

EU Anti-Corruption Alert

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LITIGATION/CONTROVERSY

First EU Anti-Corruption Report: What it Means for Business

By Paul A. von Hehn*

1) Introduction

In February 2014, the EU Commissioner for Home Affairs, Cecilia Malmström, released the EU Anti-Corruption Report.¹ It is the first of its kind and will be issued every two years as part of an ongoing monitoring and assessment mechanism of the anti-corruption efforts in the 28 EU Member States.

The two most troubling results are: Corruption costs the EU some €120 billion every year, almost the equivalent of the EU budget. And three quarters (76%) of Europeans think that corruption is widespread whereby more than half of them (56%) think that over the last three years, corruption in their country has actually increased.

The scope of the Report is much broader than simply a review of the national anti-bribery laws. Corruption is broadly defined as “any abuse of power for private gain” thus covering all types of corruption including political corruption, bribery of public officials and private or commercial corruption.² Starting from the premise that the ultimate goal is to prevent corruption, a significant part of the Report focuses on the “corruption environment,” i.e., the conditions for corruption such as the existence and enforcement of preventive policies, political accountability, the effectiveness of anti-corruption enforcement agencies, etc.

The Report also identifies “Specific Risk Areas” and, because of its crucial importance for the internal market, contains an in-depth discussion of the corruption risks in public procurement.

The primary addressees of the Report are the EU Member States. To this end, the Report highlights problems for each of the 28 Member States but also good practices which could serve as a model for other countries.

However, this Report (as well as the subsequent reports) is also of significant relevance for business. For a company operating in Europe, it provides important considerations for structuring its compliance program, in particular where to expect Red Flags or how to plan for the sustainability of its compliance program.

* Paul von Hehn, based in Brussels and Berlin, is a partner of Wilmer Cutler Pickering Hale and Dorr LLP. He is a member of the firm’s Investigations & Criminal Litigation Practice Group. He regularly advises clients on international compliance, including anti-corruption issues.

¹ Report from the Commission to the Council and the European Parliament, 3 February 2014, COM(2014)38 final. For the Report including all country chapters, Eurobarometer surveys, country factsheets, and Q&A, go to http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/organized-crime-and-human-trafficking/corruption/anti-corruption-report/index_en.htm.

² See Frequently Asked Questions: the EU Anti-Corruption Report, Memo/14/68.

2) Rationale and Key Features of the Report

(a) "Fighting Corruption in the EU"

This Report is the follow-up to the EU Commission's 2011 Communication on "Fighting Corruption in the EU."³ It found that while the Member States had most of the legal instruments and institutions in place to prevent corruption, enforcement was very often weak or missing. Since, however, this falls mainly into the national competence of each Member State, the EU Commission decided to set up a mechanism to regularly monitor and assess Member States' efforts against corruption and to publish its results every two years together with specific recommendations in the "EU Anti-Corruption Report." The expectation is to thus "stimulate" the necessary political will of the Member States to fight corruption and implement the recommended measures.

(b) Targeting the Corruption Environment

The Report makes use of the findings of other monitoring and evaluation mechanisms of anti-corruption efforts that exist on an international level, notably GRECO,⁴ the OECD⁵ Convention on Combating Bribery of Foreign Officials, and the UN Convention against Corruption.⁶ However, the Report goes further and also analyzes in country-chapters for each EU Member State the "environment" of corruption, i.e., issues that are likely to have an impact on the risk of corruption occurring such as influence trading, favoritism, abuse of office, etc.

Thus, the scope of the Report goes beyond an assessment of the status of corruption in a narrow legal-technical sense (which, of course, is also part of the Report) but also provides an analysis and discussion of what the Commission considers to be key conditions to effectively prevent or at least limit and control corruption, understood in the broad sense of being "any abuse of power for private gain." In summary form, these key conditions are:

- Political accountability of decision-makers
- Financing of political parties
- Controls and procedures in public authorities
- Conflicts of interest of public officials
- Effectiveness of the enforcement agencies (courts, police), including independence of the judiciary
- Transparency policies and freedom of information
- Whistleblower protection
- Transparency of lobbying.

The Report also looks at the enforcement of foreign bribery and the conditions for pursuing private or commercial bribery. All of these are analyzed for each of the 28 Member States, followed by country-

³ Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee, 6 June 2011, COM(2011) 308final; at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0308:FIN:EN:PDF>.

⁴ Council of Europe Group of States against Corruption.

⁵ Organization for Economic Cooperation and Development.

⁶ It entered into force in December 2005 and the EU joined in September 2008; Council Decision 2008/801/EC (OJ L 287, 25.9.2008, p.1).

specific recommendations for measures that, in the Commission's view, have the potential to improve the conditions for preventing corruption in a particular country.

(c) Perception and Experience of Corruption

To show the pervasiveness of corruption, the Report is supplemented with two surveys on perception and experience of corruption. The "Special Eurobarometer"⁷ is a survey conducted among the general population based on face-to-face interviews. It deals, among others, with personal experience of corruption as well as attitudes towards favors and gifts. As mentioned above, at European level, 76% think that corruption is widespread in their own country. Around 73% of Europeans think that bribery and the use of connections is often the easiest way of obtaining certain public services in their country.

The "Flash Survey" is business-focused and covers six sectors in the EU, namely energy, healthcare, construction, manufacturing, telecommunications and the financial sector.⁸ According to this survey, almost 50% of businesses in Europe consider political patronage still the best way to succeed. 50% of the construction sector and 33% of the telecoms/IT sector felt that corruption was a serious problem. According to the survey, the smaller the company, the more often corruption and nepotism appeared to be a problem for doing business.

3) Specific Risk Areas and Public Procurement

(a) Industry Sectors

The Report identifies a number of specific industry sectors which are seen as particularly vulnerable to corruption. The most critical ones are:

- Urban development and construction: Here, the Commission found that the corruption risk is particularly high across the EU.
- Healthcare: In particular procurement and the pharmaceutical industry were found to be vulnerable to corruption.
- Tax administration: This was highlighted as a serious problem particularly in one Member State.
- Financial sector: The Report found that in a number of Member States, there was a need for enhanced integrity and transparency standards.

The country reports identify further risk areas.

(b) Public Procurement

The Report devotes a special chapter on public procurement. It is a significant area for the EU economy (roughly one-fifth of the EU's GDP), and the country reports show that public procurement is one of the areas most vulnerable to corruption. Corruption can easily add 20% to 25% and in some cases even 50% to the costs of a contract. The Report found that construction, energy, transport, defence and healthcare industries seem to be most vulnerable to corruption in public procurement.

Typical types of conduct identified in many of the country reports were specifications tailor-made for a company, conflicts of interest in bid evaluation, unclear selection or evaluation criteria, abuse of emergency grounds to avoid competitive procedures, or amendments of contractual terms after conclusion of the contract. While these types of conduct are not necessarily related directly to corruption, they nevertheless constitute risk factors that increase the vulnerability to corruption.

⁷ See http://ec.europa.eu/public_opinion/archives/eb_special_399_380_en.htm.

⁸ See http://ec.europa.eu/public_opinion/archives/flash_arch_374_361_en.htm#374.

To address these and similar issues, the Commission makes a set of five recommendations:

- Systematic use of corruption risk assessments in public procurement
- Implementation of high transparency standards for the entire procurement cycle including contract implementation
- Strengthening of control mechanisms for the entire procurement cycle including contract implementation
- Ensuring coherent overview and raising awareness about the need for prevention and detection of corrupt practices at all levels of procurement
- Strengthening of sanction regimes.

4) Significance of Report for Business

This first EU Anti-Corruption Report (together with the monitoring and assessment mechanisms to be summarized in the subsequent reports) is important for companies doing business in Europe in a number of ways.

(a) “New” Assertiveness of Anti-Corruption Authorities

Even if Member States need time (or are expected to take their time) to follow-up on the Report’s recommendations, no company in Europe can or should assume that in the meantime nothing will happen. As confirmed by the Report, all countries have most of the necessary laws and institutions in place to prevent and fight corruption. Thus if, “encouraged” by the Report, an enforcement agency decides to be more active and assertive in applying its anti-bribery laws, the anti-corruption climate will suddenly change, at least for that particular Member State. There is also the additional “risk” that (depending on the scope of the applicable laws) the same enforcement agency would also pursue foreign bribery, extending its assertiveness further.

(b) Red Flags

The fact that the Report has identified a number of industries as “specific risk areas”⁹ being particularly prone to corruption and singled out public procurement as vulnerable to corruption, means that any business in Europe is well advised to treat these indications as Red Flags for purposes of its compliance program.

Similarly, if any of the Eurobarometers or Business Surveys identifies particular practices as being a serious problem – for instance, in Poland 92% said that bribery and the use of connections is the easiest way to obtain certain public services and 56% said the only way to succeed in business is through political connections¹⁰ - , a company should review its own business practices whether and to what extent they are susceptible to the same allegation.

In all of these cases, a company may want to review its compliance procedures and possibly reconsider its approach as to how it is conducting its business in these areas. And it may also consider to conduct some special refresher training in these Red Flag areas.

(c) Strengthening of Compliance Program and Internal Procedures

More generally, companies should start to carefully review the country reports for the Member States in which they do business, as well as the relevant Eurobarometer and Flash Survey for possible medium- and long-term changes.

⁹ See above under 3.

¹⁰ See Annex 21 (Poland) to the EU Anti-Corruption Report; Brussels, 3 Feb 2014 COM(2014) 38final.

The perception of corruption reflected in these Surveys is an important indicator of what types of conduct are seen as problematic and might attract the scrutiny of the enforcement authorities. A careful review of these Surveys would allow a company to take measures to counteract such perception. For instance, if in a country influence peddling, nepotism or conflicts of interest are seen as a problem, a company may want to take precautions to avoid an allegation (whether perceived or true) of being seen to be “too close” to the relevant public authorities. Similarly and depending on the specific circumstances, lack of transparency in public procedures might turn against the company if it is not careful in making sure that its relationship and dealings with the relevant officials are completely open and transparent.

Reviewing the company’s business practices in light of the findings of the Report and renewing the risk analysis would be an important first step. This should then be followed by reviewing the compliance program in order to determine whether its procedures are robust enough to protect the company from scrutiny and allegations of the anti-corruption authorities.

5) Conclusions

This first Anti-Corruption Report with its ongoing monitoring and assessment mechanism leading to follow-up reports every two years has set a process in motion whose purpose is to change important corruption-relevant parameters. Businesses that make use of such practices as influence trading, political patronage, nepotism or other favoritism are clearly targeted by the Report. Transparency and avoidance of conflicts of interest will change the way public authorities will interact with business. And the Member States are encouraged and expected to strengthen and make more efficient the enforcement of its anti-corruption rules.

Put differently, the anti-corruption climate in Europe is clearly becoming tougher. There are strong indications that the general mind-set which, in sharp contrast to the U.S., has shown more “largesse” to bribery, is changing.

We do not know how quickly Member States will follow up on the recommendations of this Report (and subsequent reports) and bring about the changes to the business environment. However, it is certain that a process has been set in motion that will change the way business and public authorities in the EU will interact.

The message of the Report is loud and clear: Any company doing business anywhere in the EU is well advised to start reviewing and making adjustments to its compliance program and policies in light of the findings and recommendations of the Report. Any prudent company must assume that sooner or later an enforcement agency in a Member State will not only start scrutinizing the company’s business practices but also display a greater assertiveness and apply (much) broader anti-corruption standards than were thus far “normal” or expected practice.

FOR MORE INFORMATION ON THIS OR OTHER EU ANTI-CORRUPTION MATTERS, CONTACT:

Paul A. von Hehn +32 2 285 49 03 (Brussels), +49 30 20 22 64 00 (Berlin) paul.vonhehn@wilmerhale.com

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