

Unclassified

DAF/COMP/GF/WD(2014)40

Organisation de Coopération et de Développement Économiques
Organisation for Economic Co-operation and Development

04-Feb-2014

English - Or. English

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

Global Forum on Competition

FIGHTING CORRUPTION AND PROMOTING COMPETITION

Contribution from the European Union

-- Session I --

This contribution is submitted by the European Union under Session I of the Global Forum on Competition to be held on 27-28 February 2014.

Ms Ania Thiemann, Head of Global Relations, OECD Competition Division,
Tel: +33 1 45 24 98 87, Email: Ania.Thiemann@oecd.org

JT03351912

Complete document available on OLIS in its original format

This document and any map included herein are without prejudice to the status of or sovereignty over any territory, to the delimitation of international frontiers and boundaries and to the name of any territory, city or area.



DAF/COMP/GF/WD(2014)40
Unclassified

English - Or. English

FIGHTING CORRUPTION AND PROMOTING COMPETITION

-- European Union --

1. Corruption – threat to the European economy and its competitiveness

1. The European Union considers tackling corruption as one of its priorities. An estimated 120 billion euros per year equalling to one per cent of the EU GDP is lost to corruption¹. EU Member States attach particular importance to combating corruption in both the public and the private sector, in the belief that in both those sectors it poses a threat to a law-abiding society as well as distorts competition in relation to the purchase of goods or commercial services and impeding sound economic development².

2. The Treaty on the Functioning of the European Union recognises that corruption is a serious crime with a cross-border dimension which Member States are not fully equipped to tackle on their own. Article 83(1) of the Treaty on the Functioning of the European Union lists corruption among those crimes for which directives providing minimum rules on definition of criminal offences and sanctions may be established, since corruption often has implications across, and beyond, internal EU borders³.

3. This paper will primarily focus on the actions undertaken by the EU to address corruption in all its forms throughout the EU. On the issue of the interface between the fight against corruption and competition policy a link will be made with the EU's policy on public procurement. Finally, the paper will describe the actions undertaken by the European Commission and its Directorate General for Competition to protect itself against the risks of corruption within its own organisation.

2. Corruption – shaping effective anti-corruption legislation

4. In recent years, the European Union has undertaken a number of anti-corruption initiatives of a general nature. These initiatives include the Commission's Communication on fighting corruption in the EU of 2011, the Commission's decision establishing an EU Anti-corruption Report and the Stockholm Programme of 2010 adopted by the European Council. In addition, policing and judicial institutions have been set up such as Europol (the European Union's law enforcement agency), Eurojust (The European Union's Judicial Cooperation Unit) and OLAF (the European Anti-fraud Office) which also play an important role in tracking down and preventing corruption. The European Union has also adopted a number of more specific measures addressing the problem of corruption. The most notable example is the European Union Council's Framework Decision of 2003 on combating corruption in the private sector. These initiatives are complemented by the European Union's participation in anti-corruption initiatives under various international frameworks. All of the above initiatives are examined in detail below.

¹ Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee, Fighting Corruption in the EU ("Commission's Communication"), Brussels, 6.6.2011 p. 3.

² Council Framework Decision 2003/568/JHA of 22 July 2003 on combating corruption in the private sector Framework Decision ("Framework Decision") para 9 of the Preamble.

³ Commission's Communication, p. 3.

2.1 *The 2011 Commission's Communication*

5. In 2011 the European Commission issued its [Communication on fighting corruption in the EU](#). The Communication is an important step towards the implementation of a comprehensive anti-corruption policy in the Union. In the Communication, the Commission recognizes that the EU should put a stronger focus on corruption in all relevant EU policies – internal as well as external.

6. In conjunction with the Communication, the Commission decided to issue on a regular basis EU Anti-Corruption Reports⁴. These Reports introduce a procedure for the periodic assessment of EU States' efforts in the fight against corruption, which could help create the necessary momentum for firmer political commitment by all decision-makers in the EU⁵. Supported by an expert group and a network of research correspondents, and the necessary EU budget, the Report is managed by the Commission⁶.

7. The first anti-corruption report has been published on 3 February 2014. The Report is accompanied by country analyses for each Member State including tailor-made recommendations. Subsequent reports will be published by the Commission on a biannual basis. The fact that the average score of the EU Member States in the Transparency International's Corruption Perception Index had only slightly improved in the period 2001-2011⁷ confirms that further actions are needed. The review mechanism provided for by the Report is expected to facilitate this process.

8. Finally, the EU also monitors public perception on corruption in its Member States. The 2013 Eurobarometer Flash survey, conducted among business managers, made a number of interesting points. At European level, more than 4 out of 10 companies consider corruption to be a problem for doing business. When asked specifically whether corruption is a problem for doing business, 50 % of the construction sector and 33 % of the telecoms/IT companies felt it was a problem to a serious extent. The smaller the company, the more often corruption and nepotism appears as a problem for doing business.

2.2 *Corruption as part of the EU security policy*

9. The anti-corruption policy of the European Union is part of the EU security policy under the so-called Stockholm Programme (An Open and Secure Europe Serving and Protecting Citizens, adopted in 2010 by the European Council).

10. The Stockholm Programme indicated that corruption can be a cross-border crime and as such, together with terrorism, drug trafficking and organized crime, challenge the internal security of the Union⁸.

11. In the Stockholm Programme, The European Council called upon the Member States and the Commission to improve the prosecution of tax evasion and corruption in the private sector and to facilitate the exchange of best practice in prevention and law enforcement⁹. Amongst others, the European Council

⁴ Commission decision of 6.6.2011 establishing an EU Anti-corruption reporting mechanism for periodic assessment ("EU Anti-corruption Report").

⁵ Website of DG Home Affairs, http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/organized-crime-and-human-trafficking/corruption/index_en.htm.

⁶ Commission's Communication, p. 4.

⁷ Commission's Communication, p. 3

⁸ European Council, the Stockholm Programme – an Open and Secure Europe Serving and Protecting Citizens, 2010/C 115/01 ("Stockholm Programme"), para. 4.1, p. 17.

⁹ Stockholm Programme, para. 4.4.5, p. 23.

invited the Commission to develop indicators, to measure efforts in the fight against corruption (particularly, in areas relating to the European Union law such as public procurement)¹⁰.

2.3 *The EU's adherence to multilateral frameworks of the Council of Europe and the United Nations*

12. At multilateral level the EU is active within the context of the "Council of Europe Group of States against Corruption" (GRECO). In 2007 the Council of Europe and the European Union signed a Memorandum of Understanding. The Memorandum stated that legal cooperation in the sphere of the rule of law (including fight against corruption) between the two parties should be further developed to ensure coherence between EU law and Council of Europe conventions although this does not prevent the EU from adopting more far-reaching rules¹¹.

13. In June 2011, the European Commission issued a Report on the modalities of European Union participation in GRECO. On 25 September 2008 the EU subscribed to the United Nations Convention against Corruption.

2.4 *Judicial and police cooperation*

14. Judicial and police cooperation within the EU is crucial for tackling corruption. The Commission cooperates and plans to enhance its cooperation with institutions such as Europol and Eurojust. The Commission also cooperates with OLAF, an independent investigative body whose aim is to prevent fraud, corruption and any other illegal activities adversely affecting the Community's financial interests.

15. Since 2008 the EU contact-point network against corruption (EACN) has brought together Member States' anti-corruption authorities, as well as the Commission, OLAF, Europol and Eurojust¹². Additionally, in its 2011 Communication the Commission has called upon Europol and Eurojust respectively to step up efforts to combat corruption as a facilitator for organised crime activity and to facilitate the exchange of information among Member States' authorities on corruption cases with cross-border implications¹³.

2.5 *Framework Decision on corruption in private sector*

16. In 2003 the European Union Council adopted the Framework Decision on combating corruption in the private sector ("Framework Decision"). The Council recognized that any corruption in the private sector within a Member State is not just a domestic problem but also a transnational problem, most effectively tackled by means of a European Union joint action¹⁴.

17. The aim of the Framework Decision was in particular to ensure that both active and passive corruption in the private sector are qualified and treated as criminal offences in all Member States, that

¹⁰ Stockholm Programme, para. 4.4.5, p. 23.

¹¹ Report from the Commission to the Council on the modalities of European Union participation in the Council of Europe Group of States against Corruption (GRECO), Brussels, 6.6.2011, ("Report on GRECO"), p. 3.

¹² Commission's Communication, p. 11.

¹³ Commission's Communication, p. 11.

¹⁴ Framework Decision, para. 1 of the Preamble.

legal persons may also be held responsible for such offences, and that these offences incur effective, proportionate and dissuasive penalties¹⁵.

18. The scope of application of the Framework Decision is broad and includes business activities in both profit and non-profit entities¹⁶. Concretely, the Framework Decision requires that Member States criminalise two types of conduct, which can be summarised as follows:

- promising, offering or giving a bribe to a person in the private sector in order that he or she do something or refrain from doing something, in breach of that person's duties;
- requesting or receiving a bribe, or the promise of such, while working in the private sector, in order to do something, or refrain from doing something, in breach of one's duties¹⁷.

19. Since the adoption of the Framework Decision the European Commission has monitored its transposition through issuance of implementation reports¹⁸. The first implementation report issued in 2007 showed that there was still room for improvement in Member States efforts applying the Framework Decision¹⁹. In June 2011 the Commission issued the second implementation report which confirmed the conclusions of the earlier implementation report²⁰.

3. The EU public procurement directives

20. One particular area where a clear link can be established between the fight against corruption and competition policy concerns the field of public tendering or, in EU terminology, "public procurement", as anti-competitive practices occurring in the context of tendering procedures, such as bid rigging, may also involve cases of corruption and public procurement in general is vulnerable to corruption.

21. Public expenditure on works, goods and services accounts for roughly 19% of EU GDP (2009) and therefore represents a very important sector for the EU economy. Almost a fifth of this expenditure falls within the scope of EU regulatory supervision as reflected in the EU Directives on public procurement (i.e. approx. €420 billion, or 3.6% of EU GDP)²¹. The main contribution of the EU public procurement Directives²² to the fight against corruption consists in strict obligations for transparency at several stages of the tendering procedure. According to the Directives, the tender documents including award criteria set by the procuring authority have to be published before the submission of tenders. The Directives also provide for an obligation to exclude candidates or tenderers who have been the subject of a conviction by a final judgement for certain enumerated crimes²³. Amongst these, a conviction for corruption is listed as an

¹⁵ Framework Decision, para. 9 of the Preamble.

¹⁶ Report from the Commission to the European Parliament and the Council based on Article 9 of Council Framework Decision 2003/568/JHA of 22 July 2003 on combating corruption in the private sector, Brussels, 6.6.2011 ("Implementation Report"), p. 3.

¹⁷ Implementation Report, p. 9.

¹⁸ Implementation Report, p. 8.

¹⁹ Commission's Communication, pp. 8-9.

²⁰ Commission's Communication, pp. 8-9.

²¹ Commission's Communication, p. 12-13.

²² Directive 2004/18/EC on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts and Directive 2004/17/EC coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors.

²³ Article 45 of Directive 2004/18 and Article 54(4) of Directive 2004/17.

obligatory reason for exclusion. Furthermore, the EU "remedies directives"²⁴ guarantee that efficient legal review procedures for illegal award decisions are available in all EU Member States.

22. The public procurement Directives have been revised aiming at an in-depth modernization of public procurement in the European Union²⁵. The revised Directives together with a new Directive on concessions will enter into force in March 2014. Stakeholders consulted by the Commission as part of the public consultations recognized that procurement markets are exposed to risks of favouritism and corruption. Member States and the general public agreed that the current EU public procurement Directives have done much to address and limit the occurrence of collusion and corruption. It was felt however that more specific measures are needed. The new Directives will have the first EU definition on conflicts of interests, rules on the modification of contracts as a basis to look at the vulnerable post-award phase, extended exclusion grounds and increased reporting of Member States on cases of fraud and corruption.

4. European Commission's internal rules regarding fraud, revolving doors and conflict of interest

23. The European Union not only looks outward in its fight against corruption, it also takes measures guarding itself in its day to day activities against the risks of corruption fraud and related practices.

24. At the level of the European Commission comprehensive rules and policies have been adopted on conflict of interest and the "revolving door" phenomenon (i.e. staff leaving and returning to the institution). The Commission realizes that, given the need for a competitive labour market and the added value which work experience obtained elsewhere may bring, a certain degree of employees' circulation is desirable. However, this circulation is subject to strict ethical rules preventing any possible conflicts of interest that can undermine its functioning and reputation.

25. The Treaty on the Functioning of the European Union itself contains a general obligation for EU officials not to disclose information of the kind covered by the obligation of professional secrecy, even after their duties have ceased.

26. In addition, all staff of the European Commission, including those of its Directorate General for Competition, is bound by Staff Regulations. The Staff Regulations guarantee the impartiality, loyalty, discretion of all those who work for the European institutions²⁶. They address issues of conflict of interest and professional integrity. Violations of Staff Regulations may lead to the imposition of disciplinary measures and, in case of insider dealing, to penal sanctions in Member States.

27. The latest version of the Staff Regulations entered into force on 1 January 2014 and reinforces the Commission's policy in particular with respect to the issue of staff leaving and returning to the Commission. One of the notable examples is the introduction of an explicit prohibition for senior officials, during twelve months after leaving the service (the so-called "distance rule"), to engage in lobbying or advocacy activities vis-à-vis the European Commission on issues for which they were responsible during the last three years.

²⁴ Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts.

²⁵ Website of DG Internal Market, http://ec.europa.eu/internal_market/publicprocurement/modernising_rules/reform_proposals/index_en.htm.

²⁶ Website of the Vice-President of the European Commission responsible for Inter-Institutional Relations and Administration, [Maroš Šefčovič](#).

28. In addition to the Commission Staff Regulations, which are applicable all across the European Commission, DG COMP has issued a specific Code on Ethics and Integrity²⁷ ("Code on Ethics"). This document complements the provisions of the Staff Regulations and reflects the specificities of the responsibilities of DG COMP.

29. Some examples of the rules laid down in the Code on Ethics are the following:

- new officials of DG COMP are prohibited from dealing with pending cases i) if they have been involved in these cases while working for a previous employer, or ii) if they have any other conflict of interest (e.g. resulting from the spouse's employment, or from financial interests in companies subject to an investigation);
- former officials of DG COMP must ask for prior authorization of the European Commission's Director General for Human Resources to engage in a professional activity before the expiry of two years after leaving the Commission; the Institution can prohibit or impose some conditions to the former official to practise a new professional activity if this activity is related to the work the former official has carried out during the last three years of service and could lead to a conflict of interest;
- Officials currently employed must obtain a permission to undertake activities outside the institution: e.g. they are not allowed to carry out, with or without remuneration, any activities as self-employed person (e.g. as lawyer, economist, accountant, interpreter, consultant etc.) or in a company (this includes e.g. non-executive director, unpaid adviser, etc.);
- all members of a case investigation team (including the case manager, case secretaries and assistants) need to make a case specific declaration of conflict of interest in the "case management application" when they are assigned to a case;
- all participants in inspections are required to make a specific inspection conflict of interest declaration.

30. Additionally, DG COMP recently adopted an Anti-Fraud Strategy, which is modelled along the guidelines and templates of OLAF and other Directorates General. The Strategy complements the Code on Ethics with specific actions on fraud prevention.

5. Conclusion

31. The EU considers that corruption is a serious issue which needs to be addressed both at EU and at Member State level. As such, the fight against corruption is an integral part of overall EU policy as reflected, both directly and indirectly, in many different areas of EU policy.

32. In the field of competition policy, no specific policy initiatives have been developed to target corruption as such, considering that a strong competition enforcement policy in particular in the most affected areas, such as cartels, indirectly contributes to and complements other policy measures targeted against corruption.

33. An exception to this concerns the internal rules developed by the Commission to guard itself against undue influences and corruption. In this area the Directorate General for Competition has designed special rules on working ethics, which complement the more general Commission's rules, to take into account the particularities of competition law enforcement.

²⁷ Code on Ethics and Integrity of DG COMP Staff, Version 3.1 January 2013.