Introduction

Since the end of communism in Central and Eastern Europe, corruption has emerged as a major political issue and a serious impediment to efforts for social and economic development in the region. As a result of the biggest enlargement process in European Union (EU) history, eight post-communist countries (the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Slovakia and Slovenia) joined the EU in 2004.

The pre-accession process coincided with the collapse of communism and the EU was in a unique position to guide the Central and Eastern European (CEE) countries in their democratic and economic transitions. Combating corruption gained unprecedented importance during this process. It was recognised as a central element of democratic governance and the rule of law and became an explicit condition for EU membership. Throughout the pre-accession period, the EU attempted to tackle the issue of corruption in the CEE countries. The EU influenced their national anti-corruption policies and demanded reforms from the candidate countries in a way that had never occurred within the EU Member States.

This book does not offer a systematic treatment of the causes of the phenomenon of corruption or its principal characteristics. Therefore, there is also no significant analysis of the capacity of legal regulation to penetrate this phenomenon and bring about effective change. Instead, the book focuses on the EU anti-corruption policy in the specific context of the 2004 enlargement. In particular, it answers three important questions: what is the policy of the EU against corruption within the CEE countries after accession? Is this policy enough to address the problem of corruption across the Member States? And, if not, should the EU develop a more comprehensive framework?

The book builds upon six crucial findings:

- The EU does not have a clear competence under either the EC or the EU Treaty to prevent and combat corruption within the Member States.
- The extent of corruption within the CEE candidate countries forced the EU to develop a new anti-corruption policy for the purpose of the enlargement process.
- Accession represented a challenge but also a great opportunity to influence reforms in the post-communist countries. The enormous leverage within the accession process allowed the EU to influence the anti-corruption policies of the candidate countries to an unprecedented degree.
- The candidate countries had to comply with broad anti-corruption standards and their national policies were under rigorous scrutiny by the EU. The focus was on formal compliance with the EU and international instruments against corruption, rather than implementation of fundamental anti-corruption reforms. The EU did not fully take advantage of the potential offered by the accession process and its efforts were hamstrung by the lack of a framework against corruption within the Member States.
- As a result of the 2004 enlargement, the EU acquired experience in setting anti-corruption standards and evaluating progress in meeting them across the countries. The EU used this experience in its policy towards Romania and Bulgaria to develop a more robust system of post-accession monitoring.
- Corruption in the new Member States is an ongoing challenge and should continue to be a priority. The lack of a coherent anti-corruption framework within the EU and the disappointing results of the accession process may discredit plans for further enlargement.

I will argue that the EU should develop a more coherent anti-corruption policy for three main reasons. First, the existing anti-corruption framework does not respond to the urgent need to enhance the anti-corruption standards across the Member States and to provide adequate monitoring of those standards. Second, the EU policy does not safeguard the achievements of the pre-accession process, and, as a result, the anti-corruption standards are diminished once a country joins the EU. Third, it is appropriate for the EU to act strongly against corruption, as it has the necessary tools and the political capacity to develop an adequate strategy to tackle this problem.

The argument is presented in the legal and political context as of July 2009, except where otherwise indicated. It is set out in seven chapters.

Chapter 1 discusses why corruption emerged as an international policy issue in the 1990s and surveys the major international initiatives in this area. The chapter also introduces the EU's definition of corruption and points at strengths and weaknesses of this definition. Finally, the chapter analyses the causes of corruption in the CEE countries and explains the importance of the fight against corruption for the success of their democratic transitions.

Chapter 2 introduces a legal and historical context for the development of the EU policy. The chapter analyses the EU legal powers in the area of anti-corruption under the EC and EU Treaties. The chapter argues that while the EU powers under the EC Treaty are limited by legal factors, the action against corruption under the EU Treaty is constrained by the lack of the political will of the Member States to give up this national field of competence. Next, the chapter moves on to explain that the EU approached corruption in its own unique way through policies aiming at ensuring the proper functioning of the internal market and protection of the European Communities' (EC) financial interests.

Chapter 3 presents an overview of the EU anti-corruption framework. The chapter underlines the limited nature of this framework in comparison to the relevant international initiatives. Furthermore, the chapter argues that the EU system for monitoring the implementation of the anti-corruption instruments is fragmented and ineffective.

Chapter 4 explains how the fight against corruption became one of the central conditions for EU membership. The chapter argues that the EU was in a unique position to affect domestic policy-making in the CEE countries. The chapter also examines when in the pre-accession process the EU potential to influence the content of anti-corruption reforms was the greatest.

Chapter 5 analyses how the EU evaluated the extent of corruption within the CEE candidate countries. The chapter discusses the new mechanisms and institutions in this area developed by the EU for the purposes of the pre-accession policy. Finally, the chapter points at weaknesses and the limited nature of the EU evaluation.

Chapter 6 focuses on the EU strategy against corruption within the candidate countries. The chapter begins with discussion of anti-corruption standards set by the EU, making a clear distinction between requirements of the *acquis* and informal standards developed by the EU specifically for the CEE countries. Finally, using the example of Poland, the chapter assesses the impact of the EU accession on

the anti-corruption policies of the candidate countries and points at its limits.

Chapter 7 evaluates the impact of the 2004 enlargement on the EU policy against corruption. The chapter shows the reinforcement of the EU anti-corruption strategy towards Romania and Bulgaria and argues that verification mechanisms developed by the EU are ineffective. Furthermore, the chapter examines the possible developments of the EU policy against corruption.

Finally, the conclusion will present the specific policy recommendations. The case will be made that the EU should develop its own soft law anti-corruption framework in the form of mutually agreed non-legally binding policy recommendations.

1 Corruption: concept, importance and international response

Corruption is not a new phenomenon. However, it was only in the 1990s that it first emerged as a global policy problem that could no longer be addressed purely through domestic means. In the era of globalisation, a truly international response involving major international policy players is vital to the success of anti-corruption initiatives.

The goal of this chapter is to introduce the central concept of corruption and give an overview of the major international instruments in this area. To this end, the chapter starts with a discussion of the definition of corruption adopted by the EU.[1] It points out the strengths and weaknesses of this definition and compares it with definitions adopted by other international organisations. Following this discussion, the chapter moves on to analyse the prevalence, causes and consequences of corruption in the CEE candidate countries.

EU policy within the 2004 accession process was based on the perception that corruption in the CEE candidate countries was more widespread than in the Member States. This chapter examines this claim by presenting evidence of corruption within the CEE countries before the accession. In addition, the chapter discusses why the heritage of communism and the nature of political and economic transitions made the CEE countries particularly vulnerable to corruption.

Beyond this, the chapter goes on to look at the emergence of international cooperation against corruption in the 1990s and explains why corruption became an international policy problem. Furthermore, the chapter also shows the evolution of international cooperation, surveys

[1] The term EU is normally used throughout the book, even when it is in some cases only the first pillar of the EU. The term Community is referred to when it is necessary for clarity of competences under the first pillar.

the major multilateral initiatives against corruption, and discusses how international organisations can help in preventing and combating corruption across countries. Finally, the chapter examines the monitoring mechanisms relevant to the fight against corruption and emphasises the importance of an effective evaluation system for the success of the anti-corruption initiatives.

1.1. The EU's definition of corruption

When researching corruption, it is apparent from the outset that there is no single and agreed definition as to what constitutes corruption. The concept of corruption is subject to an ongoing debate among political scientists, lawyers, economists and social scientists, who all focus on different aspects of corruption. As has been pointed out, 'no precise definition of corruption can be found which applies to all forms, types and degrees of corruption, or which would be accepted universally as covering all acts, which are considered in every jurisdiction as constituting corruption'.[2]

While the classical definitions of corruption referred to destruction of public morality and 'a decline … of the virtues … of a state or a ruler'[3], modern definitions focus on the actions of individuals and their 'discretionary freedom or power in the decision making process'.[4] According to one of the most cited definitions in the literature introduced by Klitgaard, corruption is likely to occur in conditions where an official has monopoly power and a degree of discretion over certain goods or services, and where the system of accountability is weak.[5]

The European Parliament (EP) provided its first definition of corruption in 1995 as 'the behaviour of persons with public or private responsibilities who fail to fulfil their duties because a financial or other advantage has been granted or directly or indirectly offered to them in return for actions or omissions in the course of their duties'.[6]

[2] Council of Europe, 'Programme of Action Against Corruption, Multidisciplinary Group on Corruption', (1996) GMC (96) 95, at 14.
[3] U. von Alemann, 'The Unknown Depths of Political Theory: The Case for a Multidimensional Concept of Corruption', (2004) 42 *Crime, Law & Social Change* 25–34, at 26.
[4] P. C. van Duyne, 'Will "Caligula" Go Transparent?', (2001) 1(2) *Forum on Crime and Society* 73–98, at 74.
[5] R. Klitgaard, *Controlling Corruption* (University of California Press, 1988), at 75.
[6] European Parliament, 'Resolution on Combating Corruption in Europe', (1995), A4-???0314/1995, OJ C 017/443, 22.1.1996.

In its first Communication on EU policy against corruption in 1997, the Commission clarified this concept by stating that corruption refers to 'any abuse of power or impropriety in the decision making process brought about by some undue inducement or benefit'.[7] In 1998 this definition was endorsed by the European Court of Auditors.[8]

The Commission subsequently refined the concept of corruption at the EU level in 2003 as an 'abuse of power for private gain',[9] explicitly stating that this definition embraces both the public and private sectors. It is important to emphasise that, as far as the definition of corruption is concerned, the EU was in the vanguard. In contrast to definitions employed by other international agencies, which placed the public sector at the centre, the EU's definition of corruption, since its first formulation in 1995, included both public and private sectors. The Commission emphasised that it did not wish to adopt traditional definitions followed by the World Bank and the leading non-governmental organisation in this area, Transparency International, which viewed corruption as 'the use of one's *public* position for illegitimate private gains'.[10] Over time, Transparency International also adopted a broader definition of corruption as 'the misuse of entrusted power for private gain'[11] to include the private sector. The World Bank's definition, however, remains deliberately confined to the public sector, as the World Bank lends primarily to governments and supports government policies, programmes and projects.[12]

At the outset, only public sector corruption (corruption carried out by or against public officials) was subject to studies and legal regulation at national and international levels. Regulation of private sector corruption (corruption within business activities) is more recent. This late response can be attributed to the perception that the owners of

[7] Commission (EC), 'Communication from the Commission to the Council and the European Parliament on a Union Policy Against Corruption', COM(97) 192 final, 21.05.1997, at 1.

[8] Court of Auditors, 'Special Report No. 8/98', OJ C 230, 22.7.1998, para 6.1.

[9] Commission (EC), 'Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee on a Comprehensive EU Policy Against Corruption', COM(2003) 317 final, 28.5.2003, at 6.

[10] *Ibid*.

[11] Transparency International, 'Frequently Asked Questions About Corruption', see: http://www.transparency.org/news_room/faq/corruption_faq#faqcorr1, accessed 1 July 2009.

[12] World Bank, *Helping Countries Combat Corruption: The Role of the World Bank* (World Bank, 1997), at 9: http://www.worldbank.org/publicsector/anticorrupt/corruptn/corrptn.pdf, accessed 1 July 2009.

companies would take the necessary measures to prevent employees from acting in ways that are likely to harm the organisation and that there are fewer incentives for corruption in the private sector, as in economies with effective competition inefficient behaviour is penalised by the market.[13] Over time, however, an agreement emerged that private sector corruption constituted a serious problem and had to be met with an international response. There were three main reasons for this. First, the private sector corruption also had international ramifications. Second, it has been pointed out that 'the private sector is larger than the public sector in many countries, and the line between the two sectors is blurred by privatisation, outsourcing and other developments'.[14] Third, as Webb has noted, the huge economic influence of multinational corporations and the leverage they had in relation to States, meant that they also had to be a target of an international anti-corruption strategy.[15]

When defining corruption for the purposes of EU policy, the Commission drew a distinction between a narrow criminal law definition and a broader concept of corruption used for purposes of prevention policy. A similar distinction is also reflected in the policies of other leading international organisations in the area of anti-corruption, such as the United Nations (UN) and the Council of Europe.

The distinction between the criminal law definition and the broader concept of corruption adopted for the purposes of prevention is very important. Criminal law definitions constitute a basis for prosecuting offenders and therefore must be clear-cut and precise. Clarity of definition is a safeguard against the discretionary power of public authorities. As a result, the criminal law usually does not define corruption in a broader sense, but is restricted only to certain types of corrupt conduct which can be more precisely defined, such as taking or giving bribes.[16]

[13] A. Argandoña, 'Private-to-Private Corruption', (2003), 47 *Journal of Business Ethics* 253–267, at 253.

[14] Transparency International Press Release, 'UN Convention Must Criminalise Private Sector Corruption' (2003): http://www.transparency.org/news_room/latest_news/press_releases/2003/2003_03_11_un_convention, accessed 1 July 2009.

[15] P. Webb, 'The United Nations Convention Against Corruption. Global Achievement or Missed Opportunity?', (2005) 8(1) *Journal of International Economic Law* 191–229, at 213.

[16] United Nations Office for Drug Control and Crime Prevention, *Global Dynamics of Corruption, The Role of the United Nations Helping Member States Build Integrity to Curb Corruption*, Global Programme Against Corruption Conferences, Vienna, October 2002, at 3: http://www.unodc.org/pdf/crime/gpacpublications/cicp3.pdf, accessed 1 July 2009.

The EU restricts its criminal law definition to 'passive' and 'active' bribery. In short, 'passive' bribery refers to taking bribes and 'active' bribery refers to giving bribes by a person who induces corruption. As will be discussed in more detail in Chapter 3, the definition of bribery adopted in EU instruments does not differ in any substantial way from bribery as defined in other international instruments. However, it is important to emphasise that bribery is only one of the types of corruption, and there are many other common forms, such as favouritism, nepotism, embezzlement, trading in influence, buying votes or illegal political party financing.[17]

In contrast to the EU, the UN and the Council of Europe adopt broader approaches and criminalise other types of corruption as well. The UN Convention Against Corruption (UNCAC) adopted in 2003 focuses on the criminalisation of specific types of corrupt conduct, such as bribery, embezzlement, trading in influence and abuse of functions.[18] The Council of Europe Criminal Law Convention on Corruption prescribes criminalisation of bribery offences and trading in influence.[19] It is also worthy of note that the Council of Europe introduced the definition of corruption, for the purposes of civil law, as 'requesting, offering, giving or accepting directly or indirectly a bribe or any other undue advantage or the prospect thereof, which distorts the proper performance of any duty or behaviour required of the recipient of the bribe, the undue advantage or the prospect thereof'.[20]

For the purposes of prevention, the EU and the UN accept the same definition of corruption as an 'abuse of power for private gain'.[21] Meanwhile, the Council of Europe adopts a slightly narrower approach by accepting that the definition of corruption cannot be

[17] For discussion see: United Nations Office on Drugs and Crime, *The Global Programme Against Corruption. UN Anti-Corruption Toolkit* (3rd edn, UNODC, 2004): http://www.unodc.org/pdf/corruption/publications_toolkit_sep04.pdf, accessed 1 July 2009.

[18] Articles 15–19 of the United Nations Convention Against Corruption, Resolution 58/4 (adopted 31 October 2003, entered into force 14 December 2005) (the UNCAC): http://www.unodc.org/pdf/crime/convention_corruption/signing/Convention-e.pdf, accessed 1 July 2009.

[19] Articles 2–12 Council of Europe, Criminal Law Convention on Corruption, ETS No. 173 (adopted 27 January 1999, entered into force 1 July 2002) (the Criminal Law Convention): http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=173&CM=1&DF=7/11/2007&CL=ENG, accessed 1 July 2009.

[20] Council of Europe, 'Civil Law Convention on Corruption: Explanatory Report', ETS No. 174: http://conventions.coe.int/Treaty/EN/Reports/Html/174.htm, accessed 1 July 2009.

[21] United Nations Office for Drug Control and Crime Prevention (n 16), at 3.

unduly broad and cover a number of general offences committed by people in the course of their employment, such as fraud, embezzlement, theft and other acts which prejudice the employer, and explains that 'corruption is not about putting one's fingers in the till but more about the abuse of power or improbability in the decision-making process'.[22]

The concept of corruption for the purposes of prevention must be far more inclusive. As the Council of Europe has noted:

> no comprehensive and all-embracing strategy in the fight against corruption can ever be formulated, if one were to limit such measures to criminal corruption alone. … a corrupt practice or system might not as yet be considered by law an offence, but such an omission would not render it less corrupt in its character.[23]

The concept used for purposes of prevention should embrace the criminal law definition, but it cannot be limited to it. Apart from criminalisation, a comprehensive anti-corruption strategy must focus on enhancing integrity and accountability. Criminal law regulations are not flexible enough to embrace all types of corrupt conduct. The concept of corruption employed for the purposes of prevention should target not only the conduct, which is illegal at a given time, but also activity that is unethical. Adoption of a broader concept also ensures that no corrupt conduct will be excluded from policy in the future.

The EU's definition of corruption as the 'abuse of power for private gain' is broad enough to include most forms of corruption. Its scope, however, is not entirely clear. Questions arise how to define vague concepts like 'abuse of power' or 'private gain'. As Alemann has noted, this 'definition starts from the assumption that a concrete, formal and informal system of laws and norms exists which is accepted by all sides' and that is not the case.[24] Often the rules may not be exactly defined as to what is allowed and what is not. For example, it is hard to state in a clear way how big the private gain should be in order to fall under this definition. Some authors have argued that there ought to be a threshold value in order to exclude minor benefits, such as in the extreme example where a civil servant takes a pencil belonging to his employers.[25]

[22] Council of Europe (n 2), at 15. [23] Council of Europe (n 2), at 16.
[24] Alemann (n 3), at 29. [25] *Ibid*.