

The European Union and the UN Convention against Corruption

Martin Příborský*



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ABSTRACT

This article examines the European Union's role and obligations under the United Nations Convention against Corruption (UNCAC), to which the EU acceded in 2008 as the only regional economic integration organisation. It first outlines the scope and structure of UNCAC and its implementation architecture, including the Conference of the States Parties and the peer-review Implementation Review Mechanism. The article then analyses the specific legal position of the EU: its declaration of competences (pre- and post-Lisbon), the partial and evolving nature of its UNCAC obligations, and the practical consequences for representation and voting. Particular attention is paid to the EU's failure so far to join the UNCAC review mechanism, despite being a State Party, and to the legal, institutional, and political challenges this raises – notably the need to update the EU's declaration of competence, to define which provisions and institutions should be reviewed, and to arrange an appropriate review set-up. The contribution concludes that, although the EU likely already complies with most UNCAC standards, it must urgently resolve these technical issues, participate fully in the review process, and clarify its competence in order to safeguard its credibility in global anti-corruption efforts and to prepare the ground for accession to GRECO and other review-based mechanisms.

AUTHOR

Martin Příborský

Policy Officer
European Anti-Fraud Office (OLAF),
European Commission

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I. Introduction

The European Union (EU) has gradually intensified its activities within the area of anti-corruption policies over the last decade. In 2011, the European Commission announced several policy initiatives, which might completely change the dynamic of policy development in this field within the EU in the near future.¹ The Communication on Fighting Corruption in the EU, which is analysed in another article of this issue, outlines a new mechanism, the so-called “EU Anti-Corruption Report,”² to monitor the EU Member States’ efforts in the fight against corruption. It also suggests that the EU should join the Council of Europe Group of States against Corruption (GRECO). By means of this particular GRECO membership, the EU institutions could profit from the knowledge of one of the most developed review mechanisms, experience with country reviews, and access to information on the situation in individual Member States. These data could be extended further and used for the EU Report, which should be more ambitious in certain aspects and offer more possibilities than the GRECO reviews. It might, however, also require that the EU institutions themselves undergo a scrutiny of their anti-corruption standards by GRECO, which would be the first such experience for the EU institutions.

In this context, it is useful to recall the EU’s experience with another international anti-corruption standard that it became party to in 2005, the United Nations Convention against Corruption (UNCAC). The UNCAC also includes a review mechanism that the EU was supposed to join recently, however the EU is facing certain difficulties in doing so.

The objective of this article is to briefly describe the content of the UNCAC as well as structures and procedures for its implementation. An explanation will follow as to the position of the EU within the process. Ultimately, an analysis of the situation regarding the expected review of the EU institutions will be given.

II. The UN Convention against Corruption

The UNCAC is the first universal legally binding anti-corruption instrument³ and a very comprehensive legal document covering various aspects of the fight against corruption. Its chapters address issues of prevention, criminalization and law enforcement, international cooperation, asset recovery and technical assistance, and information exchange. It covers corruption in both public and private sectors. Besides prevention, investigation, and prosecution, it governs the freezing, seizure, confiscation, and return of the proceeds of corruption. Furthermore, it also encompasses related offences such as money laundering, embezzlement, trading in influence, illicit enrichment, concealment or protection of property, to name just a few. It underpins many other aspects of the effective fight against corruption, e.g., transparency or the participation of civil society, and it deals with various practical tools for the detection, investigation, and prosecution of corruption acts.

The Convention was negotiated between January 2002 and October 2003, following UN resolution 55/61 of 4 December 2000,⁴ by which the UN General Assembly requested preparation of a specific convention on corruption. The resolution required the Secretary General and the UN Office for Drug Control and Crime Prevention in Vienna⁵ to conduct the preparatory work. Subsequently, a report was submitted to the UN Commission on Crime Prevention and Criminal Justice. Afterwards, an expert group elaborated draft terms of reference, which were adopted as a basis for the negotiations. The Convention was negotiated within an ad hoc committee set up for this purpose.

The Convention was adopted by the UN General Assembly on 31 October 2003⁶ and opened for signatures at a conference in Mérida, Mexico on 9 December 2003. Therefore, it is sometimes called the “Mérida Conven-

tion.” In addition, 9 December 2003 was designated by the UN General Assembly as International Anti-Corruption Day. It entered into force on 14 December 2005. To date, it has 159 full members, State Parties, and 14 other signatories that have not completed the ratification process yet. Among these, 25 EU Member States and the European Union as a regional economic integration organisation have completed the internal ratification procedures and become State Parties, and two Member States (Czech Republic and Germany) are only signatories.⁷

III. EU Accession to the Convention

In addition to states, the UNCAC is open for membership to regional economic integration organisations (REIOs)⁸ such as the EU, “provided that at least one member State of such organisation has signed this Convention” (Art. 67(2) of the UNCAC). The European Community, which at that time enjoyed a legal personality and thus had the necessary legal capacity, signed the UNCAC on 15 September 2005 and became a State Party on 12 November 2008, following the ratification by the Council.⁹ It is so far the only REIO that has joined the Convention. As with any other REIO in the context of international treaties, the Community acceded to the UNCAC only with respect to the extent of competence conferred upon it by its Member States. Hence, the EU is a full member (State Party) of the Convention, but it is obliged to implement only those provisions of the UNCAC that fall within its scope of activities. In accordance with Art. 67(3) of the UNCAC, the Community declared the extent of its competence, which is annexed to the instrument of ratification.¹⁰ It covers the competence provided for in the treaties establishing the European Community, the so-called first pillar, which corresponds to the scope of the UNCAC. According to the Declaration, the Community claims an exclusive competence with respect to its own administration. This comprises such areas as prevention policies within Community structures, including transparency measures, recruitment policies, codes of conduct and other integrity measures, public procurement standards, etc. It covers the establishment of EU anti-corruption bodies, in particular the European Anti-Fraud Office (OLAF), and provides for their functioning. Furthermore, the Community declares competence in policy areas in which powers are shared with Member States. The UNCAC is relevant here, in particular for rules governing the internal market, including access to public contracts, standards on accounting and auditing, and the prevention of money laundering. The Community competence also extends to supporting anti-corruption efforts within development policies.

From the date of entry into force of the Treaty of Lisbon on 1 December 2009, the European Union replaced the Community as the State Party to the Convention. The three pillars disappeared, and the EU also assumed the competence in the common foreign and security policy (former second pillar) and in the area of justice, freedom and security (former third pillar). The latter especially is very relevant for the UNCAC. In this area,¹¹ there are rules, mainly on police and judicial cooperation in criminal matters, that match the provisions of the UNCAC. Among them, Art. 83 of the Treaty on Functioning of the EU (TFEU) explicitly mentions corruption as one of the subjects against which an EU action may be taken. As a consequence, the EU is obliged to update its declaration of competence in line with Art. 67 of the UNCAC. So far, there has been no action taken by the EU institutions in this sense.

As for the legal position of the EU within the context of the UNCAC, the EU enjoys full membership independent from its Member States and acts individually alongside them unless the EU acts represented by the Council Presidency, currently in cooperation with the EU Delegation (see below). Due to its membership, the position of the EU is different in comparison to other parts of the UN, notably the UN General Assembly, where the EU has only an enhanced observer status. Theoretically, when voting on matters for which the competence has been transferred from the Member States to the Union, the EU would vote on behalf of all

Member States, which are State Parties, having a corresponding number of votes. However, in practice, voting is not used within the UNCAC structures, and all decisions have so far been reached by consensus.¹²

IV. Implementation of the Convention

The UNCAC established a special mechanism for the implementation of the Convention in order to facilitate cooperation among the State Parties and to improve their capacity to properly implement the complex provisions thereof. It consists of a hierarchical structure of different bodies. The supreme decision-making body is the Conference of the State Parties (COSP), which meets regularly, adopts its own Rules of Procedures, establishes other bodies and procedures for implementation of the Convention, receives information required from the State Parties, and deals with all other matters relevant to implementation. The COSP has met four times so far.¹³ It has established several working groups¹⁴ and made arrangements in order to collect and exchange information on various subjects.

A very important role is also played by the Secretariat of the Convention provided by the United Nations Office on Drugs and Crime (UNODC), which takes care of the administration, organisation of events, collection and distribution of information and documents, training, and other support to the State Parties.

The most challenging task of the COSP has been the establishment of a mechanism to review the implementation of the Convention, based on Art. 63(7) of the UNCAC. It was debated by the COSP during its first three sessions and by the Working Group on Review of the Implementation between 2006 and 2009. The Terms of Reference were finally adopted at the third session in Qatar in November 2009.¹⁵ Another specific body, the Implementation Review Group (IRG), was established to overview the process. The review mechanism was launched by the drawing of lots at the first session of the IRG in July 2010.

The mechanism is based on mutual peer reviews by the State Parties. Each State Party shall be reviewed within two cycles of five years, as the provisions of the UNCAC were divided into two groups. Within the first cycle, only chapters III (criminalization and law enforcement) and IV (international cooperation) of the Convention shall be reviewed and, during the second cycle, chapters II (preventive measures) and V (asset recovery). All State Parties should be reviewed during one of the first four years of the cycle, based on drawing of lots. The fifth year is reserved for signatories and State Parties that would defer the review. Each State Party is reviewed by two other State Parties, which should include one from the same geographical region as the State Party under review and possibly have a similar legal system. Each State Party should serve as the reviewing State Party one to three times during each cycle. All State Parties under review are drawn at the beginning of the cycle for all of the first four years. The reviewing State Parties are selected at the beginning of each review year.

One of the first steps and the basis for the review is a comprehensive self-assessment checklist, which each State Party must deliver to the Secretariat, describing the level of implementation of the UNCAC, in particular legislation and other measures within the national system. Each State Party must also state its focal point for the coordination of the process and draw up a list of experts who will participate in the review. The review itself may take the form of a desk review of provided documents, namely the self-assessment checklist, or be a constructive dialog, or even make use of other means of exchanging information, e.g., country visits. The review reports remain confidential and are not debated by the UNCAC bodies. The Secretariat drafts thematic reports summarizing the findings of the individual country reports and provides overall statistics on the review process, which are then discussed by the IRG and by the COSP. The review process is currently in the second year of the first cycle. The reviews of the first year were marked by certain difficulties because several State Parties struggled to meet the procedural deadlines. Therefore, due to the delays, only a few

country review reports and a limited amount of information was available for discussion during the last session of the IRG and at the 4th COSP in November 2011.

V. The EU within the Implementation Process

1. EU Positions and Cooperation with the Member States

The EU institutions have been participating in the process since the Commission signed the UNCAC on behalf of the Community in 2005. The Community (later the Union) has been represented at the COSP and the other bodies by the Commission, namely by the lead service responsible for the fight against corruption,¹⁶ by OLAF, and by the EU Delegation to the UNODC in Vienna. At the beginning, the Commission assumed the role of an observer together with other signatories, actively contributed to the debate, and promoted the widest possible implementation of UNCAC provisions worldwide. In concrete terms, it advocated the most ambitious review mechanism that would include mandatory country visits, the active participation of civil society, and full transparency of the review reports. It has also promoted the idea that the UNCAC should be implemented by major international organisations that cannot become formal members of the Convention.¹⁷

The Commission has aligned its positions with the other EU Member States. The EU as a whole coordinates its actions regularly during the sessions of the UNCAC bodies as well as in between these meetings. The EU representatives meet in Brussels (within the Council structures) or in Vienna. To formally harmonise its activities, the Council adopted several common positions:

- Three Common Positions (in general, on the Review Mechanism and on Asset Recovery) and one Position (together with the representatives of the governments of the Member States) on Technical Assistance¹⁸ before the 2nd COSP in 2008;
- A Common Position on the UNCAC for the preparation of the 3rd COSP and one Position (together with the representatives of the governments of the Member States) on Technical Assistance before the 3rd COSP in 2009.¹⁹

They remain the basis for the coordinated approach. The EU has tried to speak with one voice, represented by the EU Presidency.

With the entry into force of the Treaty of Lisbon, which took place only one year after the Community became a full member of the UNCAC, the situation should change. According to the Treaty, in areas of common EU policy, the Union should no longer be represented by the Council Presidency but by the European External Action Service (EEAS) and the EU delegations. Therefore, it should be the EU Delegation to the International Organisations in Vienna that should coordinate and represent the EU and communicate its common positions whenever a common approach is agreed upon among the Member States. In practice, however, given the limited resources of the EU Delegation, a temporary arrangement has been reached that the EU Delegation should lead the EU together with the Council Presidency.

2. EU Institutions in the Review Mechanism

The most significant task for EU institutions in the implementation process is the issue of participation in the review mechanism. As a full State Party, the EU should undergo the same scrutiny and possibly also serve as a reviewer like any other State Party. Nevertheless, the EU has not yet formally joined the review process. It has not participated in the drawing of lots, it has not nominated its experts for the review, and there is no

specific mention of the EU or any special arrangement in the Terms of Reference of the review mechanism. It had started preparing the self-assessment checklist before the entry into force of the Lisbon Treaty, but the draft was not completed after the Treaty became applicable, as the changes in EU primary law substantially enlarged the scope of EU competence. However, the impact these changes have on EU participation in the UNCAC has not been thoroughly analysed so far.

The EU is a strange entity in this process. It does not have the standard characteristics of state. Its competence with respect to the UNCAC and the applicability thereof on EU institutions is only partial. Therefore, at least until the update of the EU declaration of competence, the implementation of which provisions should be reviewed is not clear. Moreover, the EU has a different structure of institutions with different roles and powers than that of a nation state. Hence, it would be a challenge for any reviewer to properly grasp the EU specificities. If it were a state with limited resources and from a different geographical region, it might be almost impossible.

There is also another political issue. Could the EU institutions be reviewed by one or two of its own Member States? Would the necessary independence of the Member State be guaranteed? And would it be acceptable for the EU? The situation in the EU's legal and policy context is usually the opposite – the EU reviews and sanctions its Member States if they do not comply with EU law. The EU should resolve this situation before entering into other international mechanisms for review of the EU policies. The most topical is the accession to GRECO, which was outlined in the new Commission anti-corruption communication and which is under preparation.²⁰

All in all, it is evident that the issue merits thorough consideration and that some sort of special arrangement for EU participation in the review process could be useful. Formally, it could be arranged by adopting an amendment to the Terms of Reference.

The Commission assessed the situation in its Communication on Fighting Corruption in the EU of June 2011. It states that the “process is complex as it involves cooperation between all EU institutions, as well as with Member States in the matters falling under shared competence.”²¹ It also stresses the need to analyse the changes brought about by the Lisbon Treaty in order to determine the scope of the EU's obligations under the UNCAC. Nonetheless, at the same time, the Commission also undertook to duly implement the UNCAC within its recent Communication on the Commission Anti-Fraud Strategy.²²

In any case, the process of internal review within the EU institutions should be completed as soon as possible if the EU wishes to join the review mechanism timely during the first review cycle. As a State Party with completed ratification, the EU is expected to join the process at the latest during the 4th year of the cycle. The drawing of lots for the 4th year will likely take place during the first half of 2013. Therefore, there is only about one year remaining to resolve the technical and legal issues and to also arrange the procedural matters for the EU to join the mechanism. It is theoretically possible to foresee the EU's entry into the process in the 5th year. However, this is really the last deadline for EU participation. The issue is even more sensitive as some State Parties started raising questions as to whether and when the EU will undergo the review, suggesting that, if it is not to be reviewed, it should not be considered a State Party and have only an observer status. Such voices are rather sporadic and isolated within the UN. A continuation of the current situation, however, might be harmful for the EU's reputation and its ambitions in the area of anti-corruption policy.

VI. Conclusions

It is widely believed within the European Commission that the EU institutions at least formally fulfil most, if not all, of the UNCAC requirements. Therefore, there should be no difficulty to successfully undergo the review. It is more a legal and procedural issue that has prevented full participation of the EU in the UNCAC review mechanism so far. However, the EU has little space for manoeuvre here, as the UNCAC rules are clearly set and the EU has committed itself to respecting them. This is in contrast to the GRECO mechanism, where the modalities of participation still have to be negotiated or, in case of other policy initiatives, where the EU is not bound by international law.

Consequently, it would be desirable to quickly finalise the internal legal analyses and update the EU declaration of competence for the UNCAC. This first step seems quite complicated and perhaps legally somewhat doubtful because the EU's area of competence is in constant development, especially in the area of shared competence with the Member States. Nevertheless, it is a necessary practical step that will allow the EU to fulfil its obligations under the UNCAC and possibly also clarify the conditions for the accession to GRECO or other similar mechanisms. Primarily, however, it will take the burden off the Commission's shoulders, reinforce its good reputation in this area, and free its hands for future policy work in the development of anti-corruption standards.

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1. See, namely, Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee on Fighting Corruption in the EU of 6 June 2011 (COM(2011)308) and also Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, the Committee of the Regions and the Court of Auditors on the Commission Anti-Fraud Strategy of 24 June 2011 (COM(2011)376) as well as Communication on the protection of the financial interests of the European Union by criminal law and by administrative investigations: An integrated policy to safeguard the taxpayers' money of 26 May 2011 (COM(2011)293).↔
 2. Commission Decision establishing an EU anti-corruption reporting mechanism for periodic assessment ("EU Anti-corruption Report") of 6 June 2011 (C(2011)3673), which was adopted together with the Communication.↔
 3. There are older anti-corruption conventions, but they are only regional. Among the most important are the Inter-American Convention against Corruption of 1996, the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions of 1997, the Council of Europe Criminal and Civil Law Conventions on Corruption of 1999, and also the African Union Convention on Preventing and Combating Corruption of 2003, which entered into force after the UNCAC, however, in 2006.↔
 4. UN Resolution 55/61 – An effective international legal instrument against corruption.↔
 5. Renamed the UN Office on Drugs and Crime (UNODC) in 2002.↔
 6. UN Resolution 58/4.↔
 7. Source: UNODC website (<http://www.unodc.org/unodc/en/treaties/CAC/signatories.html>).↔
 8. The term REIO is not defined by the UNCAC, and there is no unified international definition. Therefore, we have to look at different definitions in national law or various international definitions. For example, according to US law, in the anti-trust context, the term regional economic integration organisation means "an organization that is constituted by, and composed of, foreign states, and on which such foreign states have conferred sovereign authority to make decisions that are binding on such foreign states, and that are directly applicable to and binding on persons within such foreign states, ..." (15 USCS § 6211 (9)). Aside from the EU, the other major REIOs include, for example, the Association of Southeast Asian Nations (ASEAN), the North American Free Trade Area (NAFTA), the Common Southern Market (Mercosur), and the Andean Community of Nations (CAN, both within the Union of South American Nations (USAN)), etc.↔
 9. Council Decision of 25 September 2008 on the conclusion, on behalf of the European Community, of the United Nations Convention against Corruption (O.J. L 287, 29.10.2008, p. 1-110).↔
 10. Declaration concerning the competence of the European Community with regard to matters governed by the United Nations Convention against Corruption, Annex II to Council Decision of 25 September 2008 on the conclusion, on behalf of the European Community, of the United Nations Convention against Corruption (O.J. L 287, 29.10.2008, p. 1-110).↔
 11. Currently Title V, Area of freedom, security and justice, of the Treaty on the Functioning of the EU (TFEU).↔
 12. The diplomats in the UN organisations in Vienna call it the "Vienna spirit."↔
 13. In 2006 (Jordan), 2008 (Indonesia), 2009 (Qatar), and 2011 (Morocco). The next meetings are scheduled for 2013 (Panama), 2015 (Russia), and the seventh session at the seat of the Secretariat in Vienna (probably in 2017).↔
 14. Currently there exist an Open-ended Intergovernmental Working Group on Asset Recovery and an Open-ended Intergovernmental Working Group on Prevention, which also took over tasks of the former Open-ended Intergovernmental Working Group on Technical Assistance. An Open-ended Intergovernmental Working Group on Review of the Implementation of the UNCAC prepared the review mechanism before the 3rd COSP.↔
 15. CAC/COSP 3, Resolution 3/1 – Review mechanism.↔
 16. Originally the Directorate-General (DG) Justice and Home Affairs (JAI), later DG Justice, Liberty and Security (JLS), and currently DG Home Affairs (HOME).↔
 17. Such a process of voluntary implementation has been initiated within the organisations of the UN system.↔

18. Council documents No 15012/1/06 REV 1 CRIMORG 165 RESTREINT UE, 14412/1/07 CRIMORG 164 RESTREINT UE, 15233/1/07 CRIMORG 172 RESTREINT UE and 5359/08 CRIMORG 10 DEVGEN 8 RESTREINT UE.↔
19. Council documents No 11452/2/09 REV 2 CRIMORG 104 RESTREINT UE and 11455/2/09 REV 2 CRIMORG 105 RESTREINT UE.↔
20. Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee on Fighting Corruption in the EU of 6 June 2011 (COM(2011)308).↔
21. Ibid., Section 3.3.↔
22. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, the Committee of the Regions and the Court of Auditors on the Commission Anti-Fraud Strategy of 24 June 2011 (COM(2011)376), Section 2.6.1, p. 16.↔

* Author statement

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