

Corruption and Bribery in the Wake of the COVID-19 Pandemic

Responses at the International and EU Levels

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ABSTRACT

This article describes the heightened risk of corruption and other criminal phenomena that accompany the financial stimulus and economic recovery measures taken by governments in the wake of the COVID-19 pandemic. International organisations (United Nations, OECD) and European organisations (Council of Europe, European Union) have identified these risks – including the possible involvement of organised crime – and recommended taking timely and appropriate countermeasures ranging from prevention to prosecution. The European Union has established a new conditionality mechanism for funding post-COVID-19 recovery: if a Member State does not respect the rule of law, this could undermine the principle of sound financial management, which may ultimately lead to the denial of Union funds. These measures should ideally have a positive long-term effect on transparency and good governance.

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With the end to the lockdowns nearing in most Member States, we seem to be slowly overcoming the most critical period of the COVID-19 pandemic in the European Union. However, we are probably still far from having fully assessed its medium- and long-term consequences, not only in terms of human suffering – which matters most – but also in terms of legal uncertainty and economic disruption on a global scale.

This unprecedented and prolonged situation of emergency, with its destabilising effect on our social fabric and governmental structures, has created a favorable environment for criminal activities and, specifically, for corruption and bribery. Therefore, responses to this crisis from international organisations, states, and private entities should also include mechanisms for preventing, detecting, and prosecuting corruption and bribery. This is all the more urgent since governments across the world keep injecting hundreds of billions of euros to counter the negative effects of the pandemic and support investment. Recent information from media and open sources confirm the concrete risk of corrupt behaviours related to the pandemic,¹ often in relation to public procurement contracts.²

I. Preventing and Combating COVID-19-Related Corruption – Actions at the International Level

The international community and international and multilateral organisations/bodies engaged in the prevention of and fight against corruption, as well as leading international law enforcement institutions (e.g., Euro-pol³ and Interpol), civil society organisations (e.g., Transparency International⁴), and sectoral studies,⁵ have clearly depicted the situation along these lines. This is why identifying and addressing corruption risks will become increasingly important in order to protect trust in public institutions and businesses, and to preserve public confidence in the ability of governments to mobilise an effective crisis response in the future. Since March 2020, all major multilateral fora have aimed to draw attention to the issue of corruption risks in the health sector, both in relation to malfeasance, in general, and to vaccines, in particular. With different emphases, these activities have attempted to identify the specific risks of corruption in the health sector and to indicate the tools and strategies to counter or at least mitigate them.

In particular, in October 2020, *Ghada Fathi Waly*, Director-General/Executive Director of the United Nations Office on Drugs and Crime (UNODC) – the world’s largest agency for combating drugs trafficking, organised crime and corruption – sounded the alarm already. At the meeting of the UN countries who are party to the Palermo Convention against Transnational Organised Crime (UNTOC) in Vienna, the UN high official remarked: ⁶

“The placing of fake COVID vaccines on the online market is the most serious criminal threat today. [...] Falsified COVID vaccines will soon be a lethal reality and governments need to be prepared to counter this threat.”

The Secretary-General of the United Nations, *António Guterres*, made similar comments at the same event.⁷ UNODC also presented a policy guidance document for the States Parties to the UN Convention Against Corruption (UNCAC) that aims at preventing corruption “in the allocation and distribution of emergency economic rescue packages in the context and aftermath of the Covid-19 pandemic.”⁸

Within the Organisation for Economic Cooperation and Development (OECD), the Working Group on Bribery in International Business Transactions (WGB), the monitoring body of the 1997 OECD anti-bribery convention, underlined in Spring 2020 that some corruption risks may already be present, due to the actions put in place to mitigate the health and economic crisis generated by the pandemic.⁹ Other major risks may emerge in the medium and long terms, in parallel with the full implementation of robust policies that aim to remedy the

economic consequences of COVID-19. Against this background, the related risks for citizens' trust in public institutions and business are readily apparent. Another closely-related field is the counterfeiting of medical products. Noteworthy in this context is a special joint publication by the OECD and the EU Intellectual Property Office (EUIPO) that is devoted entirely to the counterfeiting of medicines.¹⁰ In a similar vein, the Council of the European Union recently called on Member States to intensify their efforts against COVID-19-related counterfeiting and piracy, particularly given the connection of these crimes with international economic and financial crime and the involvement of organised criminal groups.¹¹ This stocktaking exercise may help identify existing legal differences between the Member States' criminal law frameworks, possible criminal law and prosecution gaps, and legal and practical obstacles to cross-border cooperation within the EU. The Financial Action Task Force (FATF) – the global money laundering and terrorist financing watchdog active in the OECD Headquarters – also produced a statement and a paper on the impact of the COVID-19 crisis as regards the monitoring of illicit financial flows and the combating of money laundering and terrorist financing.¹²

In light of the growing international attention paid to health sector-related corruption in the course of the pandemic, the G20 Anti-Corruption Working Group (ACWG) decided to collect national experiences in response to this threat and drew up a Compendium of Good Practices¹³ offering, among other things, an overview of corruption risk hypotheses specifically related to vaccines.¹⁴ The adoption of High Level Principles (HLP) by the ACWG is expected by the end of the Italian Presidency. The current draft provides that countries' efforts to tackle corruption in emergencies should be designed and implemented along three building blocks:

- “Preparedness”, focusing on the planning and training for future events;
- “Mitigation”, including measures to prevent or reduce the impact and consequences of corruption and related crimes when a crisis or emergency occurs;
- “Response and recovery”, including anti-corruption measures to ensure a prompt and smooth cooperation among authorities, and a clear set of recovery rules and practices for effective restoration.

At the European level, the Council of Europe's Group of States against Corruption (GRECO) adopted guidelines on how to prevent corruption in the context of the health emergency caused by the COVID-19 pandemic.¹⁵ The guidelines underline that the COVID-19 outbreak increases corruption risks, with the health sector being specifically exposed, in particular because of surges in the immediate need for medical supplies and the simplification of procurement rules, overcrowded medical facilities, and overburdened medical staff. While acknowledging that corrupt practices may indifferently affect the public or the private sectors, including but not limited to the procurement system, the guidelines identify bribery in medical-related services, corruption in new product research and development (including conflicts of interest and the role of lobbying), and COVID-19-specific fraud related to the marketing of counterfeit medical products as the main typologies of corruption in the health sector. GRECO stresses that transparency in the public sector is the key means of preventing corruption, whatever form it takes.

II. Protecting the EU Budget from Corruption – The EU's Conditionality Mechanism and the Role of the EPPO

As governments seek to boost post-pandemic economic recovery by investing public funds, including loans obtained through the financial markets, the need to ensure transparency and to protect these funds from

corruption commensurately increases. It was in this spirit that the European Union adopted a new mechanism of conditionality¹⁶ for the protection of its next multi-annual budget (2021-2027)¹⁷ and its recovery funding (also known under the heading “NextGenerationEU”),¹⁸ which together represent a massive €1,8 trillion public funding source. This new mechanism, much disputed by some governments,¹⁹ ties Union funding to respect for the rule of law, including, *inter alia*, the requirement of effective and independent judicial authorities. Regulation 2020/2092 specifically demands that Member States have a well-working preventive and enforcement system against fraud and corruption. Recital 7 of said Regulation establishes a groundbreaking new principle:

“Whenever Member States implement the Union budget, including resources allocated through the European Union Recovery Instrument established pursuant to Council Regulation (EU) 2020/2094, and through loans and other instruments guaranteed by the Union budget, and whatever method of implementation they use, respect for the *rule of law is an essential precondition* for compliance with the principles of *sound financial management* enshrined in Article 317 of the Treaty on the Functioning of the European Union (TFEU).”²⁰

The Regulation further clarifies in Recital 8:

“Sound financial management can only be ensured by Member States if public authorities act in accordance with the law, if cases of fraud, including tax fraud, tax evasion, corruption, conflict of interest or other breaches of the law are effectively pursued by investigative and prosecution services [...]”

Art. 4 of Regulation 2020/2092 confirms that a breach of the rule of law may, *inter alia*, concern the lack of “prevention and sanctioning of fraud, including tax fraud, corruption or other breaches of Union law relating to the implementation of the Union budget or to the protection of the financial interests of the Union, and the imposition of effective and dissuasive penalties on recipients by national courts or by administrative authorities.” In addition, the breach may be triggered by the lack of “effective and timely cooperation with OLAF and, subject to the participation of the Member State concerned, with the European Public Prosecutor’s Office (EPPO) in their investigations or prosecutions pursuant to the applicable Union acts in accordance with the principle of sincere cooperation.”

This new “conditionality” mechanism highlights the importance of the EPPO²¹ in the overall system of protection of the Union’s financial interests, which is required by the Lisbon Treaty²² itself. It acknowledges the EPPO as the ultimate – and much needed – prosecution body at the EU level, responsible for overseeing and enhancing the chain of national authorities and Union agencies (i.e., OLAF, Europol, and Eurojust) active in this area. As the Union’s independent prosecution body, the EPPO will undertake to investigate, prosecute, and bring to judgment cases of fraud, corruption, and other illegal activities that affect the Union’s financial interests in accordance with the EPPO Regulation,²³ tackling criminal offences that are defined by national laws implementing the provisions of the “PIF Directive.”²⁴ The core mission of this new European body is to protect EU funds from criminals in the common interest of EU citizens. Its launch on 1 June 2021 not only clearly represents a major step forward in the system of judicial protection of Union funds but also opens up a new phase in the history of European integration.

III. Concluding Remarks

In conclusion, two points appear to emerge from this brief analysis:

- The pandemic has laid bare a series of new phenomena that profoundly destabilised our economies and affected human behavior, including the ways in which people commit crime. While the urgency of

stimulating the economy convinced governments to take decisive action and invest public funds in sectors that have suffered, e.g., transport, tourism, or the service industry, the availability of public funding simultaneously increased the risk of misuse, including fraud and corruption, particularly in public procurement procedures. To counter such risks, governments and international bodies have committed to enhancing control and enforcement procedures, ranging from measures ensuring transparency to better law enforcement. Examples abound that show how a crisis usually leads to long-term societal changes, and sometimes the long-term benefits may even outweigh the initial economic costs.

- A crisis is always an opportunity for governments to review their policies and adapt them to the new reality. It remains to be seen whether COVID-19 has provided such an opportunity.

1. See, inter alia: <https://www.ilfattoquotidiano.it/2020/11/17/covid-fiale-del-vaccino-cinese-a-roma-i-medici-sono-falsi-o-non-testati-non-vi-avventurate-nellacquisto/6006430> and <https://europa.today.it/attualita/esercito-vaccino-covid-rischio-assalti.html> and <https://www.ilfoglio.it/hacker-news/2020/05/04/news/finti-vaccini-e-test-falsificati-il-dark-web-che-lucra-sulla-pandemia-316541/> and <https://www.forzearmate.eu/2020/11/18/il-vaccino-contro-il-coronavirus-diventa-appetibile-per-le-organizzazioni-criminali-le-forze-armate-tedesche-mettono-a-disposizione-le-caserme/>. All links in this article were accessed on 21 June 2021.↵
2. See the experience of Eurojust (information available on the website “Eurojust and COVID-19”: <https://www.eurojust.europa.eu/judicial-cooperation/tasks-and-tools-eurojust/eurojust-and-covid-19>).↵
3. <https://www.europol.europa.eu/publications-documents/viral-marketing-counterfeits-substandard-goods-and-intellectual-property-crime-in-covid-19-pandemic> and <https://www.independent.co.uk/news/uk/crime/covid-vaccine-uk-latest-fake-fraud-b1722906.html>.↵
4. <https://www.avvisopubblico.it/home/wp-content/uploads/2020/04/Transparency-Re-Act-Anticorruzione-al-tempo-del-Coronavirus.pdf>. See also the activities of other civil society organisations: https://apps.who.int/gb/ebwha/pdf_files/WHA73/A73_R1-en.pdf.↵
5. <https://it.insideover.com/societa/lombra-delle-organizzazioni-criminali-sul-vaccino-anti-covid.html> and <https://policingsinsight.com/features/analysis/covid-19-criminal-activity-preventing-a-coronavirus-vaccine-crime-wave/>.↵
6. https://www.aduc.it/notizia/vaccini+falsi+anti+covid+onu+grave+minaccia_137445.php. See also: <https://www.interris.it/news/coronavirus-vaccino/>.↵
7. <https://news.un.org/en/story/2020/10/1075182>.↵
8. United Nations Office on Drugs and Crime, “Accountability and the Prevention of Corruption in the allocation and distribution of emergency economic rescue packages in the context and aftermath of the Covid-19 pandemic”, 15 April 2020 https://www.unodc.org/documents/Advocacy-Section/COVID-19_and_Anti-Corruption-2.pdf.↵
9. OECD, “Public Integrity for an Effective COVID-19 Response and Recovery”, 19 April 2020, <https://www.oecd.org/coronavirus/policy-responses/public-integrity-for-an-effective-covid-19-response-and-recovery-a5c35d8c/>; OECD, “Policy measures to avoid corruption and bribery in the COVID-19 response and recovery”, 26 May 2020, <https://www.oecd.org/coronavirus/policy-responses/policy-measures-to-avoid-corruption-and-bribery-in-the-covid-19-response-and-recovery-225abff3/>.↵
10. OECD/EUIPO, “Trade in Counterfeit Pharmaceutical Products”, revised version May 2020, Paris, https://www.oecd-ilibrary.org/governance/trade-in-counterfeit-pharmaceutical-products_a7c7e054-en.↵
11. “Council conclusions on intellectual property policy (18 June 2021)”, Council doc. 9932/21.↵
12. FATF, “COVID-19-related Money Laundering and Terrorist Financing – Risks and Policy Responses”, May 2020, Paris, <https://www.fatf-gafi.org/publications/fatfgeneral/documents/covid-19-ml-tf.html>. See also the most recent World Bank intervention <https://blogs.worldbank.org/governance/tackling-corruption-governments-covid-19-health-responses>.↵
13. The Compendium was published online under: https://www.unodc.org/pdf/corruption/G20_Compendium_COVID-19_FINAL.pdf.↵
14. Six national delegations (Saudi Arabia, Canada, Mexico, United Kingdom, Turkey, and Spain) have illustrated in their country responses to the Compendium the issue of vaccines, in some cases expressly indicating this sector as an area of particular vulnerability in terms of the danger of counterfeiting and unfair distribution, prices, and procurement. See pages 14, 21, 23, and 52 of the Compendium and pages 21, 40, 69, 71, 75, 138, 168, 188, 208, 209 and 212 of Annex G containing the countries’ replies to the survey on corruption and COVID-19.↵
15. GRECO, “Corruption Risks and Useful Legal References in the context of COVID-19,” 15 April 2020 <https://www.coe.int/en/web/corruption/greco-guidelines>.↵
16. Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget, O.J. L 433I, 22.12.2020, 1.↵
17. Council Regulation (EU, Euratom) 2020/2093 of 17 December 2020 laying down the multiannual financial framework for the period 2021 to 2027, O.J. L 433I, 22.12.2020, 11.↵
18. Council Regulation (EU) 2020/2094 of 14 December establishing a European Union Recovery Instrument to support the recovery in the aftermath of the COVID-19 crisis, O.J. L 433I, 22.12.2020, 23.↵
19. In March 2021, Hungary and Poland launched legal action at the European Court of Justice for annulment of the Regulation (Cases C-156/21 and C-157/21) – see also [eucrim 1/2021, 19](https://eucrim.eu/2021/19).↵
20. Emphasis added by the authors.↵
21. Cf. P. Csonka, A. Juszczak and E. Sason, “The Establishment of the European Public Prosecutor’s Office – The Road from Vision to Reality”, (2017) *eucrim*, 125-135 = <https://eucrim.eu/articles/establishment-european-public-prosecutors-office/>.↵

22. See Art. 325(1) TFEU: "The Union and the Member States shall counter fraud and any other illegal activities affecting the financial interests of the Union through measures to be taken in accordance with this Article, which shall act as a deterrent and be such as to afford effective protection in the Member States, and in all the Union's institutions, bodies, offices and agencies."↩
23. Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO'), O.J. L 283, 31.10.2017, 1.↩
24. Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law, O.J. L 198, 28.7.2017, 29. For the Directive, see A. Juszcak and E. Sason, "The Directive on the Fight against Fraud to the Union's Financial Interests by means of Criminal Law (PFI Directive) – Laying down the foundation for a better protection of the Union's financial interests?", (2017) *eucrim*, 80-87 = <<https://eucrim.eu/articles/the-pfi-directive-fight-against-fraud/>>.↩

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