

Is there the Need for Further Harmonisation on Corruption Offences in the European Union?

Laura Mickevičiūtė¹

Keywords: international standards, criminalization of corruption offences, trading in influence

The importance of comprehensive approach to fight corruption (a combination of prevention and repressive measures) is emphasised in this year's Report on the rule of law situation in the European Union (hereinafter – EU) (2020 Rule of Law Report). This Report analyses various aspects such as amendments of national criminal laws regarding corruption offences, the importance of criminal investigations, and the application of sanctions for corruption offences.

Why is the topic of fight against corruption so important? Corruption is a “euro-crime which is established in Article 83.1 of the Treaty on the Functioning of the European Union (hereinafter – TFEU). What does it mean for the Member States? Article 83.1 of the TFEU establishes that the European Parliament and the Council may establish minimum rules concerning the definition of criminal offences and sanctions in the areas 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. The EU has competence to harmonise criminal laws in this field. Thus, the EU might establish minimal standards that should be followed by the Member States (See more: Klip, 2009, p. 151-166).

Important legal frameworks regarding the issues of corruption were adopt-

- ¹ PhD student at Vilnius University Faculty of Law, Department of Criminal Justice; title of doctoral thesis in preparation is *Criminal Liability for Trading in Influence*. Fields of research: criminal law, qualification of crimes, corruption offences, trading in influence. E-mail: laura.mickeviit@gmail.com.

ed in the EU about 20 years ago. Thus, this research seeks to answer the question whether there is a need for further harmonisation of corruption offences in the EU? In order to answer this question, first of all, the research reveals the legal framework, the minimal standards, the definition of corruption offences and its development. Second, this research compares the EU's legal framework, the United Nations Convention against Corruption (hereinafter – UNCAC), and the Criminal Law Convention on Corruption of the Council of Europe (hereinafter – the Convention on Corruption). The comparative analysis provides a different approach to the corruption offences, in particular, the criminalisation of trading in influence.

This analysis is based both on theoretical (comparative, systematic analysis) and empirical methods (analysis of the EU law on corruption, other international standards, scientific and legal works).

The Legal Framework of the EU on the Criminalisation of Corruption

Corruption has attracted international attention only since the end of the XXth century. There are some reasons for growing international attention to corruption, for example, the process of globalisation and privatisation, bribery scandals, the importance of legal cooperation and assurance of double criminality principle (See: Kaiafa-Gbandi, 2010, p. 139-183; Szarek-Mason, 2010, p. 32). At the European level, the first minimal standards for the fight against corruption related to the criminalization of corruption crimes was adopted in the EU more than 20 years ago.

Regarding the criminalisation of corruption offences, these legislative instruments are relevant: Protocol drawn up on the basis of Article K.3 of the Treaty on the European Union to the Convention on the protection of the European Communities' financial interests – Statements made by Member States on the adoption of the Act drawing up the Protocol (hereinafter – Protocol) adopted in 1996, the Convention on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union (hereinafter – the EU Convention) adopted in 1997, Council Joint Action 98/742/JHA of 22 December 1998 on corruption in the private sector (no longer in force)(hereinafter – the Joint Action) and Council Frame-

work Decision 2003/568/JHA on combating corruption in the private sector (hereinafter – Framework Decision 2003/568/JHA) replaced the Joint Action adopted in 2003.

Briefly, some key aspects should be mentioned. According to the preamble of the Protocol, the main aim of this regulation at the EU (EC) level was to ensure the criminal liability for corruption offences committed by Community (Union) or foreign officials. At that time, the national regulations did not cover, or covered only in exceptional cases, conduct involving Community officials or officials of other Member States. Other features of corruption offences were not discussed a lot. However, the definition of the *corpus delicti* of active and passive corruption, including main features, was provided by the Protocol. Of course, only general corruption offences – active and passive bribery, were described. So, the first step of harmonisation did not attempt to make significant changes regarding to the list of corruption crimes, many countries had criminalised bribery in their national laws.

Certainly, the cross-border element was crucial for the first attempt to harmonise national law regarding the criminalisation of corrupt behaviour. The fundamental freedoms of the EU were the essential reason why the harmonisation of corruption offence was stressed. Thus, it was concerned about crimes committed in another Member State. A second major project of the harmonisation of criminal law in the 1990s is the development of international standards against transnational corruption. In this regard, principles of double criminality and trust between the Member States played the important role. (Pieth, 1999, p. 535).

Later, the EU introduced a somehow new approach to corruption-related crimes. The criminalisation of corruption in private sector has been emphasised in the EU since 1998. This was the fundamental change related to corruption offences because major countries were not familiar with this concept. Indeed, currently the criminalisation of corruption in private sector has raised many discussions, too.

However, the first definition of corruption offences was limited to the EU's financial interests. Although the notion of the EU's competence changed, the establishment of minimal standards has not changed. In the last decade, aspects regarding the criminalisation of corruption offences have been stressed less than other questions related to corruption such as confiscation, organised

crimes and so on. Nevertheless, the question related to the criminalisation of corruption offences can still be found in the EU law that protects the EU's financial interests since corruption is a particularly serious threat to the EU's financial interests (Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud). However, the notion of corruption offences has not changed – the active and passive corruption is only established. Moreover, it is limited by the EU's financial interests (Article 4). Some other legal acts (for instance, Directive (EU) 2018/1673 of the European Parliament and of the Council of 23 October 2018 on combating money laundering by criminal law) provided only the link to the Convention on the fight against corruption involving officials of the European Communities or officials of the Member States of the European Union and Council Framework Decision 2003/568/JHA.

To sum up, the legal regulation on corruption offences has been adopted more than 20 years ago in the EU and this notion is still found in legal acts regarding other topics which fall under the competence of the EU.

The EU's Policy Correlations with the Policy of the United Nations and the Council of Europe

Almost at the same time, at the end of XXth century, other international instruments related to fight corruption were adopted. In 1999, the Council of Europe adopted the Convention on Corruption. The UNCAC which is the only international instrument was adopted in 2003. The broader definition of corruption offences, including uncommon new corruption crimes (such as trading in influence), has been introduced in the Convention on Corruption and the UNCAC. What is the attitude in the EU to these anti-corruption instruments? Does the adoption of these instruments explain the absence of a new regulation regarding the criminalisation of corrupt behaviour at the EU level? (See: Kaiafa-Gbandi, 2010, p. 166).

The importance of cooperation among organisations and the other international legal instruments have been recognised by the EU since the XXth century. The development of a comprehensive anti-corruption policy was emphasised in the Stockholm Programme. Also, the importance of GRECO was

mentioned.² But the active progress was made only in 2019. Since 2019 the European Union has participated in GRECO's proceedings as an observer. This means that the EU might participate in GRECO's meetings, see all documents discussed (Council Decision (EU) 2019/1086 of 18 June 2019 on the position to be taken on behalf of the European Union). Observation of the situation in the Member States would be helpful (the European Union becomes an observer). However, the question is what impact it will have on the EU regulation? Will it change the way of harmonisation of the national laws on criminalisation of corrupt behaviour?

Of course, the Member States have been encouraged to ratify international legal acts (On a comprehensive EU policy against corruption). Thus, the harmonisation of national laws on corruption offences has been related not only to the EU but also to the Council of Europe and the United Nations. How has it affected the notion of the criminalisation of corrupt behaviour? As it was mentioned, these legal instruments have provided longer lists of corruption crimes. However, for instance, the approach to some uncommon corruption crimes is not as strict as to active and passive bribery. The UNCAC has provided trading in influence as a semi-mandatory offence. It means that states might decide to criminalise this activity or not. The Council of Europe provided the possibility of reservations regarding the criminalisation of trading in influence.

Conclusions

The EU has adopted international instruments regarding the criminalisation of corrupt behaviour. Further, the legal acts of the UNCAC and the Council of Europe have an impact on the legal policy in the EU. The main legal acts regarding the criminalisation of corrupt behaviour were adopted more than 20 years ago in the EU. Since then, new legal acts on corruption offences have not been adopted. Maybe, there are enough international legal acts, and the main

² In 1999 the Council of Europe established GRECO which monitors the implementation of the Convention standards, cooperates with Member States, evaluates both the Member States' regulation and case-law, addresses recommendations to each country and assesses the measures taken by them to implement these recommendations (see Welcome to the GRECO website – Council of Europe, available at <https://www.coe.int/en/web/greco>).

questions are answered. However, there are some unclear aspects, for example, the approach to uncommon offences such as trading in influence, the notion of some features of bribery and so on.

Bibliography

Legislation

Consolidated version of the Treaty on the Functioning of the European Union *OJ C 326, 26.10.2012, p. 47-390.*

United Nations Convention against Corruption (2003). A/58/422.

Council of Europe Criminal Law Convention on Corruption (ETS No. 173).

Convention drawn up on the basis of Article K.3 (2) (c) of the Treaty on European Union on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union *OL C 195, 1997 6 25, p. 2-11.*

Joint Action of 22 December 1998 adopted by the Council on the basis of Article K.3 of the Treaty on European Union, on corruption in the private sector *OL L 358, 1998 12 31, p. 2-4.*

Protocol drawn up on the basis of Article K.3 of the Treaty on European Union to the Convention on the protection of the European Communities' financial interests - Statements made by Member States on the adoption of the Act drawing up the Protocol *OJ C 313, 23.10.1996, p. 2-10.*

Council Framework Decision 2003/568/JHA of 22 July 2003 on combating corruption in the private sector *OL L 192, 2003 7 31, p. 54-56.*

Council Decision (EU) 2019/1086 of 18 June 2019 on the position to be taken on behalf of the European Union within the Plenary Meeting of the Group of States against Corruption (GRECO) or within the Committee of Ministers of the Council of Europe as regards the decision on granting the Union observer status in GRECO *ST/9884/2019/INIT OJ L 171, 26.6.2019, p. 115-116.*

Directive (EU) 2018/1673 of the European Parliament and of the Council of 23 October 2018 on combating money laundering by criminal law *PE/30/2018/REV/1 OL L 284, 2018 11 12, p. 22-30.*

Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law *OL L 198, 2017 7 28, p. 29-41.*

Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee - On a comprehensive EU policy against corruption, /* COM/2003/0317 final */.

Special literature

- Kaiafa-Gbandi, M. (2010). Punishing Corruption in the Public and the Private Sector: The Legal Framework of the European Union in the International Scene and the Greek Legal Order. *European Journal of Crime, Criminal Law and Criminal Justice*, 18: 139-183.
- Klip, A. (2009). *European Criminal Law: an Integrative Approach*. Intersentia.
- Pieth, M. (1999). The Harmonization of Law Against Economic Crime. *European Journal of Law Reform*, Vol. 1, No. 4, p. 527-545 [online]. Available at <https://edoc.unibas.ch/4216/1/MarkPiethTheHarmonization%281%29.pdf> [Accessed 28 February 2021]
- Szarek-Mason, P. (2010). *The European Union's Fight Against Corruption: The Evolving Policy Towards Member States and Candidate Countries*. Cambridge, Cambridge University Press.

Other sources

- Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: 2020 Rule of Law Report (The rule of law situation in the European Union) [online]. Available at http://www.epgencms.europarl.europa.eu/cmsdata/upload/265a21c9-0b19-4512-8d21-ffb511459bc6/2020_Rule_of_Law_Report.pdf [Accessed 28 February 2021].
- European Union becomes an observer to Council of Europe's anti-corruption body GRECO [online]. Available at https://search.coe.int/directorate_of_communications/Pages/result_details.aspx?ObjectId=0900001680965e07 [Accessed 28 February 2021].
- Welcome to the GRECO website – Council of Europe [online]. Available at <https://www.coe.int/en/web/greco> [Accessed 28 February 2021].

About author

Laura Mickevičiūtė is a PhD Student at Vilnius University Faculty of Law, Department of Criminal Justice. Fields of research: criminal law, qualification of crimes, corruption offences, trading in influence.
