



TRANSPARENCY INTERNATIONAL
The global coalition to curb corruption

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**Comments on the
European Commission Communication
on
" A Comprehensive EU Policy Against Corruption"**

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INTERNATIONAL – BRUSSELS



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1. Background

The communication on “A Comprehensive EU Policy Against Corruption” (1) is the second strategic Commission document on this subject. The first one, “A Union Policy against Corruption” (COM (97) 192 final of 21-5-1997) was followed up by the European Parliament “Bontempi Report” (adopted on 6-10-1998).

TI takes some credit for having supplied substantive inputs to both Commission initiatives through several contributions and in particular its two comprehensive memoranda addressed to the EU Institutions: “The fight against international corruption: what the EU can do” (Nov. 1995) and “Fighting corruption: what remains to be done at EU level” (Nov. 1999).

TI has urged the Commission to present a second strategy document ever since we presented our November 1999 memorandum. We therefore warmly welcome the new communication.

2. General observations

The Commission document is indeed comprehensive as it covers almost the complete range of areas where the EU has the legal means and the political capacity to act.

This **reflects real change** which has occurred during the last few years: not only has the awareness of the disastrous consequences of corruption increased dramatically, but also, more importantly, concrete steps have been taken at EU level to counter corruption.

It is recalled that in 1995 TI felt that it should draw the attention of EU Institutions to “what the EU can do” in the fight against corruption as, at that time, the EU was apparently not sufficiently aware of its potential role, limiting its initiatives to fraud to the detriment of the Community budget.

Now the fight against corruption has become a relatively high priority.

The September 2001 events have pushed the fight against terrorism to the foreground. But as both terrorism and corruption come under the heading of organised crime, progress achieved in the fight against organised crime in the wake of “September 11” has also included actions against corruption.

The Commission document represents an **excellent stocktaking** exercise which shows, area by area, what measures have been taken wherever action against corruption is possible at EU level, be it through EU initiatives or legal acts of its own, or be it

(1) COM (2003) 317 final of 28-5-2003
www.europa.eu.int/eur-lex>documents of public interest



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through common positions of the EU and its Member States in international fora (e.g. OECD, Council of Europe, UN ...) where the EU has sometimes been able to play a leading role. **The stocktaking reveals of course also where further work is necessary.**

It can be concluded that the European and international legal framework (criminal and civil law instruments) has been established. However, it should be strongly emphasised that the existing **international agreements should be ratified and transposed into national law as a matter of urgency** by all signatories who have not yet done so, including some EU Member States which are lagging behind. Conversely, there seems to be no need for new conventions, except that the **negotiations on a UN Convention against corruption should be concluded.**

The same holds true for the mechanisms of judicial and police cooperation between the competent authorities of Member States. The legal framework for this cooperation which will facilitate the fight against transborder corruption, exists with the important exception of the **establishment of a European Prosecutor**, for which the draft Constitutional Treaty contains only a modest opening. **TI has made a strong plea in favour of creating this essential function.**

This being said, TI shares the Commission's view that, concerning legal instruments as well as judicial and police cooperation, the **focus must now be on implementation and monitoring**, all the more so as TI surveys show that the new rules (in particular the criminalisation of transborder corruption) are little known by the interested actors and as, at this stage, they are rarely applied (almost no court cases yet).

As far as the fight against corruption within the EU Institutions is concerned, TI considers that sufficient safeguards, controls, audit and anti-fraud mechanisms have now been put in place. One could even wonder whether there is not a need for encouraging civil servants to take more responsibility and for providing ethical training rather than for supplementary controls and bureaucratic procedures; it being admitted that there can never be an absolutely fraud/corruption-proof system, as recent cases show. TI wants nevertheless to raise one question: Why has the Commission still not established **implementing rules for Art. 16 of the Staff Regulations**, which is supposed to resolve **conflict of interest situations** that frequently occur when officials leave the EU Institutions?

Perhaps the most promising field for initiatives at EU level is that of "other policies" (single market, other internal policies, external aspects), most of them being Community policies which do not encounter the same kind of problems as changing or aligning criminal law for example. In practically all relevant areas concrete first steps have been taken although they are, according to TI, insufficient in several cases (cf. "3. Specific remarks", below). We share the Commission's view that in these chapters the focus is on prevention, although sanctions are not excluded (e.g. blacklisting).



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All in all, the fact that a great number of initiatives have been taken during the last few years might explain why the **Commission document contains relatively few new concrete suggestions.**

3. Some specific remarks

- 3.1. The Commission takes the view that **monitoring and evaluation** mechanisms based on peer review are essential to make sure that new rules are adequately implemented. TI agrees.

However, the Commission considers that at this stage a specific EU monitoring system would be inappropriate as it would mean unnecessary duplication of work going on particularly in OECD and Council of Europe.

TI tends to disagree on this point: Whilst it is of course no use duplicating the monitoring of the implementation of OECD and Council of Europe instruments, we think that there is **scope for an EU mechanism** using existing structures, **to monitor the implementation of EU instruments and initiatives** which, otherwise, would not be followed up systematically at all. This seems particularly important in view of the imminent enlargement. EU monitoring could include, inter alia, the ratification of EU instruments, transposition into national law, harmonisation of substantive criminal law (definition of corruption, criminal liability, criminal penalties ...), application of framework decisions (e.g. private-to-private corruption), the proper functioning of judicial and police cooperation .

As far as the Area of Freedom, Security and Justice is concerned, we consider that Art. III – 156 of the draft Constitutional Treaty hints in the same direction as it foresees the possibility of defining modalities for objective and impartial evaluation of the implementation of Union policies in this area.

- 3.2. TI shares the Commission's view that **detecting corruption cases** is extremely difficult because of the "pact of silence" between bribe payer and bribe taker. This is why the protection of **whistleblowers** is so important. But this is likely not to be enough.

We would **encourage the Commission to explore seriously the "ways to facilitate the burden of proof** for law enforcement authorities".

An interesting example for this new approach is the work going on in the Council concerning a legal act which would alleviate the rules for confiscation of the proceeds of specific financially relevant crimes by shifting the burden of proof from the authorities to the convicted criminal: he would have to demonstrate that the property was legitimately acquired.

Some third countries have introduced the reversal of the burden of proof as an instrument in the fight against corruption: the State authorities do not have to prove that an official has accepted bribes, but the official who lives "beyond his normal means" has to demonstrate that his property has been legitimately acquired.



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Couldn't these ideas be explored further, while fully respecting the guarantees of the EU Charter of Fundamental Rights?

3.3. **Public procurement** is a highly relevant area in terms of fighting corruption. At EU level this matter appears under three headings:

1. rules which oblige Member States to open up their public procurement to EU-wide competition;
2. rules for procurement financed from the EU's own budget resources;
3. the definition of international procurement rules (notably WTO).

TI has had the opportunity to present to the competent Commission services its general approach to curbing corruption in government procurement (1). We will not repeat this approach here.

However, we would like to single out **one aspect to which TI attaches great importance: blacklisting**, i.e. exclusion from further contracts, on a temporary or permanent basis, of companies which have been caught in corruptive acts. Blacklisting is a genuine sanction and one of the most effective deterrents.

The Community directives on public procurement by Member States foresee the possibility of blacklisting, but only if applicants have been convicted by a definitive criminal judgement for corruption. This condition of "res judicata" makes blacklisting ineffective as court cases are much too rare and lengthy.

Until recently, the Commission took a similar position concerning procurement financed by EU budget resources.

TI has consistently argued that, **short of a final criminal judgement, other steps should suffice for blacklisting**, in particular a confession by a manager or overwhelming evidence based on prosecutorial investigation coupled with the absence of persuasive evidence to the contrary. This method is used by the World Bank and in some jurisdictions in Germany, for example.

TI has called again earlier in 2003 on the Commission to explore steps in this direction, with a special focus on foreign aid programmes. TI is pleased to conclude from a recent correspondence with the Director General of AIDCO that the **Commission now shares the view** that the new 2002 Financial Regulation applicable to the General Budget and other relevant texts allow **potential contractors to be blacklisted** not only in the case of a final court judgement, but **also if corrupt practices can be "proven by any means which the contracting authority can justify"**. This seems to be a **major breakthrough** which should now be consolidated by guidelines for practical implementation.

(1) For example: Statement on "Transparency in Government Procurement and the Fight against cross-border Corruption" presented to an EC Meeting on Transparency in Government Procurement, Brussels, 16 May 2003.



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Member countries should be encouraged to **establish a central register** of bidders who have been blacklisted. The Commission should of course do the same. In the longer run, bidders blacklisted in one Member State should also be excluded in other Member States and at Commission level, and vice-versa.

- 3.4. As far as the **private sector** is concerned TI welcomes the recent **adoption of a Framework Decision on Private-to-Private Corruption** (cf. 3.1. on EU monitoring). The envisaged change in criminal law is a useful complement to self-regulation by the private sector, an approach which TI supports strongly.

In this context, we draw attention to **TI's recent initiative** to establish, in collaboration with companies, academia, trade unions and other NGOs, a set of **"Business Principles for Countering Corruption"** (1). These principles are intended to be a practical tool to which companies can refer for a comprehensive guide to good practice.

It could also be an input to the public-private dialogue which the Commission is seeking to promote.

- 3.5. TI welcomes the focus which the Commission document puts on **political corruption** and **looks forward to proposals** which the Commission announces on this subject.

Among the key global priorities, TI has indeed put political corruption (e.g. political party and campaign financing) very high on the agenda.

We are aware that this might be one of the more difficult subjects to tackle at EU level; but the Commission has TI's full support.

- 3.6. TI shares the Commission's assessment that **corruption is still a serious problem in many acceding and candidate countries**, although the prospect of accession has led to significant improvements, perhaps more in the adoption of anti-corruption legislation and in the building of adequate institutional arrangements than in practical implementation. Here, as within the existing Union, the **focus must be on enforcement**.

TI stands ready, as it did in recent years with the cooperation of its network of national chapters in acceding countries, to supply the Commission with information and its own evaluation of progress made in the fight against corruption. This year TI's contribution will again be an input to the Commission's autumn report.

(1) www.transparency.org/building_coalitions/private_sector/business_principles.HTML



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3.7. In **foreign aid programmes**, the ACP-EU **Cotonou Agreement** is indeed an **exemplary model** as it addresses explicitly the issue of **good governance** (with an operational definition focused on the transparent and accountable management of a country's **resources**) and the fight against **corruption**. TI welcomes the balanced approach of "Cotonou", which covers positive support measures as well as possible sanctions.

TI regrets that the performance of ACP countries in terms of **good governance** – in particular expressed by their determination to fight corruption – has **not so far obtained a sufficient weighting as a criterion for aid allocation**.

Furthermore we urge the Commission to seek to **introduce, in all cooperation agreements** where financial cooperation is a significant component, **clauses similar to those in the Cotonou Agreement**, in particular with an operational definition of good governance centred on the management of **resources** (and not of a country's affairs). This, logically, links up directly with the fight against corruption.

TI has welcomed the manual of instructions for public procurement involving Community funding and expressed a positive opinion as early as 1999 on the draft "ethics clauses". We trust that standard clauses can soon be inserted in the relevant documents concerning all regions where financial cooperation takes place.

3.8. TI would have wished to see a **reference in the Commission document to the problem of freezing, confiscating and repatriating stolen assets**, which plays a major role in dialogues with developing countries, in particular with Africa, as well as in the negotiations on a UN Convention against corruption.

TI recalls that at the first Africa-Europe Summit in Cairo in April 2000 a political commitment was taken "to ensure that illegally acquired public funds lodged in foreign banks are investigated and returned to their countries of origin".

In this respect, an **EU/Member States initiative would be welcome** to show Europe's **readiness to deliver on the Cairo commitment**.