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THE FIGHT AGAINST CORRUPTION IN EUROPE: LIGHTS AND SHADOWS**

Abstract: This work addresses the fight against corruption in the European area, analyzing the main organizational and criminal normative instruments of the international and the supranational organizations with a European presence: the OECD, the Council of Europe and the European Union, and concludes with some critical considerations.

Key words: Corruption, International organizations, Council of Europe, OECD, European Union

Zusammenfassung: Diese Arbeit befasst sich mit der Korruptionsbekämpfung im europäischen Raum und analysiert die wichtigsten organisatorischen und kriminell-normativen Instrumente der internationalen und supranationalen Organisationen mit europäischer Präsenz: der OECD, dem Europarat und der Europäischen Union und schließt mit einigen kritischen Bewertungen.

Schlüsselwörter: Korruption, Internationale Organisationen, Europarat, OECD, Europäische Union

PRELIMINARY GENERAL CONSIDERATIONS

There is practically complete agreement among authors about the difficulty of giving a single concept of corruption¹, since this is a complex and transversal phenomenon². Hence, more than a single definition of corruption, reference is always

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1 In the etymological sense of corruption derives from the Latin *corrupto*, *corruptionis*, in which the prefix of intensity “con” means to break, to tear up. From a sociological point of view, K. Liebl /2000/: Ich bin korrupt, du bist korrupt, wir sind korrupt! –oder: Wer ist korrupt?“ Überlegungen zur Korruptionsdiskussion und –definition, *Zeitschrift für soziale Probleme und soziale Kontrolle*, N° 11-1/2, p. 7f.

2 See in this sense, I. Blanco /2004/: La corrupción desde una perspectiva criminológica. Un estudio de sus causas desde las teorías de las actividades rutinarias y de la elección racional, (F. Pérez, ed.), *Serta in memoriam Alexandra Baratta* (Salamanca, Universidad de Salamanca), p. 267 f., and J. F. Malem /2016/: La corrupción: Algunas consideraciones conceptuales y contextuales”, *Revista Vasca de Administración Pública. Herri-Ardularitza Euskal Aldizkaria*, N° 104, 2, p. 26 f.

made to various concepts of corruption, according to the discipline studying it, the causes that cause it, or their types, determined, fundamentally, by the areas in which it takes place (the public administration, police, judiciary, business).

The conventions, treaties and other inter- or supranational instruments on the subject, as well as the state regulations do not usually contain a concept of corruption, nor is the term used in the classification of administrative infractions or crimes that sanction it. If it is contained, descriptive definitions³ are enunciated or assimilated to bribery⁴.

It is also significant to show that, from a synthetic point of view, corruption is usually defined as an “abuse of power to obtain private earnings”, while, in other concepts, both concepts are contrasted in a genus-species relationship⁵.

The effects of corruption basically affect two areas: the structure of the democratic State of Law and the system of the social market economy⁶.

As regards the incidence of corruption in the democratic State of Law, it undermines the moral foundations of society⁷, thereby generating political instability, by distorting electoral processes – internally within political parties and trade unions – or externally in the European community, general, regional or local elections⁸, basically through bribes. In this way, public administrations and democratic institutions in general are delegitimized⁹.

On the other hand, corruption is also a constant threat to human rights, inasmuch as it violates the rule of law¹⁰ and constitutes a violation of the right to equality before the law, leading to the substitution of the public interest by the private

- 3 In the same line, UN /2003/: United Nations Convention against Corruption, Mérida, in UNODC y Corrupción. Available on: <http://www.unodc.org/lpo-brazil/es/corruptcao/>. Date of consultation: March 2. 2016, p. 1.
- 4 See art. 2 of Civil Law Convention on Corruption (infra); J. L. De La Cuesta /2003/: Iniciativas internacionales contra la corrupción, *Eguzkilore*, N° 17, p. 8, however, warns that, there is a growing trend to equate corruption and any administrative irregularities.
- 5 UN /2005/: Acción mundial contra la corrupción. Los documentos de Mérida, (Viena, Naciones Unidas). Available on: https://www.unodc.org/pdf/corruption/publications_merida_s.pdf. Date of consultation: July 2. 2016, p. 88.
- 6 See L. Bernaldo /1998/: Estado, Economía y Corrupción, *THEMIS: Revista de Derecho*, N° 38, p. 255–262, p. 255 f.
- 7 On this matter, inter alia: R. Bustos /2010/: Corrupción política: un análisis desde la teoría y la realidad constitucional, *Teoría y Realidad Constitucional*, N° 25, pp. 79, 89; J. M. Andrés /2012/: Ética, corrupción y el paradigma del “Homo Economicus”, *Encuentros multidisciplinares*, V. 14, N° 40, pp. 3, 4, 6, 8; M. überhofen /1997/: *La corrupción en el derecho comparado* (Buenos Aires, Ciedla), p. 111; M. Villoria /2002/: Ética pública y corrupción en el inicio de un nuevo milenio”, *Foro Internacional*, N° 170, p. 651 f.
- 8 See G. Ruiz-Rico /2014/: La lucha contra la corrupción desde el estado constitucional de derecho: la legislación sobre financiación de partidos políticos en España, *Cuadernos Manuel Giménez Abad*, N° 7, p. 223 f., emphasizing that: “Constitutional democracy has not been shown to be immune to the phenomenon of corruption”.
- 9 O. Diego /2007/: Marco institucional para combatir la corrupción, *Revista Española de Control Externo*, V. 9, N° 27, p. 159 f.
- 10 G. Marinucci, E. Dolcini /1999/: Diritto penale minimo e nuove forme di criminalità, *Rivista Italiana di Diritto e Procedura Penale*, p. 804.

interest of those who corrupt it, thus undermining the ability of governments to offer basic public services¹¹, and thereby generating inequality not only formally, but also materially¹².

In the economic sphere, the effects of corruption are also equally harmful¹³, in that they discourage investors, national or foreign, since companies do not usually invest in areas where bribes and lack of institutional reliability are present¹⁴. Likewise, corruption hinders the creation and survival of small and medium-sized companies¹⁵, since these are the most vulnerable to institutional corruption –both nationally and internationally–, given the difficulty or impossibility of assuming the spiraling costs of bribery.

Corruption does not only put a break on productivity¹⁶, it also accentuates the processes of economic crisis, generating public and private debt, which leads to a subtraction or inefficient distribution of resources for economic and social development and public finances, affecting the welfare state¹⁷.

Finally, corruption gives rise to flows of black money, damaging the stability and reputation of the financial sector, threatening the internal market of each State and therefore supranational organizations such as the European Union¹⁸, in addition to sustaining, to a great extent, tax havens and generating a constant money laundering process.

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- 11 J. F. Malem /2014/: Derechos Humanos y Corrupción, *Crítica*, Nº 989, p. 49 f.
 - 12 M. Villoria /2014/: La transparencia como política pública en España: algunas Reflexiones, *Economía: Revista en Cultura de la Legalidad*, Nº 7, pp. 86, 93, 96 f.
 - 13 F. Boehm /2005/: Corrupción y captura en la regulación de los servicios públicos, *Revista de Economía Institucional*, V. 7, Nº. 13, p. 245 f.; J. Fisher /2010/: Fighting Fraud and Financial Crime. A new architecture for the investigation and prosecution of serious fraud, corruption and financial market crimes, Policy Exchange, *Research Note*, marzo, p. 2 f.; O. Johnson /1975/: An economic analysis of corrupt government, with especial application to less developed countries”, *KYLOS*, Nº 28, p. 47 f.; A. Nieto /2007/: ¿Americanización o europeización del Derecho Penal económico?, *Revista Penal*, Nº 19, p. 127 considers that “the Americanization of criminal law against corruption is closely linked to the protection of the market”, where it is not a matter of protecting the Administration, but of avoiding anti-competitive behaviors.
 - 14 D. M. Soto, R. Fernández /2007/: Corrupción pública: actuación del gobierno y cuantías de soborno, *Anales de Economía Aplicada*, Nº 7, p. 46 f., conclude that there is a correlation between the articulation of anti-corruption measures and the reduction of costs derived from corruption for companies.
 - 15 C. M. Gómez /2004/: El análisis económico de la corrupción, *Quórum: Revista de Pensamiento Iberoamericano*, Nº 10, p. 145.
 - 16 With particular reference to the OECD countries, M. Salinas y F. J. Salinas /2006/: Efectos de la corrupción sobre la productividad: un estudio empírico para los países de la OCDE, *Papeles de trabajo del Instituto de Estudios Fiscales. Serie economía*, Nº 6: p. 12 f.
 - 17 J. J. Ganuza /2013/: Luchar contra la corrupción y salir de la crisis económica: dos caras de una misma moneda, *Documentos de Trabajo FUNCAS*, Nº 731, pp. 15, 23, maintains that the fight against corruption is a complementary task to any other action that is undertaken in the fight against the economic crisis.
 - 18 World Bank /2013/: El precio de la corrupción. Available on: www.bancomundial.org/temas/anti-corrupcion/precio.htm. Date of consultation: March 23. 2016. p. 25; European Parliament /2013/: paragraphs AC, AD, AE y AI.

1. THE FIGHT AGAINST CORRUPTION IN EUROPE BY MEANS OF CRIMINAL LAW

This fight began in the late twentieth century, coinciding with the progressive strengthening of the process towards the political unification of the EU and also with what has been called the “expansion of criminal law”. This last phenomenon can be described as follows¹⁹:

- a) in terms of the broadening of the list of conducts to be criminally punished either by creating new figures, or by expanding the scope or modalities of the existing ones;
- b) in terms of the increase of the applicable penalties, which, given the indeterminacy or the establishment of minimum sanctions in the European normative instruments, has had a multiplying effect on the entity of the penalties to be imposed; and
- c) in terms of the internationalization of crimes, due to the transnational character that many of them may have, especially in the community sphere, due to the permeability of borders –e. g., in the Schengen area-, with the consequent drawing up of international treaties and conventions on penal aspects – substantive and procedural –, or for the effect of the approximation rules of criminal law within the European Union (hereinafter, EU), all of which has had an inflationary effect on the penal legislation of the member states.

The fight against corruption in Europe in the criminal sphere has three main sources of normative production and areas of action:

- The Organization for Economic Cooperation and Development (OECD),
- The Council of Europe and
- The European Union.

2. THE FIGHT AGAINST CORRUPTION FROM THE ORGANIZATION FOR COOPERATION AND ECONOMIC DEVELOPMENT (OECD)

This international organization was created by the Treaty of Paris of December 14, 1960. It currently brings together 35 countries, the majority of which are European. Its main objectives, as its name says, are cooperation and economic development, in which corruption is an obstacle to eradicate, since it also slows the expansion of international trade, which is another of its objectives.

19 G. M. Silva /2001/: *La expansión del Derecho penal. Aspectos de la Política Criminal en las sociedades postindustriales* (Madrid, Civitas), pp. 41, 65, 83, 86, 87, conceives supranational integration as a multiplying factor of the expansion of criminal law; adapt such phenomenon to the subject studied here: A. Mateos /1995/: *La Unión Europea y su incidencia en los derechos penales nacionales*, *La Ley*, N° 2p. 939; I. Ortíz De Urbina /2012/: *Política criminal contra la corrupción: una reflexión desde la teoría de la pena (o viceversa)* – in: *Garantías constitucionales y Derecho penal europeo* (Madrid, Marcial Pons) (S. Mir, M. Corcoy, eds.), p. 385 f.

2.1. *The anti-corruption instruments of the OECD*

A noteworthy anti-corruption instrument of this body is the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (Paris, December 17, 1997)²⁰. The purpose of the said agreement is to urge the signatory States to criminalize the fact that a person deliberately offers, promises or grants any undue, pecuniary or other benefit, directly or through intermediaries, to a foreign public official, for himself or for a third party, to act or refrain from acting in the exercise of official functions, in order to obtain or retain a contract or other irregular benefit in the conduct of international economic activities.

The convention urges the punishment of such conduct with custodial sentences and the punishment of legal persons with effective, proportionate and dissuasive sanctions, without determining its nature, which may or may not be criminal.

As an indispensable complement to the effective fight against this crime, each party is urged to take the necessary measures, within the framework of its laws and regulations, regarding the maintenance of books and records, to publish financial statements and accounting and auditing standards, in order to prohibit: the establishment of accounts off the books, the performance of extra-accounting or insufficiently identified transactions, recording non-existent expenses, making entries of items of liabilities with an incorrect identification of their object, as well as using false documents, by companies subject to such laws and regulations, in order to corrupt foreign public agents or to hide the said corruption.

2.2. *Critical assessment*

The 1997 Convention was created to compensate the grievances American companies complained of having suffered, affected by the Foreign Corrupt Practices Act (FCPA) of 1977, in relation to European companies in international trade²¹.

This Convention has attempted to be an instrument to fight against transnational corruption, especially in the less economically developed countries, but from developed countries, due to the greater difficulty observed in emerging economies to fight corruption of their officials, generally poorly paid, and the weak state structures of the aforementioned less economically developed countries economy, which favored corruption more than the fight against it.

But furthermore, especially after the economic crisis, the introduction of this crime in the OECD states has become a means to prevent the generalization of bribery in international transactions from impeding the –almost forced– internationalization process of SMEs, since these are the ones that, in no way or to a lesser ex-

20 It should be added that the Council Recommendation for Combating the Bribery of Foreign Public Officials in International Business Transactions adopted by the Council on 26 November 2009 make special emphasis on the progressive reduction and elimination of grease payments, the non-deductibility of bribes, facilitating complaints and the protection of internal whistleblowers, the articulation of external audits and internal controls in the procurement process, as well as the suspension or exclusion of public benefits for whom are accused/implicated in corruption, among others.

21 B. Huber /2002/: La lucha contra la corrupción desde una perspectiva supranacional, *Anales de la Facultad de Derecho. Universidad de La Laguna*, N° 19, p. 96 f.

tent, could compete with transnational cooperation in states in which bribes, grease payments or corporate hospitality were a “way of doing business”²². However, its follow-up by the European member countries of the OECD has been very uneven²³.

In recent years, under the aegis of the global economic crisis and double standards, the OECD has also made an effort aimed at combating tax havens, and has compiled one of the best-known lists of them, which, however, do not usually coincide with those of the member states of the organization²⁴.

3. THE FIGHT AGAINST CORRUPTION IN THE COUNCIL OF EUROPE

The Council of Europe is an international organization of regional European scope that came into being after the Treaty of London of May 5, 1949 and that integrates all the states of the European continent with the exception of Byelorussia, Kazakhstan and the State of the Vatican. The aim of this Organization is to promote, through the cooperation of the states of Europe, the configuration of a common political and legal space in the continent, based on the values of democracy, human rights and the rule of law. With such a declaration of principles it is not surprising that the fight against corruption has been one of the central objectives of its activity and functioning.

3.1. *Anti-corruption Instruments in the Council of Europe*

The following agreements in the Council of Europe are worth mentioning:

A.– Criminal Law Convention on Corruption (Convention number 173 of the Council of Europe, signed in Strasbourg on January 27, 1999) and its Additional Protocol made in Strasbourg on May 15, 2003.

22 Transparency International, UK /2014/: Countering Small Bribes. Principles and good practice guidance for dealing with small bribes including facilitation payments. Available on: <http://www.transparency.org.uk/publications/15-publications/1096-countering-small-bribes>. Date of consultation: Februar 8. 2016, p. 4 f.

23 In the application of this Convention and in the prosecution of this crime the United Kingdom has been particularly active, before and after the publication of the Bribery Act in 2010, due to the efficient and pragmatic functioning of the Serious Fraud Office (SFO). However, its operation has not been free of controversy, especially in those cases in which the refusal of persecution was based on the fact that they affected national interests, or because of the arrogation by the aforementioned Office of assumptions that, on everything after the Bribery Act, are the competence of the courts. At the other end would be Spain, which did not introduce the crime of corruption in international commercial transactions into the Criminal Code until Organic Law 5/2010, which has been amended three times during six years; and Spanish public prosecutor's offices have not opened criminal proceedings for this crime until 2016 (among others: DEFEX case: sale of police equipment to the Republic of Angola, where 100 million € was allegedly paid in bribes).

24 For example, the US State of Delaware, member of the OECD, played a leading role in money laundering in the case of Spanish corruption known as “white whale” (STS 974/2012, 5–12). On the other hand, and curiously, in the list of the OECD of 2011, Panama – a protagonist country in the “Panama Papers” scandal– was not included as tax haven. However, France dis consider Panamá as a tax haven; and the same goes for Gibraltar and Liechtenstein in the case of Spain. On this matter, see www.oecd.org.

This agreement deals with the corruption of national public officials, including in this concept: the “functionary”, “public official”, “mayor”, “minister” or “judge”, according to the national law of the state in which the person in question exercises these functions and as applied in its criminal law; members of the public prosecutor’s office and persons who exercise judicial functions (Article 1). Corruption of foreign or international public officials is also foreseen (Articles 1c and 5).

As regards the members of any national public assembly exercising legislative or administrative powers or a public official of any other state, each state party shall adopt such legislative and other measures as may be necessary to establish as offenses the conduct included in the Convention, according to its internal law (Articles 1c and 4).

The profuse qualification of what is understood “by public official” in the Criminal Law Convention is noteworthy. The reason for this is due to the different configuration of the concept of civil servant, public sector employee or official in the different European states, in such a way that the mere reference to the concept without precise definitions would have sown confusion. On the other hand, and in this line of precision, the Additional Protocol on corruption of 2003 adds the list of active subjects to the arbitrators and juries.

The conducts to be classified are the active and passive bribery of a public sector official or employee in order to perform or refrain from performing an act in the exercise of their functions (Articles 2 and 3 of the Convention) and the traffic of influence (Article 12), understanding as such the willful conduct of proposing, offering or granting, directly or indirectly, any undue advantage in terms of remuneration to anyone who affirms or confirms being able to exert influence over the decisions of any of the people.

Likewise, the classification of the accounting offense is urged (Article 14), intended to commit, conceal or disguise the offenses consisting of extending or using an invoice or any other document or accounting entry that contains false or incomplete information, or omit in an unlawful manner the accounting of a payment.

It also includes the responsibility of legal persons, as conceived by each state, unless they are public – national or international – (Articles 1d and 18) and which may be of the nature determined by each state, in accordance with criteria of heteroresponsability.

As far as private corruption is concerned, the criminalization of active and passive bribery in the course of commercial activity, to or by a person who directs or works in any capacity for a private sector entity, for themselves or for any other person, in order to perform or refrain from performing an act in breach of their duties is foreseen as a crime (Articles 7 and 8).

As regards the legal consequences of the offence, the punishment of the deprivation of liberty of those legal consequences that give rise to the extradition of natural persons is urged, and, in the case of legal bodies, effective, proportionate and dissuasive sanctions, including pecuniary sanctions, also covering the confiscation of products of the corruption (Articles 18, 19 and 23), which cannot be obstructed by banking secrecy.

In the organic and procedural field, it is worth mentioning the promotion of the independence and specialization of the organs that combat corruption, the co-

operation between national authorities (extradition, information and mutual assistance), and the protection of both the complainants –external and internal – and the other witnesses (Articles 20 to 22).

B.– Civil Law Convention on Corruption (number 174 of the Council of Europe, Strasbourg, November 4, 1999). The purpose of this agreement is to urge the signatory states to establish effective procedures in favor of persons who have suffered damages resulting from acts of corruption, in order to enable them to defend their rights and interests, including the possibility of obtaining compensation for the said damages, understood in a broad sense, that is: the material, non-material and loss of earnings (Article 3), also foreseeing the concurrence of offences (Article 6) and the nullity of contracts or clauses thereof which have as their object an act of corruption (Article 8).

The Convention provides that states establish appropriate procedures so that persons who have suffered damages resulting from an act of corruption committed by their public officials in the exercise of their functions can claim compensation from the state or, if it is a party that is not the state, from the competent authorities of the said party (Article 5). In the event that such damage consists of an unjustified sanction imposed on employees who have well-founded grounds for suspecting corruption and who report in good faith to the responsible persons or authorities, adequate protection measures and compensation shall be established by the state (Article 9).

The period of limitation of the action may not exceed ten years, or be less than three years from the date on which the person who suffered the damage had knowledge or should have known of the damage or the act of corruption, as well as the identity of the person responsible (Article 7).

Being aware of the supranational dimension of many cases of corruption, the parties are urged to cooperate effectively in matters relating to civil proceedings in cases of corruption, in particular as regards the notification of documents, obtaining evidence from abroad, jurisdiction, recognition and enforcement of foreign judgments and costs, in accordance with the provisions contained in the applicable international instruments relating to international cooperation in civil and commercial matters in which they are parties, as well as in accordance with their domestic law (arts. 11–13).

C.– Group of States against Corruption. This body, created by the Resolution of May 5, 1998 of the Committee of Ministers of the Council of Europe, and known by the acronym GRECO, aims, as stated in Article 1 of its statutes, to improve the capacity of its member states to combat corruption through a dynamic process of mutual evaluation and pressure by other countries, as well as through compliance with the commitments assumed in this area.

In the Commission Report to the Council 307/2011, dated 6 June, it is stated that GRECO is the most complete control mechanism for anti-corruption measures existing at a European level, as all the member states of the EU participate in it. It is composed of 49 states: the 48 European states and the USA. Each state appoints up to two representatives with the right to vote in the plenary session of this body and also commits to designate a list of experts with the purpose of preparing evaluations and reports.

The evaluations of GRECO members are carried out through rounds and in accordance with the standards established in the Twenty Guiding Principles of the Fight against Corruption²⁵, the Civil Law Convention on Corruption and the Criminal Law Convention on Corruption and its additional Protocol.

The evaluation reports are drafted after discussion with the evaluated state and, subsequently, they are discussed and, if appropriate, approved in plenary session. In principle they are confidential, but they can be published with the consent of the evaluated state, having been widely published in practice. The reports include a series of recommendations that the evaluated state has to implement within a certain period of time. Subsequently, a control procedure is conducted order to verify compliance with the recommendations and, finally, compliance reports that can be accompanied by appendices are published.

The Communication: “A Comprehensive EU Anti-corruption Policy” of 28 May 2003, having already considered the EU’s participation in GRECO as an essential element of its anti-corruption policy, taking into account the at that time, limited powers of the Community in relation to the Criminal and Civil Law Conventions on Corruption of the Council of Europe²⁶.

On the other hand, the participation of the EU in an independent manner to that of the member states is intended as a way for the EU to perform supervisory tasks, prepare evaluation and compliance reports, as well as to participate in the debates of the GRECO plenary sessions when they affect the EU Member States and, above all, in relation to the candidate countries or potential candidates, provided that they are in conformity. The aim of this is to avoid any additional burden to the administrations of the member states, as well as unnecessary duplication of work already done by GRECO.

3.2. *Critical Assessment*

After the analysis of the normative and organic instruments deployed by the Council of Europe to combat corruption, the importance that they have had and have in the fight to eradicate corruption from the European geographic space is appreciated. However, there is a lack of legal-criminal protection in significant areas:

- a) It has not been able within this organization to urge any international treaty regarding the financing of political parties and/or unions, this being one of the main breeding grounds for corruption in Europe²⁷.

25 See [https://www.coe.int/t/dghl/monitoring/greco/documents/Resolution\(97\)24_EN.pdf](https://www.coe.int/t/dghl/monitoring/greco/documents/Resolution(97)24_EN.pdf).

26 The Memorandum of Understanding between the Council of Europe and the EU signed in May 2007 provides for judicial cooperation between the parties in a political context marked by the pre-eminence of the rule of law, including the fight against corruption. This cooperation must be intensified to ensure coherence between EU legislation and the Council of Europe Conventions, but that will not prevent the EU from adopting more far-reaching measures.

27 There is only one Recommendation from the Committee of Ministers to the Member States concerning the common rules against corruption in the funding of political parties and electoral campaigns (Recommendation No. R (2003) 4 of the Committee of Ministers to member states on

- b) The Criminal Law Convention on Corruption, being a very complete normative instrument when it comes to addressing corruption conducts, nevertheless allows excessive reservations to the signatory states, which may mean serious crimes related to acts of corruption go unpunished²⁸.
- c) The Civil Law Convention on Corruption does not sufficiently develop international judicial cooperation. Likewise, it would have been desirable to specify measures aimed at protecting internal whistleblowers who, being a key element in the fight against corruption –both public and private-, end up becoming, due to their systematic lack of protection, collateral victims of the fight against corruption.
- d) Regarding the operation of GRECO, its reports usually basically show deficiencies in the compliance of the agreements, as well as institutional or normative difficulties concerning their application, also clearly showing the implementation or not of the measures that were recommended in previous rounds. The coercive effect of these for the government of the states lies in the fact that this will be known by the opposition political groups, media or experts²⁹, since the lack of publicity and transparency or not of these would be understood or would be highly negative for the state in question.

It should be positively valued that GRECO, through its supervision process, has induced the member states to act especially in the less internationally regulated areas such as the financing of political parties. However, the mandatory or more coercive nature of its recommendations is lacking, which, at times, tend to be contradictory depending on the evaluation round in question and on who the experts are³⁰.

On the other hand, GRECO has not been able to appreciate some systemic factors of corruption causation, as shown by the 2005 GRECO Evaluation Report, which did not warn of the seriousness of the problems that caused a chain of corruption scandals linked to the financial crisis that would be unleashed soon after.

4. THE FIGHT AGAINST CORRUPTION IN THE EUROPEAN UNION

After the creation of the European Economic Community by the Treaty of Rome in 1957, this organization has evolved towards a political union, which would take shape in 1993 in the so-called “European Union”. There would be a parallel process

common rules against corruption in the funding of political parties and electoral campaigns), but this Recommendation does not have the binding force of a treaty.

28 X. Deop /2001/: La lucha contra la corrupción en el Consejo de Europa, *Revista Electrónica de Estudios Internacionales*, Nº 2, p. 3 f.

29 I. Ortíz De Urbina: *op. cit.*, p. 386 f.

30 R. García /2008/: La aplicación española de las normas de derecho internacional contra la corrupción, *A.E.D.I.*, V. XXIV, p. 267.

of “Europeanization of criminal law”. Three major milestones can be identified in this process: the Maastricht Treaty (1992), the Amsterdam Treaty (1997)³¹ and the Lisbon Treaty (2007)³². This last treaty, along with the Charter of Fundamental Rights and the requirement that all member states be democratic in law, constitute the main pillars in the fight against corruption in the EU.

It is estimated that there have been around 25 million cases of corruption in the EU. Although the majority of the cases have been of a small magnitude and in the public sector, the cost is about 120,000 million euros per year, in other words, 1% of the EU GDP³³.

Regarding corruption in the private sector, a 2013 study on the detection and reduction of corruption in public procurement in the EU (specifically in France, Italy, Hungary, Lithuania, the Netherlands, Poland, Romania and Spain) concluded that in 2010 the total direct costs of corruption in public procurement of only five sectors (roads and railways, water and waste, construction and equipment, training, research and development) in the eight member states mentioned ranged between € 1,400 million and € 2,200 million³⁴.

Nevertheless, despite these figures, most of the member states of the European Union are among the best classified in the International Transparency Corruption Perceptions Index in 2015, with Denmark, Finland and Sweden occupying the podium of the best classified three EU states in that order. However, it is also true that the countries of southern Europe such as Portugal – position 28 –, Spain – position 36 –, Italy – position 44 – or Greece – position 58 – are halfway down the world table³⁵, and some recently incorporated countries such as Hungary – position 50 –, Romania – position 58 –, Bulgaria – position 69 provide even worse results in the aforementioned ranking³⁶.

31 Broadly on the treaties of Maastricht and Amsterdam, J. A. E. Vervaele /2005/: *La europeización del Derecho penal y la dimensión penal de la integración europea* (Trad. Isidoro Blanco Cordeiro), *Revista Penal*, N° 15, p. 175 f.

32 S. Romeo /2012/: *Un nuevo modelo de Derecho penal transnacional: el Derecho penal de la Unión Europea tras el Tratado de Lisboa*, *Estudios Penales y Criminológicos*, N° 32, pp. 318, 322 f.

33 European Commission /2014/: *Report from the Commission to the Council and the European Parliament. EU Anti-Corruption Report*, Brussels, 3.2.2014, 38 final. Available on: https://ec.europa.eu/home-affairs/sites/homeaffairs/files/e-library/documents/policies/organized-crime-and-human-trafficking/corruption/docs/acr_2014_en.pdf. Schedule the visit: September 28. 2016. p. 3.

34 Pricewaterhouse-Coopers y Ecorys /2013/: *Identifying and Reducing Corruption in Public Procurement in the EU – Development of a methodology to estimate the direct costs of corruption and other elements for an EU-evaluation mechanism in the area of anticorruption*. Available on: http://ec.europa.eu/anti_fraud/documents/anti-fraud-policy/research-and-in_public_procurement_en.pdf, pp. 1–371. Fecha de consulta: 2 de febrero de 2016, p. 35 f., 55 f.

35 These countries were called in the European slang under the acronym PIGS, term coined in the Anglo-Saxon financial environment, due to the financial situation of deficit and balance of payments of these Southern European states. Ireland was subsequently included (PIIGS) or even the United Kingdom (PIIGGS). But this term was later extrapolated, before the entry of Eastern European countries into the European Union, to the field of corruption, but, in this area, only in relation to its first modality (Portugal-Italy-Greece-Spain).

36 *Transparencia Internacional España /2015/: Tabla sintética de resultados*. Available on: http://transparencia.org.es/wp-content/uploads/2016/01/tabla_sintetica_ipc-2015.pdf. Schedule the visit: Februar 4 2016, p. 1 f.

4.1. *The recent history of the fight against corruption in the European Union with Criminal law*

The fight against corruption within the EU is closely linked to the protection of its financial interests³⁷, which led to the adoption of the Convention of 26 July 1995 and the *Corpus Iuris* initiative³⁸. The intention of the cited *Corpus Iuris* is to harmonize criminal law in this matter, classifying eight criminal figures, among which were corruption, embezzlement or abusive exercise of office.

From this recent precedent until the adoption of the Lisbon Treaty of 2007, the fight against corruption within the EU was characterized by the following notes:

- a) the limited powers that the EU had in the criminal sphere, which prevented it from creating a criminal justice area, as well as those it had in relation to the Criminal and Civil Law Conventions on Corruption of the Council of Europe;
- b) the unanimity rule required for decision-making, which resulted, in many cases, in resolutions and approaches to problems in the manner of an unsatisfactory “common minimum denominator”;
- c) the deficit in the effective application of the then existing normative framework;
- d) the lack of enforceability on the part of the Commission, as well as the fact that the European Parliament and the courts were barely involved in such a fight.

This situation would change significantly after the EU’s accession to the United Nations Convention against Corruption³⁹, which would be reinforced by the decision to participate in the European regional monitoring mechanism, and with the approval of the reiterated Treaty of Lisbon⁴⁰.

4.2. *The Lisbon treaty as a turning point in the legal-criminal fight against corruption in the orbit of the European Union*

This treaty, a substitute for the intended Constitution for Europe, would modify the EU Treaty (Maastricht) and the Treaty establishing the European Community

37 L. A. Arroyo, A. Nieto /2006/: *Fraude y corrupción en el Derecho penal económico europeo*, (Cuenca, Editorial Universidad Castilla-La Mancha), p. 11 f., emphasize that from the beginning the EU wanted to transcend beyond this matter. On the other hand, V. Musacchio /2011/: *La corrupción en el ámbito europeo: instrumentos y propuestas de política criminal*, *Revista General de Derecho Penal*, N.º. 16, p. 2, considers that Europe is far too focused “on the protection of its own financial interests and little on the real incidence of corruption phenomena”.

38 E. Bacigalupo /2005/: *El “Corpus Juris” y la tradición de la cultura jurídico-penal de los Estados Miembros de la Unión Europea* – in: *Curso de Derecho Penal Económico* (E. Bacigalupo, ed.), Madrid, Editorial Marcial Pons, segunda edición, p. 388.

39 Council Decision 2008/201/CE, of 25 September, on the conclusion, on behalf of the European Community, of the United Nations Convention against Corruption (Official Journal of the European Union L 287 of 29 October 2008).

40 M. Acale /2008/: *Derecho penal y Tratado de Lisboa*, *Revista de Derecho Comunitario Europeo*, N.º 30, p. 349 f.

(Rome), which allows the EU to show more ambition to respond to the concerns and daily aspirations of European citizens, among which is corruption⁴¹. In this respect, a new rubric and structure was given to the content of Chapter IV, which is now called: “Area of freedom, security and justice”, which allows the EU to have an explicit legal support for the adoption not only of mere framework decisions, but of directives of juridical-criminal content in order to guarantee the effective application of the criminal policy of the EU, with a view to the harmonization of norms and measures to combat crime within the EU and, particularly, against corruption⁴².

The “prevention and fight against crime” (Article 2.2 of the Treaty of Lisbon) occupies a preferential place within this framework of freedom, security and justice of the space without borders. In addition, Article 83 of the Treaty on the Functioning of the EU – hereinafter referred to as the TFEU, as amended by the Treaty of Lisbon – provides that the European Parliament and the Council may establish, through directives, minimum standards relating to the definition of criminal offences and sanctions in criminal areas that are particularly serious and that have a cross-border dimension, derived from the nature or repercussions of such infractions, or from a particular need to combat them according to common criteria. Among these criminal areas, corruption covered in Section 2 of the aforementioned article.

On the other hand, Article 67 of the TFEU of the Treaty of Lisbon states, as an aim of the Union, to guarantee a high level of security by means of four ways:

- a) the articulation of measures to prevent and fight crime;
- b) the implementation of coordination and cooperation measures between police and judicial authorities and other competent authorities;
- c) the mutual recognition of judicial resolutions in criminal matters; and
- d) if necessary, the approximation of criminal legislation, overseeing that national parliaments respect the principles of subsidiarity⁴³ and proportionality, in accordance with the protocol on the application thereof (Article 69

41 The Eurobarometer survey for spring 2011 among the main areas on which EU action should focus, the fourth was the fight against crime, and within this 74% of European citizens, corruption was a national and supranational problem (Special Eurobarometer 374 on corruption, February 2012).

42 H. Satzger /2011/: *Europäisierung des nationalen Strafrechts*, en SIEBER, Ulrich et alii, *Europäisches Strafrecht* (Munich, C. H. Beck), p. 231 f., points out as mechanisms of Europeanization of the legal systems of the Member States: regulatory reference, neutralization of national criminal provisions through the preference of EU law, harmonization, or interpretation in accordance with European regulations.

43 According to this principle, a matter must be resolved by the authority (normative, political or economic) closest to the object of the problem. It is included in Article 3 ter. 3 of the Treaty on European Union, amended by the Treaty of Lisbon since December 1, 2009, which says that “Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level”. Critically, M. Fuertes /2015/: *Combatir la corrupción y legislar en la Unión Europea* (Madrid, Editorial Marcial Pons), p. 47 f., wonders if this principle is serving “to weave European Community law better or, rather, it involves the risk of unraveling part of the already braided canvas”.

TFEU), as well as the different systems and legal traditions of the member states (Article 67 TFEU). In any case, as is clear from Article 83.2 of the TFEU, the approximation of laws, through directives, in matters of infractions and sanctions is a second step, after prior harmonization, and conditioned to its essential character and its effectiveness⁴⁴.

From an organic point of view, the Treaty of Lisbon has meant the granting of an increasingly important role to the European Parliament as co-legislator in most matters and the greater involvement of national parliaments. This will make the EU more responsible for its actions in the interest of the citizen, thereby contributing to strengthening the democratic legitimacy of the Union, as had been demanded⁴⁵, which is essential in criminal matters.

On the other hand, it is also worth mentioning the introduction of the qualified majority in the Council in many matters, which will streamline the decision-making process⁴⁶. Nevertheless, the weight of state sovereignty makes it difficult to break away from unanimity altogether⁴⁷.

With regard to judicial control, the Court of Justice of the European Communities will assume judicial oversight of all aspects related to security, justice and freedom, while the Charter of Fundamental Rights of the EU becomes legally binding.

4.3. *Anticorruption normative instruments in the European Union*

The anti-corruption instruments in the EU have the peculiarity, unlike the other international organizations studied, that their effects are deployed towards both the EU's own organizational structure and towards the member states. Another existing difference is that the EU's regulatory instruments are mandatory from when they are approved⁴⁸, ratification is not necessary.

44 However, as will be shown below, this programmatic statement contradicts the remarkable harmonising legislation of recent times in relation to certain groups of crimes, among which are corruption or crimes closely linked to it.

45 J. F. López /2015/: El Parlamento Europeo, legislador del Espacio de Justicia Penal de la UE, *Revista de Derecho Político*, Nº 93, pp. 18, 23; C. Rodríguez-Aguilera /2015/: ¿Es el parlamento europeo el principal responsable del déficit democrático comunitario?, *Revista D'estudis Autònoms i Federals*, Nº 21, p. 107 f., however, affirms that: "the constant reforms to expand their powers have not served to correct the democratic deficit of the whole (...) A special consideration deserves elections to the European Parliament since, in a multilevel system such as the EU, the direct representative mechanisms play a limited role and this, complemented by the low voter turnout, has configured academically these elections (...) as "second grade elections". The representative principle only half-heartedly works, more as a delegation than as true accountability (...) Neither the political actors nor the citizens grant European elections a special relevance, since, on the one hand, they are incapable of reflecting a sort of common pan-European interest, and on the other, operate exclusively as national elections".

46 C. Ferrer /2010/: El Consejo de la Unión Europea tras el Tratado de Lisboa, *Revista Universitaria Europea*, Nº 13, p. 67 etc.

47 See Art. 69 H of the Lisbon Treaty.

48 I. Berdugo /2015/: La respuesta penal internacional frente a la corrupción. Consecuencias sobre la legislación española, *Estudios de Deusto*, Nº 63/1, p. 244.

A.– Framework Decision 2003/568/JHA of the Council of July 22, 2003, on the fight against corruption in the private sector, involves adapting active and passive bribery conduct to the sphere of business activity.

The responsibility – criminal or administrative, at the decision of each member state – of the legal entities is foreseen; the criteria for the imputation of their responsibility are regulated, as well as the imposition of pecuniary sanctions.

The sanctions to be imposed on natural persons must be criminal, more specifically, deprivation of liberty with a maximum duration of at least one to three years. The temporary prohibition of the exercise of the professional activity or of an activity in a similar position or function may also be imposed, when the proven facts give reasons to think that there is a clear risk that the person abuses his position or office through acts of active or passive corruption.

B.– The Framework Decision 2008/841/JAI of the Council of 24 October, concerning the fight against organized crime, has as its main purpose that the member states classify one or both of the following modalities as offences:

- a) the conduct of any person who, intentionally and knowingly of the purpose and general activity of the criminal organization or of its intention to commit the offences in question, actively participates in the illicit activities of an organization, including the provision of information or of material means, recruiting new participants, as well as in all forms of financing its activities knowing that their participation will contribute to the achievement of the criminal purpose of this organization;
- b) the conduct of any person consisting of an agreement with one or more persons to proceed with an activity that, if carried out, involves the commission of the offences set out in Article 1, that is, those of a “criminal organization” and “structured association”, even if that person does not participate in the execution of the activity.

These conducts are publicly actionable criminal offences and will be punished with a maximum penalty of deprivation of liberty of at least two to five years, foreseeing the responsibility –without specifying its nature– of the legal entities, as well as criteria for attenuation of responsibility and coordination of the judicial proceedings.

C.– Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015, concerning the prevention of the use of the financial system for money laundering or financing of terrorism. This directive has, above all, preventive effects on corruption offences, considering them as being included within the concept of “criminal activity” for the purposes of the application of its regulation (Article 3.4.f), which may operate as underlying crimes or related to money laundering or terrorism. It starts from the premise that certain situations present a greater risk of money laundering, which applies in a particular way to business relationships with people who occupy or have held important public positions, especially when they come from countries where corruption is widespread. In these cases, the directive considers that the need to pay special attention to these persons and to

apply enhanced measures of due diligence with respect to the persons entrusted or have been entrusted with important public functions, either in their own country or abroad, and with respect to senior positions of international organizations. In any case, these measures must be preventive and not punitive.

Other instruments affecting the scope of the consequences of crime would have to be added to the above instruments, highlighting Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014, on the seizure and confiscation of instruments and of the proceeds of crime in the European Union⁴⁹.

With regard to the criminal process, the approved normative instruments focus on: the European arrest warrant⁵⁰, the creation of joint investigation teams⁵¹, the European warrant⁵², the communication of criminal records⁵³, or on internal investigation procedures on corruption of community officials⁵⁴.

Finally, these normative instruments should be complemented by the so-called “anticorruption package” contained in the European Parliament Resolutions, such as the one of October 23, 2013, a declaration of principles, in the style of *lege ferenda*, on the efforts to be undertaken by the EU in the fight against corruption.

4.4. *Organic instruments to combat corruption in the European Union*

Being a supranational organization with aspirations to become the future United States of Europe, organs have been developed in parallel with those existing in the member states in their fight against corruption. The most noteworthy of these organs are listed below.

A) The European Anti-fraud Office (OLAF). It was created by Decision 1999/352/EC and according to Article 1 its functions are:

- a) to conduct, with total independence, external and internal administrative investigations in order to strengthen the fight against fraud, corruption and

49 This Directive has had a greater follow-up than the Warsaw Convention on May 16, 2005, of the Council of Europe.

50 See Council Framework Decision 2002/584/JHA of 13 June on the European arrest warrant and surrender procedures between Member States, under which Art. 2.2 figure corruption as one of the crimes that give rise to it.

51 See Directive 2014/41/EC of the European Parliament and of the Council of 3 April on the European Criminal Investigation Order (Annex and Article 11).

52 See Council Framework Decision 2008/978/JHA of 18 December 2008 on the European evidence warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters.

53 Council Framework Decision 2009/316/JHA of 6 April 2009 on the establishment of the European Criminal Records Information System (ECRIS) in accordance with Article 11 of Council Framework Decision 2009/315/JHA of 26 February 2009 on the organisation and content of the exchange of information extracted from the criminal record between Member States

54 See Decision N° 26/2004 of the Committee of the Regions of 10 February 2004 relating to the conditions and procedures for internal investigations in relation to the prevention of fraud, corruption and any illegal activity detrimental to the Communities’ interests; Council Act of 26 May 1997 drawing up, on the basis of Article K.3 (2) (c) of the Treaty on European Union, the Convention on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union.

any other illegal activity that is detrimental to the Communities' financial interests, as well as any other activity of an operator that constitutes an infringement of the Community provisions;

- b) to develop the anti-fraud policy of the European Commission, presenting to this end the legislative and regulatory initiatives before the aforementioned Commission with a view to achieving the objectives of the fight against fraud;
- c) to represent the EU and provide assistance to national authorities and bodies, with the EU being interlocutor, within its scope of competence, with national police and judicial authorities.

This body regards as an achievement to have managed to recover more than 1.1 billion euros and to have contributed to obtaining, during its existence, the sentences of more than 300 people⁵⁵.

The implementation within the OLAF of the Early Warning System (EWS) is noteworthy in relation to the prevention of public corruption. The EWS is a database of the names of natural or legal persons who have previously carried out fraudulent conduct of the EU's financial interests or are suspected of committing it. This is intended to prevent such people from going to a public tender, or allowing the administration to block or suspend them from a contract or payment. This database has five main levels of alert, from W1 to W5, subdivided, in turn, into other sublevels.

B) Eurojust. This body was created the Decision 2002/187/JHA of the Council, later modified by the Decision 2009/426/JHA of the Council, of December 16, 2008. This unit is a judicial cooperation network, whose scope of competence includes the fight against the fraud, corruption, money laundering and participation in criminal organizations.

The Treaty of Lisbon makes Eurojust an important piece in the work of reinforcement and support in the coordination and cooperation between the national authorities responsible for investigating and prosecuting serious crime affecting two or more member states, or which must be pursued according to criteria common, based on the operations carried out and on the information provided by the authorities of the member states and by Europol. Eurojust is accountable to the Parliament and the Council and its main functions are:

- a) the initiation of criminal investigation proceedings, as well as the proposal for the initiation of criminal proceedings by the competent national authorities, in particular those relating to infractions that harm the financial interests of the Union, as well as the coordination of such investigations and proceedings; in all cases, formal acts of a procedural nature will be carried out by the competent national officials;

⁵⁵ OLAF has among the most significant operations carried out, in the field of corruption, those referred to: the irregular use of EU funds for projects in areas such as external aid, subsidies for agriculture and for environmental conservation; financing non-existent agricultural products (such as non-produced fruit juices or unplanted trees).

- b) the intensification of judicial cooperation through the resolution of conflicts of jurisdiction and close cooperation with the European Judicial Network.

This body will be evaluated in the exercise of its activities not only by the European Parliament, but also by the national parliaments⁵⁶.

C) Europol. This body is the European Police Office. It was created by the Convention based on Article K.3 of the Treaty of the European Union establishing a European Police Office (Europol Convention), signed in Brussels on July 26, 1995. With Decision 2009/371/JAI, of April 6, it changed from being an international organization to being a European agency. Its functioning is governed by the EU Regulation 2016/794 of the Parliament and the Council of May 11.

Europol's role is to support and strengthen the actions of law enforcement authorities and other services with coercive functions of the member states, as well as their mutual cooperation in the prevention of serious crime affecting two or more member states, of terrorism and of the forms of delinquency that harm a common interest which is the object of the EU policy⁵⁷. The European Parliament and the Council determine the structure, functioning, scope and powers of Europol. These competences are basically the following:

- a) the collection, storage, processing, analysis and exchange of information by the European Information System (EIS), in particular that transmitted by the authorities of the member states or third countries or third instances;
- b) the coordination, organization and conduct of investigations and operational activities, carried out jointly with the competent authorities of the member states or within the framework of joint investigation teams, or, where appropriate, in collaboration with Eurojust.

The European Parliament, Council, Commission and national Parliaments are responsible for monitoring Europol activities, institutions to which they will send an annual report, and the European Data Protection Supervisor (EDPS)⁵⁸ will monitor the use of the data they handle. In any case, any operational activity of Europol must be conducted in contact with and in agreement with the authorities of the member states whose territory is affected and the application of coercive measures will correspond exclusively to the competent national authorities.

56 Extensively about roles, functions and relations with other EU bodies, see N. Alonso /2012/: Eurojust, a la vanguardia de la cooperación judicial en materia penal en la Unión Europea, *Revista de Derecho Comunitario Europeo*, Nº 16, p. 130 f.

57 Among its most recent and relevant actions in the fight against corruption could be highlighted, by the number of European countries affected, the one carried out in 13 EU countries in which 425 "dubious" football matches were analyzed, disputed in Europe between 2009 and 2011 (70 of them in Germany, country in which already 14 people have been condemned for such events; Great Britain, Switzerland, Finland, Hungary, Belgium, Croatia or Slovenia would complete the list of countries involved).

58 See C. Blasi /2016/: El reglamento europeo de Europol: Un nuevo marco jurídico para el intercambio de datos policiales en la UE, *Revista General de Derecho Europeo*, Nº. 40 pp. 203 f., 217.

D) European Public Prosecutor’s Office. The forecast of its creation is included in Article 86 of the TFEU, with the *Corpus Iuris* being already foreseen in 1997. It was scheduled to start working in 2016, having suffered a further delay. The essential mission of this body will be, in an early stage, the fight against corruption offences that affect the financial interests of the Community, in close cooperation with Eurojust. Its structure provides for the appointment of a European Prosecutor with delegated prosecutors in each of the member states. What sets OLAF apart from the European Public Prosecutor’s Office is the legal nature of its investigations: OLAF conducts administrative investigations, whereas when the European Public Prosecutor’s Office does this it acts as a judicial body⁵⁹.

E) The European Court of Auditors (Article 285 TFEU). This body is composed of one representative from each member state. In addition to auditing EU income and expenditure, it oversees any person or organization that manages EU funds, in particular through spot checks in EU institutions (especially the Commission), in member states and in countries that they receive help from the EU, when they suspect fraud, corruption or other illegal activities, informing OLAF so they can act⁶⁰.

F) The European Ombudsman. This figure was created by the Treaty of Maastricht. They are elected by the European Parliament⁶¹. They have an essential role when it comes to ensuring transparency in the functioning of EU institutions, also investigating claims in cases of maladministration due to, among other causes, those closely linked to the phenomenon of corruption, such as: abuse of power, omission of information, refusal to provide information, or due to incorrect procedures. Their action takes place through different tiered levels of action depending on the seriousness of the matter: a) inform the institution affected by the claim; b) amicable solution; c) making recommendations to the responsible institution; d) if such recommendations are not accepted, a special report can be presented to the European Parliament to take appropriate action.

CRITICAL ASSESSMENT

The fight against corruption, in most of the EU Member States, already had the way paved by the normative and/or organic instruments that emerged under the umbrella of the UN, the OECD or the Council of Europe⁶². What the EU has done has been to intensify, through the process of its political unity, the fight against corruption both within the organization and in the member states.

59 D. Ordoñez /2016/: La corrupción en el seno de las instituciones de la Unión Europea: responsabilidades, investigación administrativa y control judicial, *R.V.A.P.*, N° 104-II, p. 248.

60 C. Ibáñez /2014/: El control jurisdiccional de las cuentas públicas en Europa: El tribunal de Cuentas Europeo y el Tribunal de Cuentas Español, *Teoría y Realidad Constitucional*, N° 33, p. 344 f.

61 M. F. Quirós Soro /2012/: La transparencia en la Unión Europea, *MÉI: Métodos de Información*, V. 3, N° 5, p. 180 f.

62 But, as J. M. Arias /2012/: Algunas reflexiones sobre la política anticorrupción en la Unión Europea, *Diario La Ley*, N° 7989, p. 2, said: “the pre-existence of this heterogeneous regulatory body has generated dysfunctions”.

Corruption has become a more visible phenomenon⁶³ in the context of the global economic crisis⁶⁴. It is not that there is more corruption in the EU states in the 21st century, but that European citizenship has developed a greater sensitivity to it, both in relation to that existing in the respective member state, and to that arising from the functioning of the EU institutions themselves⁶⁵, because EU has been gradually accumulating more power and, therefore, more risks and cases of corruption⁶⁶.

The date of incorporation of each member state into the EU determines, although not definitively, the corruption indices of each of them, since other geographic or socio-cultural factors such as the North-South and West dynamics have to be taken into account in which the second part of the disjunction is always the one with the highest levels of corruption⁶⁷.

Although the normative and organic framework could be described as sufficient, it has not been accompanied in all the member states with sufficient adequate material and personal resources for its proper application⁶⁸. Moreover, in the EU states with the highest levels of corruption, there is a weak political will to tackle the fight against corruption in a determined way. The latter appears to be shrouded in symbolic and programmatic discourses that are translated, in many cases, into a slow and ineffective pace of the incorporation of community guidelines, their application being highly conditioned by the economic interests of large companies, influential political parties, whose interests are opposed to, on many occasions, the fight against corruption, or, when this is not the case, by the umbrella that can shelter all of the above: state sovereignty.

In any case, the EU wants the fight against corruption to be unified, in other words, to be based on the consideration that a single body fighting corruption contributes to improving coordination, together with the harmonizing element of the European regulations (Regulations, Framework Decisions or Directives).

On the other hand, the fight against corruption within the EU has been centered around three thematic concentric circles that have been and are: organized crime, money laundering and, above all, the fight against the fraud of their financial interests, as well as tax evasion, which have focused the interest of the European substantive regulation from its beginnings, as also demonstrated by the very conformation and powers of the bodies established to combat corruption. Of these, OLAF is acting as, together with Eurojust, the real flagship in the pursuit of corruption,

63 G. Martinico /2014/: EU crisis and constitutional mutations: a review article, *Revista de Estudios Políticos*, N° 165, p. 247 f.

64 European Commission: *op. cit.*, pp. 3, 8.

65 Citizen awareness, as a key in the struggle against corruption, is characteristic of the EU in relation to the other international organizations studied and operates as a key element not only for the prevention of corruption and, therefore, to avoid the use of criminal law, but also as a facilitator of its application when non-criminal sanctions are insufficient.

66 As it became clear in 1999, qualified as “annus horribilis”, by the numerous cases of corruption detected within the European Commission; see D. Ordoñez: *op. cit.*, p. 239 f.

67 European Commission: *op. cit.*, p. 2.

68 I. Berdugo /2015/: *op. cit.*, p. 246.

until the figure of the European Public Prosecutor is established in the future. However, there are problems of configuration and organization, resulting from the complex delimitation of OLAF jurisdictional boundaries and certain operational deficiencies⁶⁹, as well as in the prevention system developed within OLAF: the EWS⁷⁰.

Another feature of European criminal policy in the fight against corruption is what has come to be called the “technocratization” of criminal law. This feature in itself can be positive in that it could mean a greater disconnection of partisan interests or demagogic positions. However, it has had problems: less democratic support, inasmuch as, until the Treaty of Lisbon, the intervention of the European Parliament was limited, and, on the other hand, it has led to an uncritical and hyperbolic acceptance of the European guidelines⁷¹.

Despite all this normative and organic arsenal existing in the EU, at the present time it cannot be said that there is an “EU criminal law”⁷², that is, a criminal law of supra-state scope emanating from the European Parliament, or a supranational criminal jurisdiction for prosecution, although they have been created, as is the case of OLAF, supranational administrative bodies to fight against corruption, as well as generating a significant, although not always sufficient, level of coordination between police, prosecutorial and judicial bodies in the orbit of the EU.

In sum, there is still a significant way to go. The regulation and harmonization of European regulations on banking secrecy⁷³ are at an incipient stage, although it

69 In this sense, M. Fuertes: *op. cit.*, p. 19 f., highlights the need to undertake reforms both in protection of the rights of the people under investigation, and the streamlining and facilitation of complaints, and notes that the European Public Prosecutor has not yet been created.

70 In a particular case (Case 637/2009/(TN)(ELB)FOR) –in relation to the claim of a company against its registration in the OLAF-EWS, arguing that it was irregular, as well as the refusal of OLAF to lift the alert, and alleging that it was not subject to any judicial procedure–, the European Ombudsman recommended a friendly solution, requesting OLAF to lift the W3b alert assigned to the complainant, and examine the information that was in the possession of OLAF in order to determine if another type of alert was more appropriate. OLAF did not follow the European Ombudsman’s proposal, based on its own investigation into the complaint, so the European Ombudsman closed his own investigation with a critical comment in which he also highlighted the unequal rigor with which European citizens were treated, depending on the member state to which they belonged, at the time of being classified in the EWS.

71 N. Corral /2016/: La irracionalidad de la Política criminal de la Unión Europea, *InDret*, N° 4, p. 20.

72 A. Cuerda /1995/: *¿Ostentan ius puniendi las Comunidades Europeas?*, en VVAA, “*Hacia un Derecho Penal económico europeo. (Jornadas en honor del Profesor Klaus Tiedemman)*” (Madrid, BOE) p. 625; N. De La Mata, L. Hernández /2012/: La normativa de la Unión Europea y su aplicación en el Derecho penal ambiental e informático” – in: *Garantías constitucionales y Derecho penal europeo* (S. Mir; M. Corcoy, eds.) (Madrid, Marcial Pons), pp. 495–497, emphasize the fact that strictly speaking, no clause of the funding Treaties of EU can substantiate the existence of a European criminal law in the strict sense, which does not preclude referring to a “Community criminal system”; in the same vein, H. Satzger /2007/ maintains that Criminal law in the proper sense, that is, directly applicable European criminal offenses do not exist today, which does acknowledge is the existence of a European sanctioning administrative Law. Although the redoubt referred to the protection of its financial interests has always been at the origin of any proposal of a European corpus iuris in criminal matters, and is recognized by the authors as – almost – a European criminal law.

73 In this area, mention should be made of the Agreements with countries such as Switzerland, Andorra, Monaco, Liechtenstein and San Marino (in force from 2018) that allow Member States

should be recognized that the main problem in this matter comes from the third states where assets proceeding from corruption flow to after financial engineering operations.

There is also a lack of a determined and joint fight against tax havens, in relation to which there is a notable disparity between the regulations of the member states among themselves⁷⁴, or, when this not the case, part of the territory of a state of the EU functions as a tax haven.

Another matter that remains in the shadow is the regulation of the lobbies operating around the European institutions⁷⁵, whose registration is not mandatory, but voluntary⁷⁶. This situation contrasts, in addition, with that of the member states, since most of them do not even have a regulation regulating lobbying or those that have developed such activity, have done so even less rigorously than the EU⁷⁷.

Finally, this very asymmetry between the EU and its member states is observed in terms of control over the financing of political parties⁷⁸, without contemplating,

of EU to tax its citizens who have accounts in those countries and allows that in those states measures equivalent to those of the EU are applied. There are ongoing talks with Singapore, Hong Kong and Macao. See as well: Council Decision 2009/127/EC of 18 December 2008 concerning the signature, on behalf of the European Community, of the Cooperation Agreement between the European Community and its Member States, of the one part, and the Swiss Confederation, of the other part, to combat fraud and any other illegal activity to the detriment of their financial interests; on agreements with other states, see, http://europa.eu/rapid/press-release_IP-16-288_en.htm, and also: Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee – Promoting Good Governance in Tax Matters /* COM/2009/0201 final */.

74 See supra n. 23.

75 F. Morata /1995/: *Influir para decidir: la incidencia de los lobbies en la Unión Europea*, *Revista de Estudios Políticos*, N° 90 p. 131, shows how the lobbies are consubstantial to the process of creation of the EU “in order to put pressure on governments and create the loyalties necessary to deepen the integration process until it becomes irreversible”.

76 In this sense, D. Lundy, O. Hoedeman /2016/: *Lobbies en la Unión Europea, ¿quién está al mando?* *Ahora* N° 20. Available on: <https://www.ahorasemanal.es/lobbies-en-la-union-europea-quien-esta-al-mando>. Date of consultation: December 1. 2016 p. 1, draw attention as they do not appear in the aforementioned EU Registry: “the Standard & Poor’s rating agency, the Anglo-American mining company, the Maersk transport conglomerate, the Levi’s clothing brand or the management service provider of risks AON. There is also a long list of American law firms missing. This situation, with incomplete and inaccurate information, reflects the modest approach and lack of political will in this matter (...) More than 90% of the meetings were held with the financial sector and banking. Only 4% were produced with NGOs or civil society groups (...) The consulting firms that lobby are famous for their ability to have the most influential figures within the European institutions. The famous revolving doors”.

77 Cf. I. M. Álvarez, F. De Montalvo /2014/: *Los lobbies en el marco de la Unión Europea: una reflexión a propósito de su regulación en España*, *Teoría y Realidad Constitucional*, N° 33 p. 368 f. and 374, who call the regulation of the Member States of the EU that have regulated the lobbying of “little demanding”, in contrast with the most rigorous regulation of the USA or Canada.

78 To date, regulation in this area is limited to European parties and foundations Regulation (EU, EURATOM) n° 1141/2014 of the European Parliament and of the Council of 22 October 2014, on the statute and funding of European political parties and European political foundations, without there being Community provisions on common guidelines for the Member States, in order to avoid irregular funding of political parties and trade unions at the state, regional or municipal level.

for now, what is also a source of corruption: irregular financing of political parties and trade union organizations.

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BORBA PROTIV KORUPCIJE U EVROPI: SVETLA I SENKE

APSTRAKT

Autor se bavi pitanjem borbe protiv korupcije na prostoru Evrope kroz analizu organizacionih i krivičnopравnih normativnih instrumenata evropskih internacionalnih i nadnacionalnih organizacija. Stvaranju normativnih okvira za borbu protiv korupcije pod okriljem Saveeta Evrope, OECD-a i Evropske Unije, doprinela je potreba država da prevaziđu koruptivnu aktivnost u različitim oblastima društvenog i ekonomskog života koju je svetska ekonomska kriza dodatno pojačala. To je učinjeno između ostalog i donošenjem odgovarajućih propisa na polju krivičnog prava i stvaranjem nekih organizacionih okvira za njihovu primenu. Međutim, iako određena regulativa postoji, još uvek se ne može govoriti o nadnacionalnom, evropskom krivičnom pravu. Prema mišljenju autora, ono što često predstavlja najveći problem je nedostatak političke volje na najvišim nivoima, uz uslovljenost više ili manje efikasnog delovanja zainteresovanih država geografskim, socio-ekonomskim i drugim faktorima.

Ključne reči: Korupcija, internacionalne organizacije, Savet Evrope, OECD, Evropska Unija