde criminaliteit*, http://english.wodc.nl/onderzoek/cijfers-en-prognoses/Georganiseerde-criminaliteit/index.aspx (retrieved 21 June 2012).

MA, NL, PT, RO, SK, ES, SE, UK), even though this does not always form an integral part of a specific organised crime policy. Of these States, Austria, Germany and Sweden claim to achieve particularly exceptional results from their methods of information exchange. Eight national rapporteurs deem the current systems in place unsatisfactory (BE, BL, HR, CZ, LV, LT, PO, TR).

The Austrian national report indicates that international information exchange over the course of the last few years was highly intensified, and that the relevant procedures are working 'hugely satisfying'. The German national rapporteur mentions the use of liaison-officers (*Verbindungsbeamten*) as a particular effective method to acquire and transmit the necessary data on organised crime from and to States throughout the world. In Sweden, besides the International Police Cooperation Division within the Swedish National Police Board, which is responsible for exchange of information with both national and foreign authorities, a special 'Front Office' has been established to ensure effective answers for every possible enquiry 24 hours per day. In Portugal, information exchange is deemed to be satisfying. However, the national report also indicates that there is room for improvement in the cooperation between the different crime-preventive Agencies. For example, sometimes requests for cooperation are not treated with the highest priority in order to achieve maximum celerity. Some other comments made by the National rapporteurs are provided below.

- The French SIRASCO (Information Service, intelligence and strategic analysis of organised crime),[114] an inter-ministerial based organisation, was established in 2009. It aims to collect, centralise and analyse information on organised crime in France. The development of their "separate approach per criminal organisation" maps each supposed criminal organisation active on French territory. Once mapped as detailed as possible, the information will be send to the competent administrations at the regional level, hence enhancing common knowledge through this sharing system.
- In Ireland, regular cross-border meetings and annual semesters are held which bring together law enforcement officials from both Ireland and Northern Ireland. Between the two States, on-going assessment of the organised crime threat takes place to ensure that their cooperation reflects changes in the nature of cross-border organised crime as accurate as possible.
- Because Europol, Eurojust and the European Judicial Network are all situated in The Hague (the seat of Government of the Netherlands) there is a logistic advantage to support the relevant Dutch authorities with exchange of information on the prevention of organised crime. However, the exchange of this information is somewhat limited because of the European legal statutory framework that defines the tasks and authorities of these three institutions in such a way that they are expected to be focused on certain aspects of exchange of this information only. This influences the exchange of information in such a way that this information at times is focussed on certain authorities and therefore limited in its contents. The focus of Europol is more on support to the national police, the focus of Eurojust is more on prosecuting authorities and the European Judicial Network focuses more on the competent magistrates of the Member States. Despite these limitations, the exchange of information on prevention of organised crime seems adequate and effective in The Netherlands. This is also due to the fact that the relevant Dutch authorities have several liaison officers and magistrates working inside (the network of) these institutions.

[114] French: *Service d'information, de renseignement et d'analyse stratégique de la criminalité organisée*.

4.1.15. Involved national and international authorities

2.5/2.7) Please indicate which national and international authorities (e.g. Eurojust, Europol, and Member States) and bodies are involved in the activities mentioned under 2.4.

Below is provided an overview of national and international authorities and bodies involved in the collection, exchange and analysis of information on prevention of organised crime as indicated by the national rapporteurs.

Table 4.3

Country	National authorities	International authorities
Austria	• Federal Office of Criminal Investigation (BAK)	• Europol • Interpol • Austrian liaison officer (Verbindungsbeamter) in each embassy in any European country • Member States of the Schengen area (SIS) • States of the Western Balkans (ILECU)
Belgium	• Institutions participating in the criminal procedures (police, public prosecutors, etc.)	• Institutions participating in the criminal procedures (police, public prosecutors, etc.) • Europol • Interpol
Bulgaria	• Directorate General Combating Organised Crime (GDBOP) • International Operative Cooperation Directorate • Anti-Fraud Coordination Service (AFCOS) • International Operative Cooperation Directorate • Centre for Preventing and Combating Corruption and Organised Crime (BORKOR)	• Eurojust • Europol • Interpol
Croatia	• UNKOK • State Attorney	• Eurojust • Europol • Interpol • OLAF
Cyprus	• Police • Relevant Governmental departments • Financial Intelligence Unit • Investigations Section of Custom and Excise • Cooperation with several international institutions	• Europol • Interpol • FBI
Czech Republic	• Ministry of the Interior • Specialised Organised crime units within the Police	• Interpol • Europol • Schengen information system
Denmark	• Special task force of the police relating to organised crime • tax authorities	• Europol

	• customs	
Estonia	• Not indicated in National Report	• Not indicated in National Report
Finland	• Customs Service (Tulli) • Police of Finland (Poliisi) • Boarder Control of Finland (Raja) • Criminal Sanctions Agency (*Rikosseuraamuslaitos*)	• Eurojust • Europol • Nordic cooperation between the Customs, Police and Boarder Control (PTR cooperation)
France	• *Gendarmerie Nationale* (Research Section S.R.) • Sub-Directorate of Judicial Police (DCPJ) • Service Central de Prévention de la Corruption (SCPC) (Ministry Of Justice) • Office Central de Répression du Trafic Illicite de Stupéfiants (OCRTIS) • Office de lutte contre le crime organisé (OCLCCO)	• *Office Centrale de la lutte contre le crime organisé* (O.C.L.C.C.O.)[115] • Europol • Mare Nostrum[116] • *Office Central de Répression du Trafic Illicite des Stupéfiants* (OCRTIS)[117] • EIS (Europol Information System) • Eurojust
Germany	• Federal Criminal Police Office • State Offices of Criminal Investigation.	• *Bundeskriminalamt* (BKA)
Greece	• The Ministry of Justice, Transparency and Human Rights, Ministry of Interior • The State's Prosecutor • The Hellenic Police Subdivision of Fighting Organised Crime • The Hellenic Coast Guard • The Hellenic Financial Intelligence Unit. • Subdivision of Economic Police of the Hellenic Police	• Europol • Interpol • Southeast European Cooperation Initiative (SECI) • OLAF • Eurojust • European Judicial Network • GRECO • Transnational judicial cooperation agreements with the Balkan Peninsula
Hungary	• Not indicated in National Report	• EUCPN • Eurojust • Europol • Interpol
Ireland	• The Gardai • Customs Service • Joint Investigation Teams	• Europol • Eurojust • EU Convention on Mutual Legal Assistance
Italy	• Not indicated in National Report	• Not indicated in National Report
Latvia	• Prosecutor's Office (*Prokuratūra*) • State Police • State Border Guard • Financial Police • Customs Bureau • KNAB • Criminal Money Laundering Prevention Department • Prison Administration	• Eurojust • Europol • Other Member States • EU, EEA • States that have concluded a special international agreement on the matter

[115] Central Office for the fight against organised crime.
[116] An international roster of crime analysis, called 'Mare Nostrum', was created to cross-reference DNA, fingerprints or mobile numbers of criminals, National Report France.
[117] Central Office for the Repression of Illicit Trafficking in Narcotics.

Lithuania	• Prosecution Service • Division of Organised Crime and Corruption Investigation (OCCI) • Financial Crime Investigation Service • Ministry of the Interior	• Egmont Group • Eurasian Group • Financial Action Task Force on Money Laundering • Interpol • Europol • Eurojust • European Judicial Network (EJN) • Bipartite contracts with other countries, e.g. Department of Financial Information (Poland); Financial Intelligence Processing Unit (Belgium) • Money Laundering Clearing House of the National Bureau of Investigation (Finland) • State Revenue Service (Latvia) • Anti-Money Laundering Department of the Financial Police of Ministry of Finance (Croatia)
Luxembourg	• Special subsection of the public prosecution's office dealing with economic crimes and money laundering.	• Not indicated in National Report
FYROM	• Prosecution office specialised in corruption and Organised Crime, • Department against Organised Crime of the Ministry of the Interior, • Revenue office • State audit office • Customs administration • Anti-money laundering and financing of terrorism administration • Financial police	• European Commission • Council of Europe • UNDP Office Skopje • Europol • Eurojust
Malta	• Economic Crime Unit Malta Police Force • Attorney General • Malta Financial Services Authority (MFSA) • Financial Action Task Force (FATF) • Financial Intelligence and Analysis Unit (FIAU)	• GRECO • Europol • Eurojust
Netherlands	• Monitor on Organised Crime, Research and Documentation Centre of the Dutch Ministry of Justice (WODC) • Criminal Information Unit • Drugs Enforcement Administration • Fiscal Information and Investigation Service, • National Police • Public Prosecuting Office • Royal Dutch Marechaussee	• Europol • Eurojust • European Judicial Network
Poland	• National Centre of Criminal Information (KCIK) • Central Anti-Corruption Bureau	• Eurojust • Organised Crime Task Force • Club of Bern

	• Border Protection Service • Customs Service • Military Police • Fiscal Control Service • General Prosecutor's Office • Central Bureau of Investigations • Internal Security Agency	• Conference of Central European States • Frontex • Europol • Interpol • OLAF • EPAC • EACN
Portugal	• National Unit for the Fight against Corruption (UNCC) • Central Department for the Penal Investigation and Action (DCIAP)	• Europol • Interpol • Other EU Member States
Romania	• Directorate for Investigating Organised Crime and Terrorism Offences (DIICOT) • Office for Cooperation, Representation and International Judicial Assistance (within DIICOT)	• Eurojust • Europol • Interpol • EU Member States • Non-EU Member States/ EU candidate states • EACN • OLAF
Slovakia	• Information Service • Anti-Organised Crime office within national police (UBOK) with a special emergency squad • Special division within the customs authority	• Eurojust • Europol • OLAF
Slovenia	• Criminal Police Directorate • Organised Crime Division	• Eurojust • Europol • OLAF • European Judicial Network.
Spain	• Coordination Committee against Organised Crime • Intelligence Centre against Organised Crime (CICO) • National Counterterrorism Centre (CNCA), one representative from the National Intelligence Centre (CNI) and another from the Executive Service of the Commission for the Prevention of Money Laundering and Monetary Offences (SEPBLAC)	• Europol • Eurojust • OLAF • Police forces, financial and legal services of the EU Member States • Joint Interagency Task Force South (JIATF-S) • Maritime Analysis and Operations Centre-Narcotics (MAOC-N) • Anti-Drugs Coordination Centre in the Mediterranean (CECLAD-M) • Central Office against Illegal Narcotics Trafficking (OCRTIS) • International Liaison Unit (ILU)
Sweden	• National Bureau of Investigation • Swedish National Police Board • Swedish Economic Crime Authority • Swedish National Council for Crime Prevention	• EACN • Eurojust • National Bureau of Investigation (NBI)
Turkey	• Department of the fight against the trafficking and organised crime within the Ministry of Interior	• OLAF • Europol • CEPOL

UK	• Serious Organised Crime Agency (SOCA) • Financial Intelligence Unit • Financial Services Authority (FSA) • Office of Fair Trading • National Fraud Reporting Centre • National Fraud Authority	• Europol • Schengen • EU Member States • Eurojust

4.1.16. Establishment of special training programs

2.6) Do the officers of these national authorities and the staff of these bodies receive specialised training in order to prevent organised crime committed within or through the private sector? (Article 29 UNTOC) Please specify.

All except four national rapporteurs (BE, HU, DK, IT) indicate that some form of specialised training is provided for in order to improve professionalism amongst the staff of anti-crime agencies, prosecution offices and police forces. Five national reports state that such information was not available (EE, LV, LU, MT, SK). It should be noticed that, obviously, obtaining information on this particular subject is difficult, for many Governments will be prone to keep such information classified. The German and Lithuanian National Report, for example, both confirm that such programs are indeed rolled out, but also state that the substance thereof is kept strictly secret by the authorities.

Some States have developed such training modules only recently. For example in Portugal, where, despite the fact that in recent years training programs have been developed, lack of skills of criminal investigators, prosecutors and judges still is a major flaw to the enforcement of anti-corruption legislation. Lack of specific knowledge on economic crimes often leads to a more difficult detection of crimes and to slower criminal procedures due to prosecutors and judges requiring more time and resources to understand the applicable legal framework and its specifications. Some other comments of National rapporteurs are provided below.

- In each Austrian police unit, on all organisation levels, there is one so-called 'prevention officer' (*Präventionsbeamter*), thus also within the specialised investigation teams which are dealing with organised crime. These prevention officers are receiving advanced trainings on a continuous basis, and the training programs are coordinated by the Federal Ministry of Interior Affairs.
- In Greece, A five-day educational seminar on Crime Intelligence Analysis, conducted by the School of Further Education and Training of the Hellenic Police in collaboration with the British Embassy was held in February 2012. The aim of the training course was to acquire knowledge that can be used directly to analyse intelligence and to assist police investigations at the preliminary hearing of important cases related to organised crime-. The seminar was attended by police officers, civil servants of various Government Departments who were trained by qualified instructors of the Serious Organised Crime Agency of Great Britain.
- The Turkish International Academy Against Drug and Organised Crime (TADOC) was founded in 2000 in cooperation with the United Nations Office on Drug and Crime. TADOC organises trainings and seminar programs in which so far more than 1600 national and international law enforcement officers have participated. As TADOC resides under the

Turkish National Police, participants are generally police officers from many different countries.

4.1.17. Cooperation between the public authorities and the private sector

2.9) Have specific measures been taken in order to promote, in accordance with domestic law, cooperation between national investigating and prosecuting authorities and entities of the private sector with regard to organised crime committed within or through the private sector? Please specify.

Fourteen States (AT, BE, CY, EE, FI, FR, DE, EL, LT, FYROM, NL, PT, RO, ES) indicate that some form of cooperation between the public and private with regard to combating organised crime takes place. However, the general perception is that such cooperation is usually on an *ad hoc* basis, and that tailor-made strategies and permanent communication channels still need to be developed. It should be noted that in this assessment, the obligatory disclosure of information by businesses during legal procedures is not perceived as 'cooperation between the public and the private sector' in this investigation.

During the 1990s, in The Netherlands, criminal investigations concerning organised crime were usually exclusively undertaken by police authorities, which frequently engaged in extensive and lengthy investigations. Arrests were commonly made after the conclusion of these investigations with the purpose of dismantling the criminal organisation at once and in its entirety. Since then, the trend in police investigations has shifted more towards short investigations because they appear to be more effective. Sometimes, private entities are used. The focus is then on (possible) facilitators and aiders of organised crime networks, like private transporters, private owners of construction sites and private owners of housing facilities. Sometimes these private persons have been used as a civil criminal informant and even as a civil infiltrator in an organised criminal network. The Dutch Criminal Procedure Code has been changed to provide for a legal base for these special investigation methods regarding suspects involved in an organised criminal group.[118]

- In Lithuania a website has been created (www.epolicija.lt), which allows individuals to inform the police about any crimes, including any suspicions about organised crime activities. The idea of this website is to enhance the possibility to help revealing crimes much easier, *i.e.* through pre-drafted forms on the internet, e-mails and even text messages.
- In Sweden, national policy on cooperation between investigating and prosecuting authorities on the one side and the business sector on the other side has not yet been established. However, cooperation between the authorities and the business sector does take place on a regional level. In Gothenburg, for example, the municipality has taken an initiative to establish a 'contact centre' for the fight against organised crime. The contact centre is primarily a point of cooperation between the municipality and the involved authorities, such as the police and the Swedish Economic Crime Authority, but secondarily also aims to strengthen the cooperation with local business representatives.

[118] Article 126 v-z of the Dutch Criminal Procedure Code.

4.1.18. Disqualification of persons in a leading position

2.10) Have specific measures been taken in order to disqualify persons convicted of partaking in activities and offences related to organised crime from acting as directors of legal persons by court order or any other appropriate means? (Article 31(2) sub d (ii) UNTOC)

All national reports, except four (AT, CZ, LU, TR), indicate that measures are in place in order to disqualify persons convicted of partaking in activities and offences related to organised crime from acting as directors of legal persons. The Luxembourg national report, one of the four exceptions, states that the law only provides that a person convicted may be disqualified to hold specific privileges provided by law such as e.g. the right to be elected or to carrying weapons. Similarly, the Turkish national report states that disqualification of persons is only allowed for the duration of the sentence imposed by a court of law, or half or one time the length of the sentence after the end of the term of the sentence. After this period, a person cannot be denied the right to exercise a function as director of a legal entity based on a previous conviction anymore.[119]

The Lithuanian Criminal Code does not provide for the disqualification of the director of the legal entity as a penalty. However, the Code of Criminal Procedures allows for temporary disqualification of persons convicted of partaking in activities and offences related to organised crime acting as director of legal person in two situations: (i) during the pre-trial investigation of the prosecutor and (or) (ii) during the trial process in the court. Furthermore, deprivation of the right to undertake certain responsibilities or to pursue certain activities might be imposed along with the sanction as an additional measure of a punitive effect. This constitutes a possibility only when the crime is committed in the working or professional sphere and when the court decides that the person shall not act in the same capacity ever again.

4.1.19. Measures to encourage *pentiti*

2.11) Have specific measures been taken in order to encourage persons who participate or who have participated in organised criminal groups to supply information useful to competent authorities? (Article 26 UNTOC) Please specify.

All national reports, except three (CY, EI, LV),[120] indicate that measures have been taken in order to encourage persons who participate or who have participated in organised criminal groups to supply information. In Croatia, persons who want to report organised crime offences are notified that providing false statements is a criminal offence. Policy does not seem to focus on creating encouragement and incentives to supply information regarding organised crime, more specifically regarding persons who formed part of or participated in an organised criminal group. However, according to the Croatian Penal Code a person can be released of charges in case he reveals the members of a criminal organisation before taking part in this criminal organisation or before this person commits a crime within this criminal organisation.

[119] The Czech National Report states similar arguments, and indicates that only temporary bans on the exercise of a certain capacity can be imposed.

[120] Both the Cypriot and the Latvian national report indicate that for reasons of State security, this information could not be provided. It could be presumed that these two States as well, have taken measures providing leniency. The Irish report only mentions limited whistle blowers protection here.

- In Austria, the 'Small leniency program' has been established. The Austrian Criminal Code opens the possibility for an extraordinary mitigation of penalties in the case of cooperation with the investigation authorities. If a person, who is punishable pursuant partaking in an organised criminal group or a criminal organisation, , provides information which helps to reduce the dangerousness of the association, or to clarify such offences, or to trace somebody who holds a leading position, it is possible to provide for a sentence which is below the legal minimum of the punishment.
- The Bulgarian Penal Code indicates two possibilities for a penalty exemption or for decrease of the penalty stipulated for participation in an organised criminal group by a person who voluntarily surrenders to the authorities and reveals everything known to him with respect to activities of the group in question before this group commits a crime, then this person will not be subject to punishment. A participant in the group, who voluntarily surrenders to the enforcement authorities and reveals everything known to him with respect to the group, thus helping to a significant extent in revealing and proving crimes committed by this group, will be subject to punishment lower than the lowest stipulated by the law, and in case of no minimum punishment, imprisonment will be replaced with probation.
- The Maltese 'Protection of the Whistle-blower Act 2010' was adopted in 2010 but has not entered into force yet. It sets out the basic structures and principles within which whistleblowing is to operate under Maltese law. The Act aims to provide for procedures in terms of which employees in the public and private sector may disclose information regarding improper practices committed by their employers or other employees and to protect employees who make said disclosures from any detrimental action. For a disclosure to be protected under the Act it must be made in good faith, not for personal gain and it must relate to an "improper practice" as defined in the Act.[121]

4.1.20. Protection of witnesses

2.12) Have specific measures been taken in order to provide effective protection from potential retaliation or intimidation for witnesses involved in the criminal proceedings? Please specify to measures related to physical protection, and to measures related to ensuring the safety of the witness during trial through the use of communications technology (Article 24 UNTOC).

All national rapporteurs, except two (LU, MT) confirm that some form of measures have been taken in order to provide effective protection from potential retaliation or intimidation for witnesses involved in the criminal proceedings.
The Swedish national report provides a thorough overview of possible protection measures. A co-ordinated security program for witnesses and other certain persons was established in 2006. Previously, responsibility with respect to witness protection was handled on a regional basis, and the extent of protection offered to a witness could therefore vary between different parts of the country. In order to achieve uniformity, the Government decided to impose new legislation involving the introduction of uniform provisions concerning protective measures. The new legislation does not prescribe a 'right' to obtain protection, it only states that 'a person may be subject of certain personal

[121] An "improper practice" under the Act is: (a) the failure to comply with any legal obligation to which one is subject, (b) the endangerment of the health and safety of an individual, (c) damage to the environment, (d) a corrupt practice (e) commission of a criminal offence and (f) a miscarriage of justice.

safety measures if there is a substantial risk of serious crime directed against the life, health or freedom of that person or of any close family member of that person'.

- In Belgium, witnesses can be granted two different types of protection when they fear for their safety due to giving a testimony: anonymity or physical protection. Anonymity can be either partial or full, while physical protection can either include regular or exceptional measures. As a general principle, full anonymity and physical protection cannot coincide: one can either receive anonymity or physical protection. However, in exceptional cases, when the identity of the anonymous witness was uncovered through no fault of his own, the law allows for subsequent measures of physical protection.
- In Luxembourg, there was an attempt to introduce protection measures into the Procedures Code, but the proposed law has not been adopted. The Luxembourg Bar Association (*Conseil de l'Ordre*) and several branches of the judiciary filed a comment in February 2004 which heavily criticized the anonymous testimonial. As a consequence, in February 2009, the draft law was split into two drafts: one concerned with victims of crimes and another with anonymous testimonials. The former was put into law, but the latter was more or less "forgotten". Thus, as of today, there is no provision regarding anonymous testimonials for witnesses under Luxembourg criminal procedures law (nor, for that matter, under civil procedures law).
- As mentioned earlier in paragraph 1.12, the Italian witness-protection programs are only accessible for persons testifying against a criminal organisation. These programs provide for the possibility of a new identity, relocation to another part of the country. Furthermore, the witness can testify by means of a teleconference set up in a secret location.
- France issued legal provisions which aim at avoiding pressures and threats towards witnesses, notably expert witnesses (articles 434-15, 434-8 articles 706-57, 706-58, 706-59, and 706-60 of the Code of Criminal Procedure.)

  France established procedures aiming at giving witnesses a new domicile and allowing that information concerning their identity and place of residence are not disclosed (or that such a disclosure remains restricted).

  Persons against whom there is no plausible reason to suspect that they have committed or have attempted to commit an offence and who are in a position to provide useful evidence can give notice that their address is that of a police station or the gendarmerie. The address of such a person is then recorded in a classified register.

  In proceedings brought in respect of a felony or a misdemeanour punished by at least three years of imprisonment, where the examination of a person described in article 706-57 could put in serious danger his life or health or that of his family or close relatives, the liberty and custody judge (juge des libertés et de la détention), has the possibility (under certain procedural conditions) to decide that this person's statements will be recorded without notification of his / her identity in the case file.

5. *Part C: Inventory of best practices*

Part C of the Questionnaire is titled "Inventory of best practices". In this chapter, the findings of the national rapporteurs are presented and commented upon.

Contact points

1.1) Have measures been taken to establish a national contact-point pursuant to Council Decision 2008/852/JHA[122] on the Contact- point network against corruption? Please specify: the date of establishment and provide contact information (website etc.)

Realising that the fight against all forms of corruption should be improved by cooperating effectively, identifying opportunities, sharing good practices and developing high professional standards, it was decided in 2008 to establish an anti-corruption network as an important contribution to the improvement of such cooperation. *Inter alia*, national contact points shall constitute a forum for the exchange throughout the EU of information on effective measures and experience in the prevention and combating of corruption.[123] Together, they are referred to as the European contact-point network against corruption (EACN).[124]
All 27 EU member states countries have already appointed EACN contact points, according to the EPAC/EACN website.

- The rapporteur from the FYROM reported that a contact point existed; this cannot be a formal EACN contact point as membership is limited to EU Member States.
- The Turkish rapporteur noted that the Framework Decision does not yet apply to Turkey and that no Turkish contact point exists. The rapporteur for Croatia also noted that no contact point existed there.

1.2) If yes, have these contact-points provided information on measures and best-practises regarding the prevention of corruption in the private sector? Please specify

Some rapporteurs for EU countries that were aware of the existence of a national contact point did not provide information on best practices. This holds true for two countries (namely Austria and Sweden). Where information on best practices is provided (for instance by Slovakia), it can be noted that this information does not offer many details.

- The website of the Dutch OECD contact point (which is not the formal EACN contact point) shows nine short examples of best practices. One deals with setting up businesses in Vietnam with the help of middle-men and how to avoid corruption there. Another one deals with corruption in Africa.
- The Slovak report merely states that the contact points need to publish yearly reports which are published on the portals of the office or department.
- Where Italy is concerned, it is noted that at present there is no active contact-point operating in this country.

All in all, the activities of the EACN would need to be scrutinised in more detail in order to derive useful information on best practices.

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[122] OJ L 301/38, 12.11.2008.
[123] Article 3 of the Council Decision 2008/852/JHA.
[124] *See:* www.epac.at -> EACN.

Whistle-blowers

2.1) Has national legislation or a code of conduct been established regulating disclosure by reporting persons? Please specify.

Out of the 30 countries investigated, a number indicated to have set up specific legislation (or codes of conduct) for the protection of whistle-blowers in the form of provisions on disclosure by reporting persons (CZ, EE (only for the public sector), LU, NL, PL, RO, SE, UK). A number of countries (AT, HR, CY, DK, FI, FYROM, IT, LT, PT, SK, SI, TR) indicated that such legislation does not (yet) exist, and the authorities rely on mechanisms of witness protection or the ability of employees who are dismissed without cause, to bring action against employers under labour laws. In Italy, a bill is under discussion that should regulate the matter once it is adopted.
In countries where legislation protecting whistle-blowers exists, the following systems and solutions are reported:

Measures in the Criminal Procedure Codes (FYROM, SK) or a different act (SI):

- In the FYROM, a person who has disclosed information indicating an act of corruption may not be subject to criminal prosecution or to any other liability; this person is entitled to compensation of damages, which he/she or a member of his/her family has suffered, due to the statement made or testimony given. The Criminal procedure code has a special chapter on Protection of the Witness, Justice Collaborators and Victims in which special measures are laid down for the protection of witnesses and justice collaborators.
- In Slovakia, criminal procedure code regulates that if witnesses have a well-founded fear that the announcement of identity, residence or place of residence will cause danger of his life, health and physical integrity or if there is a danger to a person close to him, the witness may be permitted not to disclose his or her identity. The anti-corruption department of the public prosecution service in Austria (WKStA) has called for introducing similar guarantees of anonymity for persons reporting corruption electronically, while ensuring that the public prosecutor can communicate with him and request additional information. In Estonia, public officials can apply for anonymity in connection with reporting corruption, unless the report is made on the incentive of personal gain or other low motives or if criminal proceedings have been commenced with regard to the case and the public official is questioned as a witness.
- In Slovenia, the Integrity and Prevention of Corruption Act, notably Article 23 (on reporting corruption and protection of whistle-blowers) regulates that if, with regard to the reported corruption, conditions have been provided for protection of the person reporting the case or his/her family members in accordance with the act on witness protection, the Commission may give to the Commission for Witness Protection a proposal for their inclusion in the protection programme or an initiative to the state prosecutor general to take the urgent protective measures. Only a court may decide on disclosure of data and identity of persons referred to in the fourth paragraph hereunder if urgently needed to protect public interest or the rights of others.

Codes of conduct (NL)

In the Netherlands, codes of conduct regulate disclosure of information by persons. An example includes a code of conduct for reporting the suspicion of misconduct in the police force or in the central government.

Obligation to report for public officials (AT, CZ, EE)
In Austria, Czech Republic and Estonia, public officials are obligated by law to report any corruption case of which they are aware and can rely on general protection of witnesses or under labour laws. The Czech Penal Code includes a crime called failure to notify a crime, section 368, and provides a list of crimes, which everyone is obligated to report under threat of criminal prosecution. In Estonia, regulations exist with regard to the public sector - public officials are obligated by law to report any corruption case they become aware of to the director of the relevant public institution or to the Police and Border Guard Board, Security Police Board or the Prosecutor's Office.
In Austria, under section 53 paragraph 1 of the Federal Act on Public Service ("FAS", *Beamten-Dienstrechtsgesetz*), public officials are obliged to report suspected offences to the head of the office (section 53 para. 1 FAS). Officials may only be transferred or downgraded if it is in the special interest of the service. In addition, federal officials have the right to directly report suspicious circumstances or allegations in connection with offences within the remit of the Federal Bureau of Anti-Corruption (BAK). Nobody can be affected adversely for such a report to the BAK (section 53a FAS). The provision was criticized in the 2010 GRECO report on Austria since it does not afford federal officials a sufficient protection mechanism.

2.2) Have measures been taken in order to establish a separate national disclosure office for whistle-blowers?

Asked about the existence of a separate national disclosure office for whistle-blowers, only five countries (EE, PL, PT, SK, SI, municipal authorities of Gothenburg in SE, several Bundesländer in DE, and the UK) indicated that such an office exists. Although no special office for whistle-blowers exists in the FYROM, there is a special witness protection council which could be helpful to protect whistle-blowers.

- In Estonia, a special hotline for reporting corruption crimes, including those in private sector, has been set up, giving the rapporteurs a possibility to retain their anonymity. According to the Prosecutor's Office, the hotline receives an average of 1-5 reports per month. However, they rarely provide sufficient grounds for commencing criminal proceedings.
- A similar telephone service has been developed in Poland by the Central Anti-Corruption Bureau, next to various other forms of notification including in person, on-line or by regular mail.
- In the United Kingdom, the hotline of the Serious Fraud Office reportedly receives 500 calls a month, however it is not known how many of these have or will lead to investigations.
- In Romania, notification mechanisms for whistle-blowers have been established under the Anti-Corruption General Directorate (DGA), National Anti-Corruption Directorate (DNA), Directorate for Investigating Organized Crime and Terrorism (DIICOT).

2.3) Please describe, if available, which national measures are particularly effective in order to stimulate persons to disclose corruption, bribery or organised crime practises in the private sector.

Where measures existed, they were regarded as effective to stimulate whistle-blowing in five out of seven cases.

- In the FYROM, the public awareness raising campaigns seem to be effective for stimulating disclosure of occurrences of bribery, corruption and OC. The anonymity of disclosure is also perceived as helpful.
- In Poland, a range of mechanisms have been developed in order to encourage perpetrators of active and passive corruption offences to disclose information on their commitment, such as obligatory or optional mitigation of penalty. The national rapporteur views such mechanism as an important practice towards breaking the conspiracy of silence. They rely on the assumption that voluntary notification of the prosecution authority should justify the impunity of the informant. Several shortcomings were also highlighted, notably the danger that perpetrators of active corruption will benefit, and the risk of false notifications that require a particularly scrupulous examination.
- In Czech Republic, Finland and Romania, measures have been developed within the private sector itself. The Czech Foundation Against Corruption (*Nadační fond proti korupci*), established in 2011 by a number of well-respected entrepreneurs, encourages people to disclose corruption, bribery or organised crime practices in the private sector by offering a reward of 1,000,000 CZK (approximately 40,000 Euro).
- In a similar vein, corporate codes of conduct in Finland and Sweden usually contain some form of accommodation for whistle-blowers.
- In Romania, a number of advertising campaigns by various media outlets have been launched with the purpose to encourage disclosure.
- The Portuguese rapporteur points to the efficiency and safety of the online notification mechanism that allows anonymity. The Romanian rapporteur mentions the effectiveness of financial incentives for whistle-blowers.
- In Lithuania, where the criminal code does not provide enough incentives or protection measures to whistle-blowers, public institutions look to encourage reporting through an information campaign about the wide-ranging adverse effects of offences that should be reported (for legal entities, public institutions, officials, but also the economy and society at large).
- The Estonian national rapporteur admitted that the current whistle-blower protection measures prove ineffective in preventing possible harmful effects of reporting (i.e. subsequent abuse by the employer/supervisor), which likely discourages reporting. In Finland, where such specific measures do not exist, the system of witness protection and labour laws and corporate codes of conduct are insufficient in potentially protecting whistle-blowers.
- In French positive law the reporting of crimes and offences makes part of many legal mechanisms as a source of information for authorities in charge of combating delinquency. Such a report can constitute also an element likely to launch the prosecution (art 40 first indent of the code of criminal procedure), an obligation which is obvious to all the public agents (art 40 indent 2 of the code of criminal procedure), and its abstention can in certain cases be criminally punished (non-reporting of crimes, art 434-1 of the criminal code).In France private sector employees are not, contrary to the employees of the public sector, obliged to signal offences of which they would know about. Even though there is no general disposition, some regulated professions, such as for example “financial” professions (accounting experts, auditors) have been imposed the obligation to signal some offences. However, whistle-blowers in the private sector got protection under Law n°2007-1598 of

November 13th, 2007, by means of inserting article L.1161-1 into the Labour Act. In the public sector officials are protected by their status.

Interconnection of business-registers and public records

3.1) Are public records being kept, or included in business-registries, of directors of legal persons convicted of corruption, bribery, or partaking in activities and offences related to organised crime? Please specify who is authorised to access these records, both national and international authorities and bodies.

Most respondents indicated that such public records are being kept. Slovakia is one exception. There, the exchange of information regarding corruption, bribery and organised crime in the framework of the EACN is not based on a central registry of convictions. Luxembourg forms another exception. Criminal records which are operated by public law enforcement agencies (*casier judiciaire*) are not accessible to the general public. Likewise, criminal judgments are not available outside of government organisations. Furthermore, no system of criminal records applicable to legal persons exists. In Turkey, a central public registry of convictions is in the process of being set up.

More diversity exists regarding the question of who can access these records.

- In the FYROM and Turkey, such access is universal.
- In Estonia, information on convictions with regard to any type of criminal offences by natural or legal persons is stored in the Punishment Register and available to everyone upon request. Separately administered is the Commercial Register, which lists natural persons on whom the court has imposed a prohibition to engage in enterprise as a supplementary punishment. Available online to the general public, contrary to the Punishment Register, it is a source of merely informative and not legal significance.
- In Finland, the Legal Registry Centre keeps note of all bans on natural persons from engaging in commercial activities within Finland, imposed by the court at the request of the prosecution under the Business Prohibition Act (1059/1985). Anyone may request an extract from the register, and the register is regularly consulted for example in connection with registration (and changes in registration) of corporate bodies. In addition, the Trade Register allows the public to access registry information on Finnish companies on the Internet, including company registers maintained by the Tax Administration. Pursuant to the Companies Act, moreover, lists of shareholders of limited companies and their respective number of shares constitute public documents, the copies of which must be available in a company's head office for anyone at cost price. Limited companies and, to some extent, other legal persons are further obliged to publish their financial statements and submit them to the National Board of Patents and Registration for registration (public document).

Most other countries apply stricter limitations.

- In Croatia, courts, the prosecution and exceptionally governmental bodies are granted access.
- In Denmark, it's the police and certain public authorities. In Cyprus, access to criminal records can be granted, upon application, by the police who administer them.

- In Germany, a central register, established under German trade law and administered by the Federal agency for justice (*Bundesamt für Justiz*), is accessible to both national and international authorities.
- In Greece, the Penal Record contains information on every criminal conviction of legal and natural persons. In order for a company or legal entity to register, commercial and industrial chambers require a penal record of its director. Under the Article 577 of the Penal Procedure Code, the record can be accessed by limited persons, such as entities of the public sector and banks.
- In the Netherlands, the issue is regulated in the Code on judicial and procedural criminal law information and the recently altered Decision on judicial data. The latter document mentions a wide range of national, foreign and international instances.
- In Finland, access to the criminal records and to the police registers, which contain additional information on suspected offences, is limited almost solely to public authorities who need such information in the course of their duties.
- In the Czech Republic, public records of convicted legal persons are kept in the Criminal Record, an institution under the Ministry of Justice to which courts are obliged to send information of sentencing of natural or legal persons. Criminal records relating to the legal person are issued to anyone upon the written request, whereas those of natural persons are publicly available.
- In Italy, the records related to such crimes are saved and managed by the Office of Criminal Records. The documents issued by this office are normally required in the ordinary course of business in order to demonstrate the absence of convictions. Moreover, legal persons could obtain an "anti-mafia" certification released by the Chambers of Commerce. It represents a document attesting that the persons vesting a leading position in a corporation have never been involved in "mafia-type" criminal association. This document is necessary in order to obtain public contracts. Nevertheless, the IT report submits, the effectiveness of such a certification is currently highly debated. Public records of legal persons convicted of any crimes are kept in Criminal Record, regulated in act no. 269/1994 Coll. But since the Criminal Liability Of Legal Persons Act, act no. 418/2011 Coll., has come into effect on January 1, 2012, it's unsure whether any legal person has been convicted of a crime to this date. It is stated in act no. 269/1994 Coll., section 11, paragraph 1, that "Criminal records relating to the legal person shall be issued to anyone upon the written request." Criminal record is also the official name of the institution (organisation subordinated the Ministry of Justice). According to the sec. 5 of the act no. 269/1994 Coll. the courts are obliged to send immediately the information of sentencing of convicted persons (natural or legal) to Criminal record. The same obligation applies to prosecutors, if the decision must be recorded according to a special legal regulation (e.g. conditional suspension of the criminal prosecution pursuant to sec. 307 of Code of criminal Procedure). On the contrary to the criminal records of natural persons, criminal records of legal entities are publicly available.
- In Austria, two registers are in place; one listing convictions of company directors and one - of legal entities. The former are kept in the criminal records, administered by the federal police. Excerpts from criminal records are available to national authorities, police offices, and the military commandos (with respect to the members of the federal army), as well as to foreign authorities, provided there is reciprocity. On the basis of the legislation implementing EU and OECD requirements on criminal responsibility of legal persons (VbVG), the government is in the long-term process of establishing a register of convicted legal entities. For now, the Ministry of Justice uses the case registers of the courts and prosecution

authorities to establish whether a legal person has been convicted or not. Information on legal entities is held in a public firm register (*Firmenbuch*), kept by the Regional Court (*Landesgericht*) for each federal state.

- In Poland, the National Register of Convictions contains information on persons convicted by final and binding judgment of Polish or foreign courts for common or fiscal offences, and information on collective entities convicted to a fine, forfeiture, ban or judgment publication under the Act of 28 October 2002 on Liability of Collective Entities for Punishable Offences. Access to the latter is vested in the strictly defined national authorities, courts, electoral commissions, state prosecutors, the police, security organs, law enforcement agencies, employers (to the extent necessary to hire an employee), foreign states authorities (where reciprocity exists), and central authorities of EU member states. Moreover, everyone including collective entities has the right to obtain information on whether his or her data is kept in the Register, and the contents of the entry.
- Sweden, with its historical respect for the principle of transparency, grants a far-reaching access to documents filed or produced by the authorities. The exception is criminal conviction records, held by the Police Authority, which are unavailable to the general public. Record extracts can only be accessed for restrictively regulated purposes. Exchange of information between different authorities is allowed. To overcome confusion on the extent to which information can be exchanged, the Ministry of Justice is set to introduce new legislation expected to facilitate exchange of information between different authorities in their work against organised crime, by easing the general provision on confidentiality.

3.2) Have measures been taken in order to connect the above mentioned public records or national business-registries for the purposes of preventing transnational corruption, bribery and organised crime? Please specify.

In a number of countries, such measures have not been taken (AT, CZ, DK, HR, IT, LU, PL, SK, TR, UK) and/or no information is available on this issue (CY, LT, SI). The report on Slovakia does indicate that the country exchanges information regarding corruption, bribery and organised crime in the framework of the EACN. However, this is not based on a central registry. In Croatia, new legislation regulating criminal records is being drafted.
In those countries where such measures have been taken (DE, EE, FI, FYROM, NL, PT, RO), details on what these measures entail differ considerably.

- The Dutch report indicates the decisions taken and the fact that these are up to date to the Framework Decision 2008/977/PbEU L 350/60 on data protection) and the Framework Decision 2009/315/PbEU L 93/23, on data for the European Criminal Record Information System (ECRIS).
- The latter is also referred to by Estonian and Greek rapporteurs.
- The FYROM report explains that the registries maintained by the Central Registry of the FYROM are connected at the national level and are cooperating with some regional registries of the same type. Where other registries are concerned, the communication goes through the already established cooperation with Interpol, Europol, Eurojust etc. It is added that Registries regarding the registration of persons (legal and natural) sentenced to one of the several prohibitions and disqualifications is kept by a central registry. This in turn is connected to existing international registries.

- Europol and Eurojust are the channels for international cooperation also in Sweden, through which information from the Criminal Record is transferred to foreign authorities. Of importance is also the 24 hour service called Front Office, which is part of The National Bureau of Investigation, NBI (*Rikskriminalpolisen*) at the Swedish National Police Board, described in the answer to question 2.8, Part B.
- The German report emphasises the importance of mutual legal assistance, with the efficiency and flexibility of Germany in handling MLA requests illustrated in the Siemens case. Incoming requests for mutual legal assistance dealing with foreign bribery offences and organized crime are rejected only in exceptional cases. One example concerns the requests filed by World Bank, which under German law does not qualify as a "responsible entity of a foreign state." Often, however, even when not all formal requirements under German law were met, German authorities have adopted a flexible approach to allow these requests to be answered to the largest possible extent, for example by making exceptions as to the language requirements.
- In Austria, the source of information on legal entities, the public firm register (*Firmenbuch*) kept by the Regional Court (*Landesgericht*) for each federal state, provides little added value to efforts to prevent transnational illegal phenomena. Notably, it does not contain any information regarding convictions and controls of criminal records do not form a part of the registration of new legal entities.

3.3) Please describe, if available, which national measures are particularly effective in order to enhance the exchange of information between national business-registries and public records for the purposes of preventing transnational corruption, bribery and organised crime.

The answers to this question were diverse. A couple of examples are:

- In the FYROM, the Central Registry has been very effective in keeping the records and providing quick access to the information. The intention is to use this system as basis for establishment of the information centre for prevention of organized crime, bribery and corruption. Especially with the establishment of the National coordinative centre for the fight against organized crime and corruption and the national intelligence data base. In the Netherlands, it is indicated amongst other things that for the local public authorities the bureau for promotion of integrity appraisal (BIBOB) can provide the necessary information on the existence of criminal records in for instance corruption, bribery or organised crime.
- For Slovakia, it is regarded as effective to impose legal entities and natural persons with a duty to disclose suspicions of commissions of offences. In Slovenia, the Commission for the Prevention of Corruption provides training for those responsible for drafting an integrity plan within their institution. They also hold an 'open door day' and raise public awareness.
- In Greece, reduction of bureaucracy together with an increased used of internet technology, are considered effective measures. An example of the latter is the country's participation in the European e-justice project through which companies and corporations can get access to insolvency registers.
- The Italian report explains that the legislature has not taken any specific measure in order to connect public records in order to prevent transnational corruption bribery and organized crime. The system is mainly based on the records saved and managed by the Office of Criminal Records. The documents issued by this office are always required in the ordinary course of business to demonstrate the absence of convictions. The usual practise adopted by

criminals of designating figureheads in order to manage legal persons has made the request of such a certification almost useless.

Sector specific best practises: prevention of corruption and organised crime in the area of illegal trafficking of waste

4.1) To what extent does corruption, bribery or organised crime in the private sector constitute an issue in waste management in your country? Please specify.

Only some of the rapporteurs indicate that corruption, bribery or organised crime in the private sector constitute an issue in waste management in their country (AT, DE, EL, FI, FYROM, HR, IT, PL, RO, TR, UK). Others indicate those are not major concerns (CZ, CY, DK, EE, LT, NL, SK, SI, SE). In the countries where it is an issue, the following specifications were provided:

Concerning legislative approach

- In Austria, the Federal Waste Management Plan for 2011 states that environmental crime is a grave and serious issue and lays down a strategy for preventing illegal waste movements in form of controlling measures. As for corruption and bribery, however, no such measures have been developed. In Greece, illegal trafficking of waste is addressed specifically in the law no. 4042/2012 on the penal protection of the environment. In combination with other relevant legislation, the law defines corruption, bribery and organized crime in the private sector regarding the waste management as serious, criminally punishable crimes. In Croatia, the minister of environmental protection has expressed her suspicion about corruptive practices in the waste management sector because of the inconsistent and complex waste management laws. This suspicion is confirmed by the rapporteur.

Concerning evidence and scope of criminal activities

- Illegal trafficking and storage of waste and hazardous substances are points of concern for Poland which is the destination country of waste smuggling and illegal trade. The reason is the low cost of waste disposal compared to other EU countries.
- In the FYROM, the issue, while present, has mainly related to petty crime such as small-scale trade of iron and copper. In Germany, especially cases of bribery have occurred at a much greater scale. According to the 2010 National Report on the Situation of Organized Crime situation (*Bundeslagebericht Organisierte Kriminalität 2010*), in 2010 illegal gains from criminal offences related to the environment reached up to 76 million Euro. In 2005, the Federal Supreme Court ruled in the case concerning a bribe of 21 million DM offered for a long term contract for the waste management in the city of Cologne and the construction of a new waste burning facility.
- In Finland, while there are no suspicions or evidence as to the existence of bribery or corruption, it is suspected that organized crime groups have been involved in illegal dumping of construction debris, especially in areas of grey economy.
- Many evidences of the interest of “mafia-type” criminal association in the Italian waste sector emerged both from investigations and trials. The parliamentary Commission of enquiry into the management of waste and the related illicit activities was erected. Moreover, the “Anti-mafia” parliamentary Commission investigates on the criminal phenomenon called “Ecomafia”, which indicates the involvement of “mafia-type” criminal associations in crimes

against the environment as waste management. Finally, a special Corps of *Carabinieri* called NOE, which is specialized in defending the environment, was instituted. The NGO report "Ecomafia 2007" claims that "mafia-type" criminal associations had a turnover of 23 billion of Euros in relation to crimes against the environment. The same report indicates that, in 2007, 23668 breaches of the law were ascertained and 163 persons were arrested for the commission of this type of crimes.

- Likewise, in Romania in March 2012, proceedings were instituted against a president of a county council and an ex-secretary of state for having allegedly accepted bribes for awarding of waste management contracts to a number of legal persons. As Romanian public authorities continue to increase the amounts spent on waste management services, it is expected that the number of corruption cases involving the awarding of such types of contracts will also increase.

In some of the countries for which it was indicated that corruption etc. in waste management did not form an issue, the following additional information was provided:

Criminal activity present but unrelated to corruption, bribery or organized crime

- In Slovakia, illegal filling (dumping of waste at land) of land with waste has been considered to be an issue. However, these commissions are usually not accompanied by acts of bribery or corruption. Likewise, in Estonia, although according to the Prosecutor's Office there have been cases of illegal trafficking of waste none of them can be connected to corruption, bribery or organised crime in the private sector. Unofficial information provided by the Lithuanian police authority indicates that these offences are uncommon in the waste management sector in that country.
- The Czech report points to the close relationship between the illegal phenomena regarding waste management and the area of public procurement, which receives much media attention but relatively little reaction from national authorities.

Corruption, bribery or organized crime occur on a low scale

- In Portugal, although corruption in this area of waste management is not considered a major issue, in the recent years 34 individual suspects and two companies have faced accusations regarding crimes of passive and active bribery of public officials, unlawful economic advantage, abuse of position in trust, aggravated fraud, active corruption in the private sector, trading in influence and forgery of technical documents, with the intention of benefiting a business group that works in the waste management sector.
- The Swedish rapporteur notes that while the number of reported cases of illegal trafficking of waste is far lower than in other Member States, it is on the increase and some cases never become detected. No case of corruption within the waste management sector has been reported.

Insufficient information

- The Slovenian report reveals that there seems to be a significant dark figure in recording and detecting such cases. The rapport on Cyprus indicates that due the lack of capacity at national level, it is impossible to determine whether corruption, bribery or organised crimes are an issue.

4.2) Has a system of preventive screening been established aimed at detecting corruption, bribery or organised crime in the waste management sector?[125]

Merely six countries point to the existence of such systems, including Austria, Cyprus, Germany, Greece, Italy, and the FYROM.

- In the FYROM, preventive screening is regulated by the Law for Waste Management Procedures for Inspections, while in Italy – by the parliamentary enquiry commission on the management of waste and the related illicit activities, as well as the "anti-mafia" parliamentary commission. Moreover, an important role is performed by the no-profit association NGO *Legambiente* instituted in 1980.
- In Germany, while a system of preventive screening aimed specifically at waste management has not been established on the federal level, several *Bundesländer* have set up specialized units within the authority of public prosecution.
- In Austria, as prescribed in the Federal Waste Management Plan for 2011, preventive checks against organized crime in waste management are coordinated and managed by the Federal Environment Agency in cooperation with ministries of interior affairs, finances, transport, and innovation and technology. In order to supply customs authorities and the police with up-to-date information on waste shipment regulations, the ministry of agriculture, forestry, environment and water management provides training courses. Furthermore, law enforcement agencies of the federal provinces have access to the eShipment application of electronic data management system to allow them to quickly determine whether trans-boundary waste shipments have been approved by the relevant authorities.

The rapporteurs for those countries in which such a system does not exist indicated the following:

- In Greece, the law No 4042/2012 is a valid tool that promotes responsible and transparent waste management procedures, although it does not refer specifically to detecting corruption, bribery and organized crime.
- In Slovakia, a mechanism for citizens to easily report of environmental crimes has been established.
- In Lithuania, while there is no special system of preventive screening for waste management sector, Article 6 of the Law on Prevention of Corruption prescribes monitoring and risk assessment of corruption-related offences in a number of sectors, including waste management. Specific measures for screening and investigating organized crime offences are set forth in the Law on Operational Activities.
- The Slovenian Ministry of Environment and Urbanism does actively control and execute the legislation, which is expected to lead to detection of commission of offences.
- In Luxembourg, although new legislation on the management of waste has been introduced in March 2012, it does not provide for mechanism of prevention of corruption, bribery or organized crime. Law enforcement in the waste management sector is administered by the Luxembourg administration of customs and excises (*Administration des douanes et accises*), which is supervised by the ministries of finance and the environment.

[125] Systems of preventive screening of business sectors are, for example, developed by the FATF. An example of such an evaluation is the report 'Money laundering through the Football Sector', available at: http://www.fatf-gafi.org/dataoecd/7/41/43216572.pdf (retrieved 21 December 2011). Another example constitutes a preventive screening of the Dutch arts and antiques sector: '*Pure art', preventive criminal analysis of the Dutch art and antique trade*, INTRAVAL, Groningen/Rotterdam, 2007.

- In Sweden, while no preventive screening system has been established, the Government has recently initiated a project which aims at enhancing the cooperation regarding detection of illegal trafficking or illegal management of waste between the police, the customs authorities, the Environmental Protection Agency and the county administrative boards. The latter are responsible for monitoring environmental issues, such as waste management. The project consists of educational seminars and materials for increasing the knowledge and awareness of illegal trafficking of waste among public officials who are in a position to detect such crimes. Furthermore, illegal trafficking is one of the focus areas of the new plan on waste management for years 2012-2017 issued by the Environmental Protection Agency.
- No system of preventive screening has been established neither does matching legislation on preventive screening exist in the Czech Republic. The issue is not included in the Government's Strategy on the Fight against Corruption. Also in Romania, there is no legislation regarding the existence of a preventive screening system aiming to detect acts of corruption in the waste management sector.

The Dutch report does not clarify whether such a system has been set up in the waste management sector.

4.3) Has a national contact-point been established, pursuant to Council Resolution 10291/11 on the creation of an informal network for countering environmental crime (EnviCrimeNet)?

On 9 June 2011, the Justice and Home Affairs Council adopted a resolution on the creation of an informal network for countering environmental crime (EnviCrimeNet).
In most investigated countries, such a contact-point was not yet established (AT, CZ, DK, EE, EL, FYROM, HR, IT, LU, PL, SK, SI, TR, UK). The Turkish report indicates that the resolution is not yet applicable to Turkey. Lithuania is not a member of the EnviCrimeNet since, according to its police authority; it does not face a significant problem of environment crime. In Greece, although a contact-point has not been established within the EnviCrimeNet framework, the matters of environmental crime are handled by the Ministry of Environment, Energy and Climate Change as well as the public prosecutor authority.
In other countries, contact-points are in the process of being installed. This is the case in Germany and the Netherlands which was one of the initiators of the proposal to set up the EnviCrimeNet. Finland, another initiator country, has recently successfully instituted a contact-point and nominated a contact person, as did Sweden.
All in all, the Council Resolution has as yet not brought much effect.

4.4) Have any methods been developed aimed at identifying criminal networks, active in the private sector, suspected of being involved in illegal trafficking of waste, either inside or outside the framework of EnviCrimeNet?

Methods aimed at identifying criminal networks suspected of involvement in illegal trafficking of waste have been developed in FI, FYROM, SE and TR.

- In the FYROM, however, they only deal with the trafficking of old iron and copper.

- The Finnish environmental administration has established a waste supervision unit, whereas the Finnish Customs supervises the illegal imports and exports of waste across the Finnish border, as well as conducts preliminary investigations in this matter. The Finnish Customs has its own operational model for risk analysis.
- In Sweden, a project aiming to detect waste 'at the source' (*Uppströmskampanjen*) has been introduced by the Environmental Protection Agency together with the County Administrative Boards responsible for waste monitoring. Through inspections at scrap-dealers or industries producing or handling waste, the project seeks to discover signs of illegal waste trafficking. It provides guidelines to public officials involved in such monitoring. Another way of detecting illegal trafficking of waste are traffic inspections by the border police divisions.

No such methods, addressing specifically the illegal trafficking of waste, are found in AT, DE, DK, EE, EL, HR, IT, LU, NL, PL, PT, RO, SK or SI. The rapporteurs for those countries indicated the following:

- In Slovenia, although private entities are required under the law to report environmental offences, there is no policy to detect or identify criminal networks in the waste sector.
- In Czech Republic, the matter falls under the competence of the Units for Combating Organised Crime and for Combating Corruption and Financial Crime, which have not yet developed methods to identify criminal networks in the area of waste management.
- In Estonia, identifying criminal networks involved in illegal trafficking of waste has merely been part of general crime detection measures and strategies.
- As for Turkey, natural persons and legal entities active in the field of waste management need prior authorisation. In addition, they are obliged to keep convictions records and send them periodically to the ministry of environment.
- The Dutch report notes that no specific methods have been in use other than the traditional methods for detecting criminal offences. The report indicates that the investigation of serious environmental crime is not well organised in the Netherlands, and more or less divided between several national, regional and local police-authorities, resulting in deficient exchange of information within the police and between the police and the public prosecuting office.
- The German rapporteur adds that the difficulties in detection of illegal waste trafficking have intensified with the Schengen Convention and the abolishment of regular border controls.

4.5) Have any methods been developed aimed at improving the exchange of information and gathering of criminal intelligence in this field, particularly with regard to Europol and Eurojust?

A number of countries have devised methods aimed at improving the exchange of information and gathering of criminal intelligence in the field of waste management (AT, DE, EL, FI, FYROM, RO, SK, SE, TR).

- The FYROM contact-point between the ministry of interior and Europol is involved in information exchange on a regular basis. Furthermore, the country has an agreement on cooperation with Eurojust and Europol.
- Such cooperation also takes place in Romania and Greece, with the engagement of the Division of International Police Cooperation of the Hellenic Police and the public prosecutor for environmental crime.
- Finland has been relying on Europol's secured communication channel *Siena* which can be used for exchanging operational intelligence information on environmental crime. Such

information may be stored at Europol for a limited time to support investigations. Furthermore, the country has made use of Interpol's *EcoMessage* system under the organisation's Environmental Crime Programme. Finland, who has successfully established a contact point within the EnviCrimeNet, is already benefitting from its mechanisms of information exchange.

- In Sweden, organized crime committed related to the environment is one of the focus areas of The National Bureau of Investigation (NBI) which is also responsible for exchanging information with Europol.
- Apart from cooperation with Europol and Eurojust, Germany, and especially its federal department for the environment, is part of the European Union Network for the Implementation and Enforcement of Environmental Law (IMPEL). The latter is specialized in prevention of crime related to the transnational management of waste.
- The Austrian report indicates that the ministry of agriculture, forestry, environment and water management maintains contacts with the authorities responsible for trans-boundary waste shipments, especially in neighbouring countries. The country participates in regular expert rounds within the EU held to ensure uniform enforcement of waste shipment regulations and to intensify cooperation projects in the field. Further, coordinated action of the authorities in charge of trans-boundary waste shipment is ensured through close cooperation within the network of the European Union for the implementation and enforcement of environmental law.
- Slovakia's cooperation with Europol and Eurojust has not specifically addressed environmental crime but rather spanned across crimes in general. The rapporteur is unaware of special collaboration between national and international institutions with respect to corruption, bribery and organized crime in the area of waste management, since Slovakia is not exposed to excessive risks of such occurrences.
- In Turkey, the ministry of environment is tasked with establishing an internationally accessible national information network. Furthermore, the country has ratified the Basel Convention 1994 on the Control of Trans boundary Movements of Hazardous Waste.

In Croatia, Estonia, Italy, Luxembourg, the Netherlands, Portugal, Slovenia and the UK no specific methods have been developed aimed at identifying criminal networks, active in the private sector, suspected of being involved in illegal trafficking of waste, other than the traditional methods for the exchange of information on criminal offences.

- In Lithuania, information about any special methods aimed at improving the exchange of information and gathering of criminal intelligence in waste management sector is not available to the public.

4.6) Are any other programs or particularly effective means being developed with regard to the prevention of illegal trafficking of waste? Please specify.

In most investigated countries, no such programs or particularly effective means have been developed. The Croatian report goes as far as stating that the country has no genuine policy dealing with illegal waste trafficking. In the Netherlands, some recommendations on effective programmes and practices have been introduced following the Probo Koala incident.

Information on particularly effective preventive measures is found in the national reports on AT, EE, DE, EL, FYROM, PL, PT, and SE.

- The Polish rapporteur indicates effective solutions employed in areas of implementation of waste management law, penalization and prevention. The authority responsible for implementation of the Act on International Movement of Waste of 29 June 2007 (JL 2007, no. 124, pos. 859, as amended) is the Chief Environmental Protection Inspector, who supervises the matters of waste importation, exportation and transit through Poland. The Inspector issues relevant permits and maintains a registry of applications and decisions pertaining to international movement of waste. As for penalization, the criminal code prescribes up to five years of imprisonment on a conviction for illegal transport of waste and up to eight years for illegal transport of dangerous waste. Prevention of illegal waste movement is enhanced through regular inspections conducted by the Border Protection Service, Customs Service, Road Transport Inspectorate and provincial environmental protection inspectors.
- In Portugal, although no system of preventive screening has been established specifically in the area of waste management, ancillary systems have proven effective. The Council for Prevention of Corruption has created an obligation for all public entities to elaborate a plan to prevent corruption in their activity, most of which are available online. In case of entities dealing with waste management, such plans identify the main risks of corruption and propose measures to address them. This indirectly constitutes a preventive system for the detection of corruption and bribery in the area concerned. In addition, Law 56/2011 of 15 November 2011 introduces a new provision (Article 279-A) in the Portuguese Criminal Code which criminalizes the illegal traffic of waste. Accordingly, illegal transport of waste in a considerable amount shall be punished with up to 3 years of imprisonment.
- The Swedish report describes the effectiveness of the Swedish legislation on shipments of waste across borders based on the Basel Convention. Approvals on the cross-border waste shipments are issued by the Environmental Protection Agency in cooperation with relevant foreign authorities, on the basis of Regulation (EC) No 1013/2006 on shipments of waste. The approved shipments are further reported to the Customs Service which has the authority to inspect all consignments of waste exported from and imported to Sweden. Customs Service has the authority to hold a shipment to verify that it has been properly declared and that all necessary information is submitted. Under suspicion of criminal activity, the shipment can be detained under the provisions on seizure in Section 22 of the Act on Penalties for Smuggling.
- The report for FYROM indicates that the government shot down the private waste collection centres on several occasions and now a new measure will be implemented where no cash payment will be available for payment for the old iron and cooper.
- The Austrian rapporteur evaluates as effective the explicit measures against illegal trafficking of waste set forth in the Federal Waste Management Plan for 2011 (see point 4.1) and in particular the procedures for exchanging experience and implementing common waste checks that it prescribes (see point 4.2).
- Estonia has effectively participated in the cooperation between prosecutors in the Baltic Sea region, next to DE, DK, FI, IS, LT, LV, NO, PL, RU, and SE. As part of this cooperation, an Expert Group on Environmental Crimes has been established.
- In Germany, tax authorities have developed several programs which aim at a better exchange of information with other national agencies in order to improve the control of cross-border movement of waste.

- The Greek report brings attention to best practices developed by civil society organisations such as the Hellenic Network for Corporate Social Responsibility (regarding the environment at large and specifically the responsible management of waste), as well as principles adopted and promoted by the Global Network Hellas (regarding the preventive approach to environmental protection).

Sector specific best practises: prevention of corruption and organised crime in the area of public procurement

According to Transparency International, "[h]igh corruption risks remain in public procurement: legislative frameworks have been brought in line with EU procurement directives, but it is an open secret in many European countries that the rules are systematically circumvented and that this can be done with impunity." According to the NGO's 2012 report, problems with public procurement are most acute in Bulgaria, the Czech Republic, Italy, Romania and Slovakia. Legislative frameworks have been brought in line with EU law, the report tells, but the rules are often systematically circumvented with impunity. As an example, it is explained that in the Czech Republic according to a survey carried out by the Association of Small- and Medium-Sized Companies in February 2010, three out of five managers of such companies believe that it is impossible to win a public contract in the Czech Republic without resorting to bribery, a kickback or some other 'incentive'. Another example concerns Bulgaria. One of the key issues there, the report explains, is that final public procurement contracts are not published and there is a common practice of renegotiation of the conditions in the annexes to the contracts. This creates an impression of excessive tolerance towards some suppliers and the draining of additional funds. This practice is also found to be common in the Italy. As for Romania, the report explains that "elaborate legislation is in place and yet there is a host of loopholes and ways in which the rules can and are systematically circumvented. These include, among others, establishing the tender criteria according to the specifics of a participant company, misuse of the state of emergency to negotiate contracts with a single company and providing confidential insider information to a participant to the tender."

Source: Transparency International, *Money, politics, power: corruption risks in Europe*, Berlin, 2012, p. 40.

5.1) To what extent does corruption, bribery or organised crime in the private sector constitute an issue in public procurement in your country? Please specify.

Most answers reflect that corruption, bribery or organised crime in the private sector constitute a problem in the area of public procurement (AT, CZ, DE, DK, EE, FYROM, IT, GR, NL, PL, PT, SK, SI, TR, UK). Specific remarks state that:
Several rapporteurs emphasise that corruption, bribery or organised crime in the private sector constitute a very serious problem for public procurement in the respective countries. According to the 2008 report by Transparency International, corruption was the most significant problem faced by businesses participating in public tendering procedures in Lithuania in 2005.

- In Poland, the National Program of Counteracting and Combating Organized Crime for years 2012-2016 states that the market of public procurements has become one of the most threatened areas of market economy, which is related, among others, to a large flow of financial resources into projects executed within the framework of public procurements.
- In Croatia, it is estimated that corruption in public procurement has caused for a loss of 10 per cent (600 million Euros) of the total purchase value of all procurements, whereas in Slovenia the value is about 30-40 per cent. In the FYROM, there is a public perception that no one can win a procurement contract without resorting to corruption.
- In Italy, investigations and trials indicate that there is interest of mafia-like criminal associations in the area of public procurement. The Italian legislator instituted the parliamentary commission of enquiry into such associations (the so-called anti-mafia

commission) whose purpose is to investigate their penetration into the sector of public procurements.
- The German report reflects that most difficult problems arise where criminal activities have to do with the margins of appreciation within the law of public procurement. Public prosecutors hesitate to prosecute these cases because of legal difficulties involved.

Due to the gravity of the issue, some countries established specialized programs institutions to address it.

- In the Czech Republic, the issue of transparency in public procurement – a frequent topic in the media – is one of the main objectives of the Government's Strategy in the Fight against Corruption.
- In the Netherlands, a specialised institution, PIANO (the centre of expertise on public procurement, *Expertisecentrum Aanbesteden*) has been created to offer guidance to governmental institutions.
- The report on Cyprus indicates that the illegal occurrences at issue are not of major concern. In Romania, while corruption and bribery are wide-spread in public procurement, organised crime appears not to pose a comparably significant risk at present.
- In Sweden, the scale of the problem is currently assessed by the Swedish Agency for Public Management.
- In Finland, public procurement has seemingly remained free from such illegal influence, however, the matter is kept under review, and various preventive measures have been taken. Despite the fact that each year there are only few cases detected by law enforcement authorities, intelligence information collected by the police shows that awarding decisions in public procurement are often biased and based on opinions of people who will benefit from the contract directly or indirectly. As appears from information from the state audit office, corruption is a bigger problem in local public procurement procedures. In Finland, where there tools or mechanisms to detect corruption are largely absent, the latter remains hidden and thus the low number of corruption cases does not provide an adequate picture of the phenomenon.
- The Estonian rapporteur points out that the issue is related mainly to cartel activities.

5.2) Has a system of preventive screening been established aimed at excluding bidders that are, or have been, guilty of corruption or partaking in activities related to organised crime?

A number of countries have established preventive measures which limit the possibility for bidders previously convicted for illegal activities in question to participate in public procurement tenders (AT, CY, DE, EE, FI, HR, IT, LT, LU, NL, PL, PT, RO, SK, SL, SE, TR). National reports name the following practices:

- *Limits to participation*

According to the national administrative laws and the public procurement directives, applicant convicted of corruption and related crimes are precluded from participation in public procurement procedures in EE, FI, DE, PT, RO, and SK. In LT, LU, PL, SI, and SE, contracting entities are required to exclude those who have been convicted of bribery from the bidding, whereas in Finland such requirement arises in the context of mandatory grounds, including aggravated or non-aggravated bribery, or participation in an organized criminal group. Exclusion of previously

convicted bidders upon discretionary grounds is used very rarely in Finland since in such cases the police do not readily provide information on previous convictions.

- In Turkey, subject to mandatory exclusion are only repeated perpetrators of bribery, who are also permanently prohibited from work in a given field (article 85(4) procurement law). Persons convicted of bribery and/or organised crime, are forbidden to participate in public procurement proceedings altogether (article 11 procurement law).
- In Luxembourg, the contracting authority may exclude tenderers from participation in public procurement contracts for up to two years for lack of commercial probity.
- In Austria, under 68 para. 1 of the Federal Law on Public Procurement ("BVerG", *Bundesvergabegesetz* 2006), the purchaser has to exclude entrepreneurs from participating in an tender procedure if a final conviction against them or, in the case of legal persons and certain other entities, against natural persons on their managerial body exists. In Austria, the purchaser may withdraw from a contract already awarded if the tenderer or a person acting for him during the award procedure has committed a criminal offence suitable to influence the award decision.
- In Finland, the procurement contract can be annulled or reversed immediately, if a public procurement unit states that it would not have entered into the contract with the company in question had it known that this company had been guilty of a bribery offence. Also an enterprise which has given false information can be shut out of the procurement procedure.
- In Lithuania, the Public Procurement Office may, upon violations of the law or possible manifestations of corruption at the procurement stage, refer the material to law enforcement institutions for further investigation or suspend the public procurement.

- *Documentation requirements*

- In Slovakia, all tender participants are legally required to prove their eligibility by providing an excerpt of their criminal record, and confirmations from the court and the tax office. In Slovenia, contracting entities may require all tenderers to provide proof of their integrity and the ministry of finance is planning to create a black list of bidders.
- On every public procurement procedure in AT, DE, FYROM, HR, LT, LU, and SE, entrepreneurs must present a non-conviction certificate from the basic criminal court.
- Additionally, the FYROM requires a certificate from the register of penalties imposed on legal persons as well as register of legal and natural person which were sentenced with prohibition of performance of profession, occupation, activity or duty and temporary prohibition of performance of duty issued by the central registry.
- Based on the Act on promotion of governmental integrity (BIBOB) (2002), Dutch governmental authorities can get information for screening and auditing of the persons who applied for a governmental permit. A bureau for promotion of integrity appraisal (BIBOB) can give this information on which a governmental authority can decide whether or not to grant a permit.

- *Cadastre of contractors*

- Austrian procurement authorities have access to a database known as ANKÖ193 (Contractors Cadastre Austria) with information on companies participating in tenders, including registration, business performance, past court procedures and convictions. Companies can register themselves voluntarily and subsequently have to provide this information. The ANKÖ is not a public register.

- *Notification of irregular transactions*

- In the Netherlands, public institutions need to give notice of irregular transactions in the fight against money-laundering, based on the act on notifications of irregular financial transactions and the act on identification in public and private sector. To enhance this administrative enforcement, on initiative of the ministry of interior affairs, regional information and expertise centres have been created which offer guidance to local authorities and other governmental institutions.
- In Finland, measures have been set out to address the problem of biased contracting decisions (see point 5.1). All bidders taking part in the procurement procedure have the right to obtain information on all bids made in the procedure once the final decision on procurement has been made. Also the general public has the right to such information. With the same purpose of ensuring fairness and transparency, in Romania, persons who in the discharge of their official positions are in a situation in which there is a conflict of interest , are not entitled to be involved in the verification/assessment process of submitted offers.
- The report on Greece explains that every relevant procedure regarding public procurement, including detection of organized crime, falls under the jurisdiction of the Unified Authority for Public Procurement. The Authority has the power to carry out checks and monitor the on-going procurement procedures and execution of contracts by screening data ex-officio. To this end, it requires the contracting authorities and stakeholders of the public and the private sector to provide relevant information and data. With the use of risk assessment methods, the Authority examines particularly the procedures of procurement and execution of public contracts falling within the scope of European law or co-financed by European programs. The report does not specify whether the Agency´s supervision results in excluding bidders convicted for corruption or organised crime.
- In some countries, even when corruption, bribery or organised crime in the private sector a considered a serious problem for public procurement, no measures excluding convicted entrepreneurs from public tenders have been introduced (CZ, IT).
- In Italy, while no such specific methods exist, the Italian penal code states that any person convicted for a certain crimes (including involvement in a mafia-type criminal association and bribery), is punished with an accessory penalty of prohibition to contract with the Public Administration from 1 to 3 years. Furthermore, in order to obtain public contracts, corporations have to present the “anti-mafia” certification released by the Chambers of Commerce. It represents a document attesting that the persons vesting a leading position in a corporation have never been involved in “mafia-type” criminal association. In France, legal as well as natural persons can be excluded from public tenders when being sentenced for corruption (res judicata, registered in a criminal record). Moreover, candidates tendering a public contract have to certify on honour that they are not in a situation forbidding them to tender. This relates among others to social and tax obligations, as well as to all bans / interdictions to tender any public contract. The submission of such a certificate is not obligatory, but it exempts the person or contractor from giving all the certificates and official certificates at this stage of procedure.

5.3) Have measures been taken in order to develop specific tools, such as notification systems, to encourage participants or other persons to provide information about corruption, bribery or organised crime in the area of public procurement?

Only CY, DE, LT, and SE appear to have developed such measures suited specifically to the area of public procurement.

- In Germany, special notification systems have been established within several Bundesländer. Furthermore, controlling authorities have been established at the municipal level (such as *Gemeindeprüfanstalt*), which regularly control the public finance. These authorities exchange information with the public prosecutor in order efficiently address concrete cases.
- In Sweden, in the years of 2010-2011 some local authorities have developed internal guidelines with more detailed examples of corruption situations and detailed information on how to report potential cases of corruption.

No such measures have been developed in AT, CZ, FI, FYROM, IT, LU, NL, PL, PT, RO, TR or UK. However, a number of reports explain that, while no special notification systems exist for crime peculiar to the area of public procurement, criminal activity can be reported through more general channels.

- In CZ, NL and GR, reports can be filed anonymously through a hotline or, in the former two, in person at police stations.
- In Lithuania, a special governmental website allows the public to provide information about corruption-related offences. Such information is then investigated by the Special Investigation Service.
- In Poland, an existing mechanism best suited to the area of public procurement is the corruption reporting procedure under the Central Anti-Corruption Bureau.
- In Portugal, general rules of protection of whistle-blowers and witnesses are applicable.

5.4) Has any initiative been developed in order to enhance transparency of conduct of private sector parties participating in the procurement procedure by the private sector itself?

Many rapporteurs mention such initiatives. Examples are:

- In the Netherlands, within the field of construction and building, the Foundation for Integrity in Construction (*Stichting Beoordeling Integriteit Bouwnijverheid*) is aiming to stimulate, manage and guard self-disciplinary rules regarding the integrity of construction and building companies in procurement and competition. The Foundation has developed a code of conduct that can be used by companies. Companies registered at the Foundation have the possibility of filing a complaint with a supervising commission regarding an offence of this code, resulting in possible sanctions.
- Also in Germany, transparency is enhanced from within the private sector itself by enhancing measures of corporate compliance as well as though general information issued by Association of German Chambers of Industry and Commerce (DIHK) or International Chamber of Commerce. Other initiatives developed in the private sector are projects pushed forward by the German Association of Protection against Economic Crime (*Deutscher Schutzverband gegen Wirtschaftskriminalität*) or the Association for Business Security (*Arbeitsgemeinschaft für Sicherheit in der Wirtschaft*), which represents over 4 million companies and self-employed.
- In Austria, the initiatives of the World Bank and Transparency International have resulted in agreements of integrity. During submissions in the public and private sector, the contracting parties agree on a so-called anti-corruption-clause to act with integrity and to implement measures for the prevention of corruption. According to a survey by PwC Austria already 37 percent of Austrian companies have participated in such agreements, 85 percent of which stated that their experiences therewith are positive.

- In the Czech Republic, a public online database created by an NGO *Naši politici, o.s.* (our politicians), with the support of *Nadační fond proti korupci* (Foundation against corruption) aims at detecting relations between Prague's public procurements and politicians. In Greece, the main NGOs for corporate transparency are the Global Compact Hellas and the Hellenic Network for Corporate Social Responsibility. The Greek rapporteur further emphasizes the importance of regulatory compliance adopted by corporations themselves.
- Rather than initiatives within the private sector, some reports discuss national measures aimed at enhancing transparency of public procurement awards (Finland) and linkages between national crime prevention measures and corporate codes of conduct (Italy).
- The Italian legislature established, by means of the Legislative Decree no. 231 of 8 June 2001, that corporations could avoid to be punished when they adopt an adequate model of organisation in order to prevent the offences specified by the same Decree. Among those offences are listed also the ones related to corruption, bribery and organized crime. Moreover, it is becoming a common standard for corporations to draw up and apply a code of ethics in order to prevent the perpetration of such offences. In the Czech Republic, the Ministry for Regional Development has launched an online information system on public procurement providing details of all public tenders as well as comprehensive information for the public concerning various aspects of public procurement.
- In 2007, Finland amended its Public Contracts Act to provide for the possibility of excluding an entrepreneur from public procurement tenders, setting out mandatory and discretionary grounds for exclusion. There is, however, no automatic consideration of international blacklists and, where blacklists are considered, exclusion from tendering is discretionary only, unless the blacklist is based on a disclosed conviction that falls under mandatory grounds. Determination of grounds for exclusion is based on information disclosed by applicants, without mechanisms in place to guarantee its accuracy. Furthermore, public procurement contracts do not include a termination or suspension clause in the event of the discovery by procurement units that information provided by the applicant was false, or by reason of the contractor subsequently engaging in bribery during the course of the contract. However, the provision of false information during the course of a public tender would amount to a discretionary waiver for exclusion.

Sector specific best practises: prevention of corruption and organised crime in the area of Emission Trading

6.1) To what extent does corruption, bribery or organised crime, in particular with regard to insider dealing and market manipulation, constitute an issue in emission trading in your country? Please specify.

Only some rapporteurs indicate that corruption, bribery and organised crime pose a problem to their national emission trading scheme. In Italy, investigations have revealed abuses with regard to the payment of VAT and in Slovenia – a case of a single company taking up all of the country's generating units. Italy and the Netherlands point to the importance of corruption prevention measures. In the latter, the Dutch Emission Authority (*Nederlandse Emissieautoriteit*) has been established to supervise the CO2 and NOx emissions trading. The Italian government has tackled tax

fraud by closing down the Italian Emission Stock Exchange and, alike in Austria, is designing a system reverse charge accounting for businesses trading in emissions allowances.
Certain rapporteurs admit to more irregularities than others, with Poland and Germany facing a surge in organised crime. In Romania, irregularities in the national GHG report for 2010 and the inadequate maintenance of the national emissions inventory resulted in the UNFCCC Compliance Committee suspending the country's right to trade its surplus carbon emissions.
Rapporteurs who do not identify the problem of corporate crime in emissions trading point to the unavailability of data (HR, SK) or the absence of jurisprudence.

6.2) Has a system of preventive screening been established aimed at detecting corruption, bribery or organised crime in the emission trading sector?

Most rapporteurs, with the exception of the Netherlands and Slovakia, do not identify systems of preventive screening in place, specific to emissions trading (DK, HR, IT, SI, TR). In a number of countries, general measures of detecting corruption, bribery or organised crime apply to the emission trading sector and other sectors alike (EE, EL, LT, PL).
Many countries have established agencies – or new functions within existing ones –for the regulation and monitoring of their emissions markets.[126] These agencies determine the access to the emissions trading system by posing requirements that are form of preventive screening. For instance, evidence that must be provided at registration in Austria and Sweden includes detailed documentation of identity and excerpts of criminal records, helpful in preventing account thefts. In Austria, an excerpt of the firm register, a VAT-Number certification, a confirmation of a valid account relationship, and an evidence of the residential registration are required to prevent, among others, tax fraud.
In some countries, detection of illegal phenomena results from joint efforts of various competent authorities, including the emissions trading regulating agencies, ministries of environment, and the prosecuting authorities (EL, SI).

- In the Netherlands, enforcement measures are used such as a coordinated action of the Tax and Customs Administration on identity fraud, VAT fraud and illegal financing, as well as the Authority for the Financial Markets on derivatives trading. They are, however, not dealing only with emissions trading, but are in charge of many fields.
- Furthermore, the Swedish rapporteur cites information exchange practices with respect to account holders in the emission trading registry, both within the EU and beyond its borders, as an important preventive mechanism.

6.3) Are any best practises or other particularly effective means being developed with regard to the prevention of corruption, bribery and organised crime in the area of emission trading?

Most rapporteurs indicate that their countries have not yet developed systems of best practices or other effective means specific to the area of emissions trading (CZ, DE, EE, FI, EL, HR, LT, LU, PL, PT, RO, SI, and TR).

[126] Austria: Emission Trading Registry of Federal Environment Agency ; Germany: European Energy Exchange (EEX), Fast Carbon Exchange, and the *Deutsche Emissionshandelsstelle* (DEHSt); The Netherlands: Dutch Emission Authority; Poland: National Centre for Emissions Management; Sweden: Swedish Energy Agency; UK: Environment Agency reporting to the Secretary of State at DEFRA.

In a number of countries, reporting obligations of account holders are counted among best practices with respect to preventing criminal phenomena. Next to Sweden and Austria, the Netherlands imposes an obligation on all trading participants to draw up a monitoring protocol, submitted for approval to the Dutch Emission Authority. In SE, following registration, account holders are subject to regular reviews.

- The Czech Republic and Austria employ practices aimed at enhancing transparency. The Czech online emissions trading registry provides the public with information on relevant legislation, glossary of terms, FAQ, templates of documents required at transactions, and register reports. Its Austrian equivalent publishes the list of the accounts in the registry, non-confidential information on account holdings and transactions, as well as reports on new entrants.

A number of rapporteurs name practices aimed at preventing cybercrime, including intensified access control to the emissions trading registry (AT, SE, NL) or introducing the four-eye principle for transactions of emission allowances (AT).
In addressing the problem of tax fraud in emissions trading, Austria and Italy have introduced a reverse charge system.

6. Summary

Abstract

This study is part of an EU wide project financially made possible by a Commission grant. It aims at the implementation of the third priority of the Commission programme: "*Prevention and fight against corruption, development of anti-corruption policies*".
It presents a horizontal overview of legal and policy measures taken by the EU Member States and three Candidate States in the area of preventing and combating corruption, bribery and organised crime committed by private legal entities. Additionally best practices aimed at preventing these crimes were drawn up. Information was gathered through a network of national rapporteurs set up specifically for this research. The study consists of three parts, concentrating on legal aspects, on anti-corruption and anti-bribery policies and measures, and on best practices.
The first part discusses national rules on fighting and preventing corruption in the private sector, with regard to bribery by the private sector of (foreign) public officials and on organised crime. The legal measures regarding corruption and organised crime were taken stock of with reference to relevant EU legislation. Provisions of the OECD Convention on Combating Bribery of Foreign Public Officials in international business transactions served as another frame of reference. All scrutinised States are Party to this Convention. The main goal is to get insight into national legislation in this area with a view to share this knowledge. The study does not form a conformity study that aims at investigating to what extent the thirty States' legislation complies with the international instruments.
The second part of this study is devoted to policies of and concrete measures taken by the concerned national governments aiming at preventing corruption and bribery committed by private legal entities and/or their (leading) employees. Provisions derived from a range of international conventions, specifically aiming at developing and applying preventive measures were used as a frame of reference. It was noted that the EU itself is also making more and more use of these conventions to help assess anti-corruption policies of the Member States.
In the third part, results are presented regarding best practices developed and put into practice by and within the investigated States.

Summary of main results

6.1.1. Legal measures

The EU legal instruments in this area aimed at harmonising substantive criminal law provisions at the national level. Nevertheless, many differences appear to remain legally between these States. In some instances EU provisions were not implemented at all. Although this study is not about assessing compliance of national legislation with international instruments, but conducted with a view to enhance the level of knowledge, sharing such insights and enhance the level cooperation. Otherwise, it may be said that the very existence of differences as summarised hereunder does not facilitate international cooperation.
Corruption committed in the private sector is covered by one EU instrument exclusively related to harmonising criminal law provisions on corruption, in the private sector (companies and non-profit private organisations, e.g. foundations). Divergences can be noted on important substantive elements:

- The scope includes sometimes not only the private but also the
- Public sector. In such cases no legal distinction is made between horizontal corruption (between legal entities) and vertical (between private and the public sector entities).

- Definitions of persons passively engaged in corruption and bribery sometimes comprise staff members of companies only, instead of referring to all persons directing or working *in any capacity* for a private sector entity (as foreseen by EU legislation).
- The illegal character of advantages given (bribes) is made dependent on two conditions: they have to be *undue* (without further explication), and the recipient of the bribe should because of the bribe perform *in breach of his* (statutory or contractual) *duty*. Both elements are distinctively implemented. So, definitions of the undue character of "advantages" differ or are left open. Further, in many cases a breach of duty is not required to render such acts illegal on the condition these (in principle law conform) acts are related to having accepted a bribe.
- In the area of sanctions, important differences can be found with regard to disqualification as a sanction excluding managers and directors who are sentenced for acts of (active/passive) corruption from carrying out comparable business activities. This can vary between having no disqualification provisions in place at all, to dismissal from his/her function or disqualification pertaining to all sort of commercial jobs, or restricted to leading positions or to functions in need of a specific license.
- Liability provisions regarding private legal entities for deeds of corruption vary significantly. Differences can be found with regard to the nature (civil, administrative and/or criminal) as well as with regard to the type of actors creating such a liability of a private sector entity. With regard to the latter dimension, in some cases the field of application of corporate liability remains restricted to corruptive conduct of leading persons, in other instances it may be extended to corruptive acts of all employees.
- A wide gamma of sanctions for sentenced private sector entities appears to be available. Fines can be imposed across all concerned States, though of highly differing degrees and almost everywhere auxiliary sanctions like criminal confiscation of illegal assets and prohibition from exercising certain business activities. Other possible sanctions vary very much. Only in two States a sentenced private legal entity can be placed under judicial supervision.
- Jurisdictional competences in this area are far from harmonised neither complementing each other's judicial powers. The UK Bribery Act is the most pertinent piece of legislation in this area. It is granting jurisdiction over corruption committed by a person associated with and on behalf of a corporation that is doing business or part of its business in the United Kingdom, irrespective of whether the acts or omissions which form part of the offence take place in the United Kingdom.

The OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions provided an additional frame of reference to study legal anti-corruption measures taken by EU and Candidate States. Its scope pertains to the area of bribery of foreign public officials in order to pursue commercial interests. The Convention requires also an approximation of the national provisions on foreign public officials with those regarding the own public officials.

The main outcomes encompass:

- Most of the investigated States have gone beyond the requirement that the improper advantage should serve commercial interests only.
- Most States also adopted legal measures with regard to the liability of legal entities for bribery of (foreign) public officials. In almost all cases such a liability was of a criminal

nature. Similar to the way of applying EU rules, in most cases this liability was restricted to acts committed by leading persons, though six states extended this to corruptive acts of all employees.
- Types of sanctions were rather similar to those applicable in the area of private sector corruption. Fines (split up in four categories) were predominant.
- Jurisdiction rules were very much alike to those of private sector corruption. All States established territory related competences and a majority of the investigated States did also exercise extra-territory powers.

Organised crime constituted the other legal area of investigation. This offence has been criminalised through EU legislation and the international UN Convention against transnational Crime (UNTOC). EU legislation is marked by a dual approach, a continental as well as a more Anglo-Saxon definition. Both definitions of the offence are entailed in the same EU instrument. On the one hand organised crime is defined as a stable and structured association of two or more persons acting with a view to commit serious crimes. This definition is applied by most States. In the alternative definition, on the other hand, such a structured association is seen as a form of conspiracy set up for the immediate commission of an offence. That definition applies in nine States. Some legislative systems are applying mixed definitions. In most cases active participation to such structured associations are criminalised and made a punishable offence. In most States, by their participation to such structured associations, leading persons can institute the (criminal) liability of the legal entity these persons are their "directing mind and will" of. Applicable penalties are very much the same as provided for by the EU private corruption instrument. The same may be concluded with regard to the way territorial and extra-territorial jurisdictional competences are regulated, opening up grounds for possible jurisdictional conflicts, either passive or active.

6.1.2. Results: application of preventive strategies and measures

Only 13 States are reported to have preventive policies with regard to private sector corruption in place, though most of these policies are of a dominantly repressive nature. In some cases these policies are part of general criminal prosecution policies. Besides, it appeared that the sector of state-owned companies constituted the main focus of these policies and not independent private legal entities.

This part of the study presents two all-encompassing overviews of national authorities and their international counterparts in the areas of respectively preventing and combating corruption and of organised crime. Cooperation with the international counterparts consists mainly of collecting, analysing and exchanging corruption related data. The overviews elucidate how much effort all States together with international partners and agencies are making to prevent and combat corruption. Among these, national agencies and/or authorities specifically or exclusively focused on this area deserve close attention as probably effective tools in addressing corruption, fraud and organised crime.

This section of the study presents further examples of preventive measures which can be taken with regard to international anti-corruption and organised crime conventions. These measures are about prevention through setting up special training programs in the private sector addressing accounting misconduct, development of codes of conduct in this area, disqualification measures of corrupt directors and managers of private legal entities, measures to encourage "pentiti" and about the providing of protection to witnesses.

6.1.3. Results: inventory of best practices

Best practices can be seen as practical and effective ways to deal with a specific challenge by the problem owner. Depending on the way of defining a specific challenge problem owners may differ. States may approach such challenges primarily from a legislative point of view. Law enforcers and other authorities could try to apply legal instruments at their disposal as effectively as possible. And private parties could try to cope with e.g. corruptive conduct through strengthening the capacities of their staff bolstering the organisational structure and by improving internal procedures.

The last section of this study gives first some general examples of such practices, derived from relevant international legal instruments, like exchanging information and strengthening contacts between experts from national authorities through the EU Anti-Corruption Network (EACN), legal provisions aimed at protecting whistle-blowers and the interconnecting of public records of directors of legal persons convicted for corruption, bribery and / or partaking in organised crime (and o.c. related offences).

All Member States appointed contact points to the EACN. From the information provided it seemed that exchanging of e.g. best practices through networks could be improved.

A minority of the concerned States adopted specific, but mostly differing whistle-blower legislation. A very much specific tool like a separate national disclosure office for whistle-blowers was only known in five countries.

Most countries do have public records containing information on convicted directors in place, but no specific public records on legal and natural persons convicted for corruption. Most of the existing criminal records are accessible only to public authorities. Whether these records can be used for preventive screening of legal and natural person in the establishment of legal entities did not become quite clear.

Finally best practices were investigated in three specific sectors: the sectors of management of waste, public procurement and emission rights trading.

To the best knowledge of the national rapporteurs, corruption and organised crime constituted problems mostly in the sector of public procurement, to a considerable degree in the sector of waste management and to a lesser extent in the sector of emission trading. Legal measures set up with a view to enhance transparency and prevent illegal practices were known in all three sectors, particularly with regard to public procurement procedures and on a lower scale in the other two sectors as well. In some countries applicants for a public tender can be screened in advance checked on possible convictions of corruption offences. Or, contracts can be annulled if knowledge is acquired afterwards about a conviction for such an offence. Besides, in many countries transparency enhancing measures in the sector of public procurement are set up by the private sector itself.

In the sector of waste management an informal EU wide network dealing with environmental crime (EnviCrimeNet) was set up but in most countries no contact points were appointed yet. There is another network (IMPEL) that is specialised in implementation and enforcement of environmental law.

Appendix

Concluding remarks made by Professor prof.dr.dr.h.c. Cyrille Fijnaut

Professor dr.dr.h.c. Cyrille Fijnaut, remarks concluding the Warsaw Conference on 13 July 2012.

Professor Fijnaut closed the Project Conference held in Warsaw on 13 July 2012 by making, in his own words, some "personal observations". (Text authorised by prof. Fijnaut)

1. Sometimes a "big bang" is needed to be able to start an innovation. Think of Siemens, introducing a complete overhaul of its internal anti-corruption compliance system after having been shocked by a high level corruption scandal. Think of the city of Amsterdam, implementing an integrated anti-criminal screening system of (small) business companies in its inner city, when research had shown that 17 criminal organisations had a powerful position in the inner city.

2. Dissimilarities between a company like Siemens as a more or less coherent body and the EU as a politically governed system of sovereign states render it impossible to implement compliance systems at the wide EU level, as has been performed by Siemens. The same counts as well for individual states and cities.

3. A comparison between companies like Siemens and companies "governed" or dominated by organised crime makes clear that the first type of companies are able to reinvent themselves in case of serious (internal) crime problems but the second category of companies not. This second category can only be cleaned up by exercising stern external control, e.g. through judicial inspection forcing them to stick to the rules.

4. The different legal frameworks and conventions established at the EU level (but also state level) are product of a political compromise struck between the concerned parties. Therefore these frameworks present only minimum rules and minimum implementing rules. But enforcement rules are mostly left out or only applicable at the minimum level although enforcement is about the most important dimension of rules and adhering compliance to those rules.

5. Another, rather striking aspect concerning legal rules relates to the circumstance that in general much knowledge is available of and insight into the level and quality of implementation, as resulting from comparative legal studies, but much less is known or such knowledge is even mostly lacking with regard to the level and impact of enforcement of those rules.

6. The application of regulatory law systems ("Ordnungswidrigkeiten" in German) instead of criminal law does bring with it the rather adverse effect that crimes (committed by legal entities and its leaders) are no longer qualified as criminal acts. The well-known American criminologist Edwin Sutherland (1939) pointed to the fact that big companies and their leaders do prefer not being criminalised (and recorded like that) and are very much willing to accept and pay non-criminal

pecuniary sanctions. In other words, the impact of criminal sanctions is much greater than that of non-criminal sanctions.

7. Very high quality review systems are needed to make it possible that companies are able to reinvent themselves. Otherwise it is impossible to validate a claim as to whether the concerned company is not corrupt anymore.

List of abbreviations

AT	Republic of Austria
BE	Kingdom of Belgium
BG	Republic of Bulgaria
CoE	Council of Europe
CY	Republic of Cyprus
CZ	Czech Republic
DE	Federal Republic of Germany
DK	Kingdom of Denmark
EACN	European contact-point network against corruption
ECtHR	European Court of Human Rights
EE	Republic of Estonia
EL	Hellenic Republic
EPAC	European Partners Against Corruption
ES	Kingdom of Spain
EU	European Union
EUCPN	European Crime Prevention Network
FATF	Financial Action Task Force
FI	Republic of Finland
FR	French Republic
FYROM	the former Yugoslav Republic of Macedonia
GRECO	Group of States against Corruption
HR	Republic of Croatia
HU	Hungary
IE	Ireland
IT	Italian Republic
LT	Republic of Lithuania
LU	Grand Duchy of Luxembourg
LV	Republic of Latvia
MT	Republic of Malta
NL	Kingdom of the Netherlands
OCTA	Organised Crime Threat Assessment
OECD	Organisation for Economic Co-operation and Development

PISM	Polish Institute of International Affairs
PL	Republic of Poland
PT	Portuguese Republic
RO	Romania
SE	Kingdom of Sweden
SI	Republic of Slovenia
SK	Slovak Republic
SWOT	Strengths, Weaknesses, Opportunities and Threats Analysis
TFEU	Treaty on the functioning of the European Union
TMCAI	T.M.C. Asser Institute
TR	Republic of Turkey
UK	United Kingdom of Great Britain and Northern Ireland
UN	United Nations
UNCAC	United Nations Convention against Corruption
UNTOC	United Nations Convention against Transnational Organised Crime