

**Establishing a Common EU Anticorruption Framework: Institutional
Enablers and Inhibitors**

Albena Dimitrova Kuyumdzhieva

Royal Holloway and Bedford New College, University of London

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Declaration of Authorship

I Albena Dimitrova Kuyumdzhieva hereby declare that this thesis and the work presented in it is entirely my own. Where I have consulted the work of others, this is always clearly stated.

Signed:

A handwritten signature in blue ink, consisting of several fluid, overlapping strokes that form a cursive name.

Date: 11.03.2018

Abstract

The European Union is the world's largest internal market comprising 28 member states and more than 500 million citizens. It is governed by complex regulatory structures which, if abused, can negatively affect the lives of millions of citizens. Whilst recognising the huge ramifications that corruption causes to the political and socio-economic structures of the European Union, this thesis identifies the drivers that have hampered the adoption of a robust common anticorruption approach. The thesis carries out this analysis by focusing on the role of the three main decision-making institutions of the European Union: the European Commission, the European Parliament and the Council of the European Union.

The research examines whether strong legislative resistance to counter-corruption measures results from a lack of supra-institutional leadership or reflects the reluctance of the Council to initiate and support the conclusion of legally binding anticorruption agreements. It evaluates the reactions of the European Union's institutions to the need for installing better accountability and transparency standards in three policy cases: the establishment and management of EU decentralised agencies; the adoption of EU criminal antifraud directive and the adoption of regulatory framework for the work of EU lobbyists.

The thesis shows that the European Commission and the European Parliament have committed themselves to boosting the transparency and accountability aspects of the existing governance arrangements, while the Council has exhibited a recurrent reluctance to do so. This demonstrates the Council's desire to maintain the status quo, albeit for reasons that have more to do with the protection of national sovereignty and allowing for political manoeuvring at national level, rather than with opposing anticorruption measures per se. The Commission and the Parliament, on the other hand, have demonstrated their

potential to become anticorruption flagships, capable of transforming the current patchy approach into a more robust anticorruption framework.

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List of Abbreviations and Acronyms

AFSJ:	Area of Freedom, Security and Justice
ALTER-EU:	Alliance for Lobbying Transparency and Ethics Regulation
CEO:	Corporate Europe Observatory
ECA:	European Court of Auditors
ECJ:	European Court of Justice
CoE:	Council of Europe
COREPER:	Committee of permanent government representatives Council in the Council of the European Union
DA:	Decentralised Agency
EBRD:	European Bank for Reconstruction and Development
EC Treaty:	Treaty Establishing the European Community
EPACA:	European Public Affairs Consultancies' Association
ERA:	European Regulatory Agencies
ETI:	European Transparency Initiative
EU:	European Union
EUROPOL:	European Police Office
GDP:	Gross Domestic Product
GRECO:	Group of States against Corruption
IIA:	Inter-institutional Agreement
IMF:	International Monetary Fund
NGO:	Non-governmental Organisation
OECD:	Organisation for Economic Cooperation and Development;
OLAF:	European Antifraud Office

PIF Convention:	Convention drawn up on the basis of Article K.3 of the Treaty on European Union on the protection of the European Communities' financial interests
TEU:	Treaty on the European Union
TFEU:	Treaty on the Functioning of the European Union
TI CPI:	Transparency International Corruption Perception Index
TI:	Transparency International
UN:	United Nations
UNCAC:	United Nations Convention against Corruption
UNDP:	United Nations Development Programme
WB:	World Bank
WG RLI-	World Bank Rule of Law Index
WGI:	World Governance Indicators

1. Introduction

Corruption costs the citizens of the European Union (EU) between €179 and € 990 billion¹ every year (Hafner et al.2016). It brings about social inequality (Rose-Ackerman 1997, Uslaner 2008), distorts trust (Ades and Tella 1997), slows down economic development (Mauro 1996), and increases the threats to security of EU citizens (Shelley 2005). Corruption is a peril that threatens the very core of the EU's existence: the areas of freedom, security and justice (AFSJ) and the single market.

Given the gravity of these impacts, one might expect the European Union to have adopted a strong anticorruption stance, ensuring that corruption be robustly fought and prevented. This is not the case, however, regardless of the fact that corruption is evidently a major concern for European citizens (TNS Opinion& Social, 2014a) and has been the subject of numerous discussions at both EU and member state level (European Commission 2014b).

Notwithstanding two decades of dedicated efforts, the actual achievements of both the EU and its member states as regards anticorruption are far from impressive (Ballegooij and Zandstra 2016, European Commission 2014b, Hough 2013, Pring 2016, TNS Opinion& Social, 2014a). So far, the EU has been largely reliant on diverging national anticorruption instruments that have not yielded the expected results. What is more, a distinct mismatch between political statements and practical interventions has been recorded (European Commission 2014b) and 'genuine political will to eradicate corruption often appears to be missing.' (European Commission 2014b:2).

¹ Direct and indirect costs, depending on the scenario applied and the benchmarking of the countries.

Looking at the reasons behind the apparent failure of the EU and its member states to tackle corruption properly, the European Commission (2010c) notes the following factors holding back the European Union in its vigorous pursuit of its anticorruption objectives: 1) the divergent approaches in applying anticorruption tools; 2) the insufficient implementation of EU and international anticorruption legislation, and 3) the lack of proper monitoring mechanisms. Ballegooij and Zandstra (2016) uphold these findings by arguing that the non-existence of EU directives dealing with corruption in the public sector and the lack of sufficient ratification, transposition and enforcement of international and EU norms are among the main barriers hindering the European fight against organised crime and corruption.

Considering the above, this thesis's main research inquiry is to reveal why the EU has not established a unified, coherent framework capable of asserting common anticorruption standards that are enforceable and obligatory for all member states. Such a framework could consist of legal provisions (EU directives or regulations) and/or procedures that would ensure similar levels of anticorruption compliance throughout the entire Union.

To establish why the EU has not adopted a common and robust, anticorruption framework, this thesis examines the policies and policy stances of those institutional players with a decisive role in the EU legislative procedures: the European Commission (hereafter referred to as the Commission), the European Parliament (hereafter the Parliament) and the Council of the European Union (hereafter the Council). In particular, three cases with a significant impact on the transparency and accountability of the European governance system are investigated: the adoption of an interinstitutional

agreement on the operational framework of European decentralised agencies; the EU criminal anti-fraud directive; and the framework guiding the work of EU lobbyists. The case studies indicate the institutional preference for establishing a level anticorruption playing field across the EU. By exploring the collective institutional responses of the Commission, the Parliament and the Council to the quest for the establishment of more transparent and more accountable policy procedures, the thesis provides an insight into the process of EU anticorruption policy formation. The latter is underexplored by the anticorruption science literature. The thesis looks at the final institutional outcomes (the adopted standpoints) and does not explore the potential motivations of the individual member states, Parliamentary committees or the Commission's Directorates General for supporting or opposing the establishment of a more coherent EU anticorruption framework. This approach allows the thesis to focus its analysis on the strategic macro level of EU public policy creation and base its arguments on hard facts that are easy to verify and difficult to contest. By doing so, the thesis provides valuable insights for further research and advocacy actions. It opens the debate on the need for building stronger EU anticorruption resistance and paves the way for follow-up research on the individual actors' motivation for anticorruption legislative resistance.

The rest of this introductory chapter presents a brief overview of the underlying triggers behind the current research. It summarises the main corruption concepts, touches upon its social, political and economic costs to the EU, and elaborates briefly on the policy efforts made so far to counteract corruption. The chapter also outlines the analytical framework of the thesis and presents briefly its hypotheses. The following sections also examine the need for such a study and elaborate on how it fills the gap that exists currently

in the contemporary anticorruption science literature. The final part of the introduction presents the plan of the thesis and the theoretical and empirical chapters that follow.

1.1 Corruption and its implications for the EU

The understanding why it is important to fight corruption and what corruption means represents a major building block of the current thesis. Although these matters are analysed in depth later in the thesis, a brief synopsis is provided here for the reader's convenience.

1.1.1 What does the term 'corruption' mean?

Records of corruption as a notion date back almost to the beginning of human history. Some of the greatest minds of Antiquity, when debating the feebleness of human nature and the purity of eternity, distinguish the corruptibility of the material world from the purity of the cosmos. Heffernan and Kleining (2004) in their comprehensive overview of the ancient understanding of the origin and characteristics of corruption quote numerous examples of the latter. They observe that, in the eyes of early Christians and ancient Greeks, corruption was a natural consequence of human nature, which spreads over humans and their socio-political order. Going as far back as the works of Plato and Aristotle, corruption has been understood to be the main characteristic that differentiates ideal from deviant political regimes (Mulgan 2012). By drawing parallels between ancient philosophers and major religious books, Heffernan and Kleining (2004) point out that both the Old Testament and Aristotle see corruption as attributable not only to individuals but to institutions and systems as well. Friedrich (2002) reflects on these notions, pointing out

that the classical understanding of corruption as a disease that infects political systems has since been adopted in the works of Machiavelli, Montesquieu and Rousseau.

Nowadays, an easy parallel may be drawn between these notions and the current practices spread all over the world. Corruption is still ‘offensive to any notion of public guardianship on which the edifice of democracy is built’ (Caiden 1997:2) and is seen as a phenomenon that ‘diminishes the horizons of public actions and in doing so shrinks the domain of democracy’ (Warren 2004:329). The presence of corruption in political interactions strongly undermines democratic culture, weakens public trust, and drains people’s confidence in their own capacity to act for the public good (Warren 2004). Slowly but steadily, corruption has positioned itself as a new form of social and economic plague that damages the democratic fabric and impedes the sustainable economic growth all over the world. The phenomenon has been commonly defined as a ‘misuse of entrusted power for private gain’ (Transparency International 2009a:14). This operational definition reflects the internationally adopted legal anticorruption framework² and is used by the European Commission when monitoring member states’ efforts to combat corruption at a national level (European Commission 2014b).

1.1.2 Why is it important to fight corruption in the EU and its member states?

A very short and simple answer to this question would be: because the EU and its member states cannot afford not to do so. Non-action in the anticorruption field could lead to severe economic, social and political repercussions both for the national member states and for the EU as a whole. Current economic studies suggest that the direct cost of corruption to the

² Notably the *UN Convention against Corruption* and a number of Council of Europe policy documents. Full description and discussion of the international anticorruption framework is included in chapter 2.

EU economy amounts to €120 billion per year, a sum close to the annual budget of the European Union or approximately 1 per cent of the EU's GDP (European Commission 2014b). If all indirect losses to the EU economy were added, these figures might reach €179-990 billion per year (Hafner et al. 2016).

The negative implications do not stop there. The fast growth of organised crime and terrorist groups has elevated the impact of corruption to a new level, positioning it among the main national and international security perils. By establishing a link between combating corruption and ensuring the internal security of the Union and protection of its citizens the *Stockholm programme 'An open and secure Europe serving and protecting citizens'* (European Council 2010b) underlines this correlation. This is particularly important in the light of the increased terror attacks faced by Europe between 2004 and 2016.

Apart from damaging the welfare and security of EU citizens directly, corruption is also related to the citizens' level of trust/distrust in the EU and national public service and political systems (Schumacher 2013, Serritzlew, Sønderskov and Svendsen 2014, Van de Walle and Six 2014). These findings were supported by the Organisation for Economic Cooperation and Development (2015) review on governance, in which evidence was presented that trust in government, is negatively correlated with the perceived level of corruption. Given the overwhelming perception of European citizens (76%), that corruption is a widespread phenomenon in their country (TNS Opinion & Social, 2014a), this correlation is particularly alarming for the stability of the democratic systems in the EU.

1.2 A brief history of European anticorruption policy development

Until recently the existence of corruption in the developed world went largely unacknowledged. Corruption was considered predominantly a problem of underdeveloped and non-democratic societies and, as such, did not raise much interest in European political and academic circles (Hough 2013: 13-14). The situation changed only in the late 1990s when the president of the World Bank James Wolfensohn³ condemned corruption as a cancer and the media was flooded with national and international corruption scandals (Hough 2013). Notable examples of these were the resignation of Jacques Santer's Commission in 1999,⁴ the Elf-Aquitaine affair,⁵ and the UK 'cash for questions' scandal.⁶

The first targeted response to the 'sudden' corruption crisis was provided by the Council of Europe (CoE), a pan-European body, expressing the concerns and interest of a wider Europe.⁷ In the period 1993–2000 the Council of Europe initiated a number of anticorruption initiatives, ranging from the establishment of the Group of States against Corruption (GRECO⁸) to the adoption of the Twenty Guiding Principles for Fighting Corruption, and the Criminal and Civil Law Conventions against Corruption (1999). At

³ In 1996, Wolfensohn gave a speech to the World Bank/IMF annual meeting, naming corruption as a cancer that should be immediately confronted. This speech is considered to be a major turning point that led to the proliferation of international donor efforts.

⁴ Santer's Commission resigned in 1999 amid allegations for corruption, fraud and misuse of power. More information available on: <https://www.europarl.europa.eu/en/programme/others/history-fall-of-the-santer-commission>. Source last retrieved on 11 March 2017.

⁵ Elf- Aquitaine was a French based oil company involved in huge fraud and bribery deals, benefiting amongst others many high level figures of French political elite. *Guardian*, source last retrieved on 10 May 2016, at: <http://www.theguardian.com/world/2001/jun/02/jonhenley>.

⁶ The scandal involves conservative members of British Parliaments paid by lobbying company for asking certain parliamentary questions. More information available at: <https://www.theguardian.com/politics/1994/oct/20/conservatives.uk>. Source last retrieved on 11 March 2017.

⁷ The Council of Europe has 47 members. All EU member states are also members of the Council of Europe.

⁸ GRECO's main objective is to improve the capacity of its members to fight corruption by monitoring their compliance with Council of Europe anticorruption standards (http://www.coe.int/t/dghl/monitoring/greco/general/3.%20What%20is%20GRECO_en.asp).

European Union level various strategic documents proclaimed the need to vigorously counteract corruption (e.g. European Parliament 1996, European Council 1997, European Commission 1997). A number of codes of conduct, transparency initiatives and other soft policy tools⁹ were launched in an attempt to ensure a coordinated European approach. And in parallel, a variety of anticorruption measures were incorporated into specialised regulations such as those dealing with public procurement and concessions.¹⁰

So far, the EU has refrained from using its heavy legal armament and EU *acquis*¹¹ has not been adopted to address the need for preventing and counteracting corruption. Instead, the topic was covered by two intergovernmental Conventions:¹² the *First Protocol to the Convention on the protection of the European Communities' financial interests* and the *EU Convention on the fight against corruption involving officials of the European Communities or national officials of Member States of the European Union*. The so-called 'Corruption Protocol'¹³ to the *Convention on the protection of the European Communities' financial interests* was the first EU legal document ever to mention corruption as a crime. Its objective was to criminalise corruption offences, but it did so only in regard to crimes affecting expenditure in the EU's budget. The *EU Convention on the fight against*

⁹ Examples of such are the EU Code of Good Administrative Behaviour, the White Paper on European Governance, Public Service Principles for EU Public Servants, the Green Paper on European Transparency initiative, SIGMA administrative standards.

¹⁰ Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement; Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts; Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors.

¹¹ The EU *acquis* consists of binding common rights and obligations for all EU member states.

¹² The main difference between the two approaches is that while the EU *acquis* has direct binding powers for the member states once it is adopted, the conventions are intergovernmental agreements that must be approved by the signatory national parliaments before entering into power.

¹³ First Protocol of 27 September 1996 to the Convention on the protection of the European Communities' financial interests, 23.10.1996, *Official Journal C* 313.

corruption involving officials of the European Communities or national officials of member states of the EU aimed to broaden the scope of corruption-related crimes (listed in the Corruption Protocol) and built the EU criminal framework for combating corruption. The implementation of these two intergovernmental conventions proved to be problematic, however, and due to their slow ratification¹⁴ and limited scope, the EU has not managed to establish anticorruption standards that are applied with equal measure throughout the entire EU (chapter 3 provides more in-depth analysis of this issue).

1.3 Why is it important to research anticorruption policy development in the EU?

Corruption as a topic has been the centre of attention of a large volume of political, social and economic science research. Yet the latest evidence paper of the UK Department for International Development Aid (2015) identified a number of gaps in the existing literature. These gaps refer, among others, to: the political economy of corruption; the incentives of the different actors for supporting/opposing anticorruption reforms; and the importance of the institutions and governance dynamics in the field of anticorruption policy. Research into the latter can provide valuable insights into how to ensure success in the EU anticorruption undertakings.

The present thesis aims to fill in some of those gaps by exploring the empirical puzzle on the absence of obligatory and enforceable anticorruption standards, applicable to all member states. To this end, it uses the fundamental theories already laid down by the bulk of political science literature in the areas of corruption, good governance, EU

¹⁴ The *EU Convention on the fight against corruption involving officials of the European Communities or national officials of member states of the European Union* was ratified in 1997, but entered into force in 2005 after its adoption by the member states. The ratification of the *Corruption Protocol* proved to be similarly tedious.

institutions and EU policy formation. Taking into account the lack of comprehensive research into European anticorruption policy development, the thesis also employs competition and anti-fraud policies as analogous, able to provide answers to the policy puzzles created by the current European anticorruption approach. By doing so, it suggests a new way of looking at anticorruption policy dynamics in the European Union.

The thesis acknowledges that the topics of corruption and good governance have already attracted the attention of many political scientists. The questions of what exactly constitutes corruption and what is good governance have been vigorously discussed. The works of Nye (1967), Johnston (1996, 2005), Philp (2002, 2006), Warren (2004), and Kaufmann and Vicente (2005) form the bulk of the most prominent research and shed some light on the different definitions, forms, manifestations and characteristics of corruption. Taking into consideration that the concept of anticorruption is an indispensable part of good governance, the thesis looks at the synergies between the two, using the conceptual frameworks developed by scientists such as Kaufman (2005), Rothstein (2014) and Smith (2007).

Whereas the works on corruption and good governance form the main ‘substance’ of the policy that is researched, studies on the European Union institutions and EU policy processes form the framework within which they are applied. The works of Hix and Høyland (2011), Pollack (2003), Kreppel (2002), Beneyto (2008), Warleigh-Lack and Drachenberg (2009), on the empowerment, developments, drawbacks and opportunities presented to the Commission, the Parliament and the Council are also comprehensively examined and employed in the thesis.

Notwithstanding the comprehensiveness of the existent research in these thematic areas, when it comes to European anticorruption policy development, the two blocks of knowledge exist in separate worlds. There are very few (if any) studies on how anticorruption and good governance frameworks are adopted at EU level. Contemporary political anticorruption theory hardly provides any proposals on how to shape anticorruption progress and or insights into how to choose the right reform paths. Some studies, such as those conducted by Abbott and Snidal (2002), Smith (2007) and Persson, Rothstein and Teorell (2013), look at the possible reasons behind the successes or failures of anticorruption efforts. They are conducted at a more general level, though, and are not linked to the attitudes and approaches of the European Union in this regard. At present, Szarek-Mason (2010) is the most significant attempt to examine EU anticorruption policy and its development. However, Szarek-Mason approaches the topic from the point of view of the fifth enlargement of the European Union and focuses on the discrepancies between the treatment of candidate countries and the existing member states. She argues that the EU anticorruption approach can be strengthened by using legally non-binding, mutually agreed policy recommendations.

Unlike Szarek-Mason (2010), the current thesis focuses on the main EU institutional players (the Commission, Parliament and the Council), and examines their competences, powers and attitudes as regards asserting an effective and legally binding anticorruption framework. The multidisciplinary character of the thesis broadens the policy perspective and enables the presentation of findings that are not available in the contemporary anticorruption science literature. The thesis's findings provide also useful input into the work of the anticorruption practitioners and policy-makers, and support the

debate on the need for sustainable anticorruption reform, reflecting the political, economic and security challenges faced by the EU today.

1.4 Analytical framework

To investigate the reasons behind the lack of a common, enforceable, EU anticorruption regulatory framework, the thesis deploys theories and concepts from the domains of anticorruption and good governance, political will, legalisation, European institutional studies and EU policy making as the foundation for testing two hypotheses with empirical research and analysis. Each of these theories are comprehensively explored in the thematic chapters that follow.

By summarising the main theories relevant to the EU anticorruption policy development, the analytical framework links my theoretical question to the empirical analysis. The thesis explores comprehensively the concepts of scholars such as Johnston (1996, 2005), Klitgaard (1988), Nye (1967) and Philp (2002, 2006) related to the definition of corruption and its main elements, along with the operational definitions used by international development organisations, such as the Council of Europe, Transparency International, the United Nations and the World Bank. Acknowledging the lack of commonly agreed scientific definitions (Gardiner 2002), the thesis employs the operational definition of Transparency International (2009a:14): ‘abuse of entrusted power for private gain’ for the purposes of the further investigation. This definition is largely consistent with both scientific and development practitioner’s notions of corruption and is used by the EU institutions as a basis of their anticorruption policy creation.

Debates on the underlying factors for corruption, within the ‘principal-agent’ (Klitgaard 1998, Rose-Ackerman 1978), and the ‘collective-action’ problem (Person, Rothstein and Theorell 2013) schools of thought, build another theoretical layer to which empirical research is applied, showing that, irrespective of the motivational factors for corruption, successful anticorruption policies are always linked to: the establishment of coherent and enforceable legal frameworks; transparent and accountable governance processes and structures; and honest leaders/institutions that can lead by example (Klitgaard 1998, Mungiu-Pipiddi 2013, Person, Rothstein and Theorell 2013, Smith 2007). Corruption is both viewed as a cause and as an outcome of poor governance, the latter suggesting that it can be actively prevented by installing strong good governance mechanisms (Jakobi 2013a, Kaufman 2005, Rothstein 2014, World Bank 2007). Such mechanisms embody the principles of transparency and accountability, which form the heart of the good governance concept. The two principles are often seen as ‘Siamese twins’ (Bovens 2010, Hood 2010, Koppel 2005) establishing a powerful anticorruption foundation. Recognising the distinction between accountability as a virtue and accountability as a mechanism (Bovens 2007, 2010), the research looks at specific cases which demonstrate how the principles of accountability for performance, finances and fairness (Behn 2001) are all applied in EU policy making. The thesis embraces the broad notion of Bovens (2010) who argues that, inter alia, accountability can be used as a synonym for good governance, transparency, integrity and responsibility. All these governance features are among the tools that serve as strong corruption deterrents and their application can be used as indicator for the existence (or the lack) of political will to fight corruption (Klitgaard 1998). Political will is of key importance in implementing any

anticorruption reform agenda, and its presence is dependent of the interests and motivations of the policy players (Abbott and Snidal 2002, Johnston 1997) and on the value pressure that may come from the society (Abbott and Snidal 2002, Mungiu-Pipiddi 2013). The complex patterns that these interests and pressures can form, makes it particularly difficult to assess if actual political will for anticorruption reform exists, or if the policy outcomes are driven by other political considerations. To overcome this difficulty in answering the research question, why the EU has not established a comprehensive common anticorruption framework, the thesis deploys the political will theory of Brinkerhoff (2000), who suggests that the existence of political will in the anticorruption domain can be measured by the presence of locus of initiative, degree of analytical rigour, mobilisation of support, application of effective sanctions and continuity of the reform efforts. These five elements are considered in the context of each presented case study and are used as indicators of the willingness of the main EU institutional players to initiate anticorruption reforms. This approach enables the thesis to look at a broader good governance perspective, focusing on the main enablers for every policy reform effort, irrespective of its subject area/field.

While the theories on corruption and good governance provide the contextual framework of the thesis, the studies on the institutional preferences of the main institutional players in particularly sensitive policy fields, provide insights on the institutional setting needed for the adoption of an effective EU anticorruption framework. By deploying the works of scholars such as Hix and Høyland (2011), Thomson and Hosli (2006a, b), Warleigh-Lack and Drachenberg (2009), the thesis describes the main competences of the three EU policy-making institutions and focuses on the policy

dynamics and interactions between them, when their policy preferences differ substantially. It further deliberates on the theory of Helstroffer and Obidzinski (2014) attesting that, when the three institutions have conflicting preferences during co-decision procedures, they tend to exhibit recurrent behaviour. This is characterised by: 1) the Commission's attempts to anticipate and accommodate the preferences of the co-legislators, and 2) the Parliament's insistence on raising the bar further and increasing the expectation of policy results. In this model, if the Council does not support the policy change, it either threatens to block the proposal, thus forcing the Commission to lower its policy aims, or stalls the negotiations. Helstroffer and Obidzinski (2014) thus suggest that the Council has stronger bargaining power when its position is closer to the status quo. Costello and Thomson (2013:1037) assert the same notion, suggesting that the 'Council's conservatism or the EP's radicalism partly explains the fact that the Council has more power'.

The theories of Helstroffer and Obidzinski (2014) and Costello and Thomson (2013) are particularly relevant in the context of the research question, as the establishment of a common anticorruption regulatory approach will, by default, change the nature of the existing non-binding and non-enforceable national commitments, thus creating potential institutional tensions under the co-decision procedures. When applied in the anticorruption domain, these theories suggest that if all three institutions are not anticorruption reform minded, the Council will have the predominant bargaining power over the outcome of the policy process. Thus, it can be expected that the Council might be the institutional anticorruption inhibitor, a behaviour it might demonstrate also in other sensitive areas of governance.

The legalisation theories of Abbott and Snidal (2000; 2002), political will measurement theory of Brinkerhoff (2000) and the bargaining powers theories of Costello and Thomson (2013) and Helstroffer and Obidzinski (2014) establish the analytical framework within which the empirical investigation develops. The thesis applies these theories with the purpose of building a comprehensive picture of the EU anticorruption policy dynamics, thus identifying the institution/s which play the role of anticorruption policy inhibitors or enablers. In doing so, the thesis also tests the applicability of these notions to the EU anticorruption policy domain and, in doing so, corroborates their viability.

Based on the literature review, the thesis builds two possible hypotheses that might explain why the EU has not used its competences in the anticorruption domain:

- Hypothesis 1: the lack of strong anticorruption regulatory framework in the EU is a result of the legislative reluctance of the Council to commit to legally binding rules.

Such behaviour would mirror the resistance of some member states to ratify internationally-agreed legal instruments, such as the *Council of Europe Civil and Criminal Law Conventions* and *UN Convention against Corruption (UNCAC)* and their preference for establishing non-enforceable systems for monitoring compliance (as described in chapter 3). The thesis suggests that, if this hypothesis is correct, the Council (expressing the views of the member states) will oppose the adoption of a legally binding anticorruption framework at the EU level. Such resistance would not reflect the opposition of anticorruption efforts per se but would rather suggest that the adoption of a regulatory framework in the anticorruption domain is heavily influenced by a mix of national,

political, economic and personal motivations that are difficult to detect and discern. Yet, it will indicate the lack of real political will to fight corruption consistently in the EU.

- Hypothesis 2: an anticorruption framework is absent due to a lack of institutional leadership by the EU supranational institutions.

The logic behind this scenario is that the success of anticorruption interventions is heavily linked to the existence of institution(s), which are capable of initiating, enforcing and upholding high integrity levels, while at the same time unifying the divergent interests, practices and viewpoints of the member states and leading them towards the common good (Klitgaard 1998, Mungiu-Pipiddi 2013, Person, Rothstein and Theorell 2013, Smith 2007). If such institutional drivers do not exist, the adoption of a common anticorruption approach is hardly possible. In testing this hypothesis, the thesis investigates the presence of political will, as defined by Brinkerhoff (2000,) and examines the locus of initiative, its continuity and the degree to which the institutions perform in-depth analysis of the problem to establish adequate and feasible reform programmes. If this hypothesis proves to be correct, the European Commission and European Parliament will exhibit a weak and inconsistent anticorruption policy drive.

These hypotheses are built on two main presuppositions. The first presupposition is that the presence of political will is the absolute prerequisite for any successful anticorruption intervention (Brinkerhoff 2000, Klitgaard 1988). The second presupposition is that the establishment of any regulatory framework at the level of EU is a result of a complex set of interactions between the Commission, the Parliament and the Council based on their specific competences and interests (Hix and Høyland 2011, Costello and Thomson 2013, Helstroffer and Obidzinski 2014). Each of these institutions, depending on its policy

preferences, can either hinder or enable the adoption of a common EU anticorruption framework. Given that EU policies are ultimately created by a mixture of EU supranational leadership and member states' consent to support or initiate these policies, not a single EU framework can be adopted if one of these components is missing. In answering the research question, why has the EU not established a strong anticorruption framework, the empirical chapters test the two hypotheses by examining the competences, national choices and policy preferences of the main EU institutional policy-makers in establishing robust accountability mechanisms for: the management of EU decentralised agencies (chapter 5); the prevention of fraud in use of EU money (chapter 6); and the regulation of EU lobbying (chapter 7). The empirical case studies confirm and reinforce the findings of Helstroffer and Obidzinski (2014) and Costello and Thomson (2013). As predicted by the model of Helstroffer and Obidzinski (2014), in the cases of European decentralised agencies and the criminal antifraud directive, the Commission attempted to anticipate the institutional opinions of the Parliament and the Council and align its proposals with them; the Parliament proposed to raise bar and increased them further, and the Council stalled the negotiations until it received a proposal that was closer to the status quo. In the case of the lobbying regulations, the Council did not exhibit strong preferences, as the framework was not directly affecting the member states and thus was not changing the status quo. The observed processes provide further empirical evidence to the findings of Costello and Thomson (2013) and Helstroffer and Obidzinski (2014). They also assert their hypothesis that, to raise the standard at all, the European supranational institutions will need to be ready to reach consensus on texts, which are far below their desired policy outcomes. This is clearly demonstrated by chapters 5 and 6, where the Commission and the Parliament

agreed on the conclusion of Joint Statement (on the decentralised agencies) and conceded to some of the demands of the Council in the case of the EU criminal antifraud directive. Thus, the theories of Helstroffer and Obidzinski (2014) and Costello and Thomson (2013) and the findings of the current thesis reinforce each other, suggesting an imbalance of bargaining powers that does not necessarily coincide with the formal balance of powers, prescribed by the Treaties.

These notions are further reinforced by the legalisation theory of Abbott and Snidal (2000; 2002) explaining the reasons that drive international and national political actors towards the adoption of softer or harder regulatory approaches.¹⁵ This legalisation theory plays a key role in the empirical analysis, as it is used as a testing ground for rationalising the policy behaviour in the anticorruption field. Legalisation is viewed as a strategy, allowing the political actors to pursue their interests and values, while at the same time, supplying a normative framework that shapes their behaviour (Abbott and Snidal 2000). The legislative drive or resistance is therefore directly related to the expectations of the political players as to how the adoption of international binding commitments will affect the national political environment. This is so, as Kahler (2000) and Abbott at al. (2000: 419) argue, because '[c]oncern about reciprocity, reputation, and damage to valuable state institutions, as well as other normative and material considerations, all play a role... Between these extremes, where most international legalization lies, actors combine and invoke varying degrees of obligation, precision, and delegation to create subtle blends of politics and law'. The degree of obligation, precision and delegation are indicative of the

¹⁵ The term hard law applies to regulatory approach that is legally binding and can be enforced. The soft law approach refers to voluntarily agreement that cannot be monitored and is not subject to any sanctions in case of non-compliance.

level of commitment and predetermine the tools available for monitoring of compliance. Abbot and Snidal (2000) therefore argue that adoption of a soft non-binding regulatory approach suggests that the member states consider the possible impact of binding regulation either unpredictable or potentially harmful within the national political context. Apart from interests, Abbott and Snidal (2002) attest that values also play an important role in shaping the form of the legalisation. They apply this theory to the case study of the adoption of the OECD antibribery convention and assert that the phenomenon observed in this occasion is also applicable to areas such as human rights, environment, health, terrorism, economic integration, and arms control.

The empirical chapters examine whether the cost-benefit legalisation theory of Abbott and Snidal (2000) is valid in the case of EU anticorruption policy adoption by investigating three legalisation attempts with strong anticorruption impact, this time not on the international, but on the European policy arena. The case studies present the EU policy dynamics in areas that have significant impact on institutional balance, domestic politics and economic interests and attest the strong interplay between law and politics in the anticorruption domain. The case studies clearly indicate the relevance of the theories of Abbott and Snidal (2000; 2002) by demonstrating that the legalisation outcome in anticorruption areas is dependent on a complex set of estimations, related to the potential political, personal and economic costs of the proposed regulations and the loss of certain powers (due to delegation to a supranational body). The empirical evidence suggests that these factors have significant roles in the creation of the EU's anticorruption policy. They also indicate that, in the cases of the adoption of the criminal antifraud directive and the establishment of regulatory frameworks for the work of EU interest representatives, not

only interests, but also values play an important role in shaping the regulatory framework. These case studies, provided further empirical evidence and proved the relevance of the legalisation theory of Abbott and Snidal (2000; 2002) to the EU anticorruption policy domain.

By empirically testing the theories included in the analytical framework, the thesis attests their applicability in the EU anticorruption policy domain and suggests that the factors that influence the outcome in the anticorruption field may have an important impact in the legalisation process concerning other sensitive issues, falling under the domain of justice and home affairs.

Further deliberation on the theoretical framework related to each of the examined subject domains is included in each of the subsequent chapters.

1.5 Methodology and case study selection

EU policy creation comprises a complex set of decision-making procedures which require the active participation of the European Commission, European Parliament and the Council. If the Commission fails to initiate a policy or legislative proposal or the Parliament and/or the Council do not support the Commission's proposal, no EU policy nor legislation can be adopted. The answer to the mystery about why the EU has not adopted a robust EU anticorruption framework lies, therefore, in the institutional resistance – or lack of interest – of one or more of these institutions.

To determine which are the anticorruption inhibitors and which the enablers, this thesis conducts a cross-institutional study of the three main EU decision-makers' roles in facilitating or hindering the establishment of policies with a significant anticorruption

impact on the EU governance domain. To this end, the thesis deploys the tools of process tracing and legal, documentary and comparative analysis. To trace the potential policy changes, the thesis uses multiple data sources, describing the policy preferences and institutional positions of the Council, the Commission and the Parliament. This requires documentary analysis of and comprehensive research into legal files, debates and policy opinions expressed by different institutional and non-state actors regarding the adoption of: transparent and accountable frameworks for the work of EU decentralised agencies and EU lobbyist; and robust EU criminal law approach for protection of EU financial interests. Public databases of the Commission, Council and Parliament are used for tracing the policy positions of the three institutions, pertaining to the examined case studies. The main bulk of analysed documents include: communications, reports, White and Green Papers and draft legal acts, elaborated by the Commission; reports of various committees, minutes from plenary meetings and resolutions of the European Parliament; Council conclusions and letters from the Presidency to the Working Parties; opinions of the Legal Service, and reports from the European Court of Auditors. Reports and opinions of non-governmental and international organisations, such as the Council of Europe, the World Bank, the OECD and Transparency International, along with public perception surveys, newspaper articles and other data relevant to the study are also comprehensively explored. The documentary analysis comprises also extensive study of the international and EU primary and secondary subject specific legal frameworks. These encompass the anticorruption conventions adopted by the United Nations, Council of Europe and the Organisation for Economic Development and Cooperation; EU Treaties, Regulations and Directives, establishing the legal framework and EU institutional competences in each of the specific case study

domains. All these documents are analysed in conjunction with a review of the literature pertaining to anticorruption, good governance, legalisation and EU institutional arrangements, antifraud and lobbying. Such an approach is instrumental for building the theoretical framework and refining the ideas and concepts used further in the empirical chapters. To facilitate the readers' understanding of the peculiarities of each of the studied domains, the theoretical framework is presented along the empirical analysis in each of the dedicated chapters.

The empirical investigation comprises three case studies, demonstrating how the principles of transparency and accountability are applied in the European governance process. Such an approach is based on the understanding that corruption operates in the governance context and can be largely prevented by embedding strong mechanisms of accountability and transparency. Based on the notion of Behn (2001) that the principle of accountability is manifested in three main forms: accountability for finances; accountability for fairness and accountability for performance, the chosen case studies represent distinct examples of how these principles are applied (or rather not applied) in practice.

The case studies have been selected because of the diverse policy fields and accountability tools they represent, but also because of their similarities, in terms of potential anticorruption effect, sensitivity and the complexity of the institutional interactions. The three policy processes that were investigated could be expected to deliver a significant anticorruption impact and create coherence between the divergent national/institutional practices. In all examined cases, agreement had to be reached by all institutions to ensure that sound good governance processes were set in place. Such

agreement however would have changed the institutional balance and would have led to power realignments. The highly sensitive nature, significant anticorruption impact and political power allocation effects of the selected cases, provide particularly suitable 'ground' for an exploration of the reasons behind the non-existence of a robust EU anticorruption approach. The selection of these case studies has been also informed by my professional anticorruption experience, acquired during my work as anticorruption expert in the European Parliament, European Commission and Bulgarian Government's Anticorruption Commission. My knowledge, experience and insights in these cases, allowed me to better understand, map and present the empirical and theoretical framework, and integrate practitioners' views in the thesis findings.

The first case study examines the policy process for establishing clear accountability and transparency mechanisms in the ways the European decentralised agencies (DAs) are established and managed. It provides particularly favourable ground for exploring the reasons behind the lack of efficient and effective accountability structures in the second layer of EU governance. The DAs manage a budget of over €1 billion, have broad powers over the ways in which EU policies are executed, and are particularly vulnerable to corruption. Hence, the governance modalities created by the EU for the agencies' establishment and management can provide valuable insights on the institutional actor/s that is/are hindering or fostering good governance compliance and accountability for performance.

The second case study, on the adoption of the criminal law directive on the fight against fraud against the EU's financial interests, exhibits another interesting example, this time related to accountability for finances. The interest in this case is based on the close

bonds between fraud and corruption, and the seemingly contradictory practices, exhibited by the established anti-fraud systems. On one hand, the duty of all public institutions, national or European, to protect taxpayers' money and ensure strong deterrents against fraudulent activities is unquestionable. On the other, when it comes to the protection of EU money, 80 percent of which is managed by the member states, the mechanisms for detecting, investigating and prosecuting fraud, diverge dramatically and up to an extent, allow for the possible perpetrators to choose the jurisdiction that is most 'favourable' for their fraud related crime-schemes. Given the large similarities between fraudulent and corruption behaviour, this case study provides strong indications on the institution/s that foster or hinder the establishment of stronger common anticorruption approach.

The third case study relates to another aspect of accountability: accountability for fairness. It examines the attempts for establishing regulatory framework for the work of interest representatives at the EU policy level. Considering that the competences of EU extend to over 75 per cent of economic and social policies (European Parliament 2008c), affecting the lives of approximately 500 million people, the need for ensuring fairness, accountability and utmost transparency of the ways EU policies are crafted is of utmost importance. So is the need to protect the latter from any undue influence, which may have negative effects on the well-being of millions. The third case study therefore explores the regulatory framework for ensuring integrity in the work of EU lobbyists. Unlike the previous two cases, which investigate policy developments and attempts to establish regulatory frameworks with direct impact on the member states, the third case study explores the establishment of a framework that creates binding commitments not for the member states, but for the EU institutions only. Such an approach allows the thesis to

compare the reactions of the three institutions to the adoption of regulatory frameworks that have no direct effect on them. Such a comparison allows the thesis to deduce if the anticorruption regulatory reluctance of the member states is related to the opposition of anticorruption framework per se or is rather linked to complex set of the national political, legal, economic and administrative factors, that predetermine the resistance towards the conclusion of enforceable binding anticorruption commitments.

While applying the relevant theoretical framework, the thesis presents each of the case studies in a similar investigation pattern. First, each chapter provides a snapshot of the respective domain along its theoretical framework, presents its characteristic features and explains their importance for building stronger good governance and anticorruption framework in EU. Then, each chapter introduces the main roles and competences of the three institutional players in the investigated domain. Following the logic of the EU legislative processes, the chapters further trace the respective policies as they develop, starting from the initial proposal of the Commission, the reactions of the Parliament and the Council, their negotiation stances and the Commission's actions in aligning/or not to the position of the other main institutional players. Each of the chapters provides an overview of the key policy steps and presents the processes as they unfold over time. Finally, the empirical chapters deliberate on the policy outcomes by applying the theoretical framework and drawing conclusions on the reasons behind the lack of common EU anticorruption framework.

The method of process tracing is used as a qualitative analysis tool, allowing the move 'away from correlational arguments and "as-if" styles of reasoning toward theories that capture and explain the world as it really works' (Checkel 2006:362). Process tracing,

as Collier (2011) argues, enables researchers to gain insight into causal mechanisms, explain better new causal claims and identify new political and social phenomenon. The benefit of using this analytical tool is that it helps to identify ‘descriptive and causal inferences from diagnostic pieces of evidence—often understood as part of a temporal sequence of events or phenomena’. (Colloer 2011: 824). Given that, the process of evidence selection requires prior knowledge in the subject area (Collier 2011), my professional background and institutional insider knowledge were utilised for the selection of diagnostic evidence that provide the basis for the descriptive and causal inference presented by the thesis. The case studies, which reveal the striving for establishing accountability frameworks in the work of the EU decentralised agencies and EU lobbyists, alongside the adoption of robust criminal law frameworks for the protection of EU financial interests, have been chosen as typical domains that represent highly sensitive anticorruption areas. By focusing on the policy outcomes in areas with high anticorruption impact, the thesis deliberates on the events and the causal mechanisms that lead to these policy outcomes (lack of robust anticorruption frameworks). It thus elaborates on the multiple paths and causal links that lead to the lack of a robust common EU anticorruption framework. In doing so, the thesis links the policy stances of the EU’s main institutional players into a coherent policy chain, exhibiting recurrent institutional preferences which may predetermine future policy outcomes in the anticorruption domain.

By looking at ‘embedded agency’, through the prism of qualitative research perspective, the thesis provides better understanding on the driving forces behind the EU anticorruption policy creation. Such an approach, as Servent, Busby and Busby (2013:14) argue ‘can also unveil hidden processes and particular biases in the formulation and

development of issues. It provides, thus, a more fluid understanding of the policy process, where influence is not just the result of formal and informal rules but depends on wider contextual elements.' These contextual elements are directly reflected in the institutional preferences of the main EU policy makers. The thesis therefore examines how these actors collaborate and respond to each other's proposals, and how these combined actions contribute to policy or institutional changes. The tools deployed by such analysis allow me to decide whether any of the main EU institutions is hindering the adoption of a common anticorruption legal regime or whether the absence of the latter is a result of a lack of political leadership and general interest in anticorruption topic. The line of reasoning is that, given the general competences of the EU institutions as conferred by the treaties, the adoption of legally binding texts is a result of a complex institutional process, requiring the initiation and consensus between the Parliament, the Council and the Commission. The lack of a common EU anticorruption legal framework should therefore point to the lack of one or more of those components.

While the typical process tracing methodology, as described by Checkel (2006), involves extensive interviews with various stake-holders, for the purposes of the current research, I decided not to conduct interviews with high-level EU officials for reasons related both to validity and reliability (Berry 2002). Considering the macro-institutional focus of the thesis and the very purpose of the interviewing (to establish motivation and preferences), elite interviews are not a useful validating instrument: their subjective element contradicts the objective fact-gathering approach undertaken in the thesis. The thesis bases its findings on the analysis of the official policy positions of the three major EU institutions and does not look at their internal institutional dynamics and the ways that

policy consensus is reached within the institution itself. Another reason for ruling out interviews as a primary-source data collection method relates to the reliability of the collected results. The extreme political sensitivity of the topic and the general obligation of high-level officials to be politically correct and not to express opinions that may harm the interests of their respective service make the reliability of any view expressed in interview at least questionable, even if not unreliable. During the research, however, informal talks with EU high-level officials have produced many insights. These were collected within the framework of my work assignments both as an EU High Level Anticorruption Adviser to the Prime Ministers of Moldova and Armenia¹⁶ and as Head of Staff of the Vice-Chair of the Constitutional Affairs Committee in the European Parliament. Although many of the discussions on the EU anticorruption policy and its viability have been of a confidential nature, the framework of the current thesis transmits their essence. The insights from these discussions and my work experience are factored into the research and have reflected on the development of the argument and the selection of the empirical case studies. They also helped to identify the series of theoretically and empirically predicted intermediary steps linking my dependent and independent variables (Checkel 2008: 115)

Acknowledging the complex set of political and institutional considerations that may influence anticorruption agenda setting, I exclude from the present analysis the internal interinstitutional dynamics and focus instead on the official outcomes and positions expressed by the Council, the Parliament and the Commission. I can thus outline the correlations between the EU institutions and the lack of a common EU regulatory

¹⁶ Since 2009, the Commission has established three EU high-level policy advice missions to support the association process in Armenia, Moldova and Ukraine (EUAG, EUHLPAM and EUAM).

framework at global, macro-institutional level. I also exclude the European Anti-Fraud Office (OLAF)¹⁷ and the European Court of Auditors (ECA)¹⁸ from the research analysis in order to focus on the EU level of anticorruption policy creation. While these two bodies have explicit anticorruption and good governance functions, they do not possess competences for initiating and adopting obligatory anticorruption mechanisms.

The chosen research methodology allows me to: identify anticorruption policy dynamics at macro political level; evaluate prior explanatory hypotheses; gain insight on the casual mechanisms for anticorruption policy adoption at EU level; and provide answers that can assist the development of anticorruption policy research.

1.6 Plan of the thesis

To understand why there is no common European anticorruption framework, one should first have a clear understanding of: 1) the adverse effects of corruption and the use of good governance tools to prevent it; 2) the existing anticorruption tools and the member states'

¹⁷ OLAF is the specialised independent anti-fraud body within the Commission's structure. Its mandate relates to conducting preliminary administrative investigations of any fraud, corruption or other crime-related activities committed against the financial interests of the EU by members of European institutions and national beneficiaries in the member states. In the latter cases, OLAF is obliged to pass all the gathered data to the national authorities, which have the power to decide whether criminal prosecution should be enacted or not. At the policy level, OLAF supports the European Commission with specialised expertise on issues related to the elaboration and implementation of the European antifraud policy framework.

¹⁸ The ECA is an independent external body, comprised of representatives of the member states. Its main role is to safeguard the interests of European taxpayers. It does not have legal initiative and its main competences refer to supporting the Commission in improving the management of the EU budget and increasing transparency and accountability in reporting. To this end, the ECA has the right to check all natural and legal entities which are handling EU funds and to conduct on-the-spot checks in the EU bodies, member states' administrations and administrations of third countries receiving EU financial support. As a specialised auditing body, the ECA can also issue recommendations for improvement. At the policy level, it consults the Council and the Parliament on the new measures for prevention and counteraction of crimes affecting the financial interests of the Union and publishes annual reports on the ways that the Commission has spent the general EU budget. If the ECA has reasonable doubts regarding possible fraudulent or corrupt activities in the audited bodies, it is obliged to inform the European Anti-Fraud Office.

compliance with them; 3) the EU institutional competences in establishing a common anticorruption framework; 4) the policy preferences of the main institutional actors.

For these reasons, the thesis is structured as follows. Chapter 2 introduces the major notions of corruption and good governance. It deliberates on the different characteristic features and manifestations of corruption, focusing on the adverse effects of corruption in the public sector and on the socio-economic and political development of society. The chapter then deliberates the underlying factors for corruption, by presenting the principal-agent and collective action problem schools of thought. It contemplates the theories of political will and political agency, introduces their various elements and explains how they reflect on the concepts of corruption and public governance. The chapter then introduces the notion of good governance as the antithesis of corruption and analyses how this is embedded in the arrangements of European governance. The various applications of the principles of transparency and accountability are discussed, outlining the synergies between the two and their interdependency, and stressing their importance for ensuring corruption-free governance. By examining the concepts of corruption and good governance, the chapter provides the contextual background of the policy research, underlines the importance of fighting corruption and exhibits the good governance tools/principles that can be used as corruption-prevention mechanisms.

Following this, chapter 3 offers an overview of the ways in which the international community and the EU community have responded to the need for counteracting corruption. To this end, the chapter presents an analysis of the major international and EU anticorruption instruments and their significance for the member states' anticorruption policy development. Further, the chapter examines the member states' compliance with

their international obligations and highlights their ongoing reluctance to conclude legally binding commitments. The chapter argues that this latter has led to the creation of divergent anticorruption standards that are neither systematically applied nor monitored across the EU. Thereafter the chapter defines the need for a stronger legal framework to counter corruption, supplied with mechanisms for enforcing anticorruption compliance. In search to identify the reasons for the absence of robust common EU anticorruption framework, the chapter builds two possible hypotheses: the Council is resisting the adoption of binding anticorruption commitments (hypothesis 1) and EU institutions fail to demonstrate anticorruption leadership (hypothesis 2). These hypotheses are further explored in the empirical chapters.

Building upon these findings, chapter 4 looks at the powers given to the EU institutions in the area of anticorruption policy creation. The competences of the European Commission, European Parliament and the Council and their strategic relationship vis-à-vis each other are examined in the context of EU policy and legislative creation. The chapter pays attention to the power allocation, competences and the constraints of the Parliament and the Commission in the domain of anticorruption. Based on this overview, the chapter argues that, within the framework provided by the EU treaties, there are no legal constraints to adopt binding EU anticorruption standards. This entails that the reasons behind the lack of common anticorruption approach are ‘internal’ and are linked to the institutional preferences of the main EU decision-makers. The chapter then presents the institutional bargaining theories of Costello and Thomson (2013), Helstroffer and Obidzinski (2014) and the legalisation theory of Abbott and Snidal (2000;2002) and argues that the adoption of anticorruption framework is an aftermath of complex mix of political,

economic and social considerations, determining the policy stances of the institutional actors. The chapter concludes with a presentation on how the EU has used its regulatory powers in another equally sensitive area of EU governance, and one that is equally important for upholding the main EU objectives: European competition policy. This brief comparison aims to demonstrate, that if the Parliament, the Commission and the Council reach an agreement, the EU can be empowered to regulate and monitor the activities of member states even in areas that have major political and economic impact at national level and which are therefore usually considered a matter of national sovereignty.

The empirical chapters that follow are built upon the concepts presented in chapters 2, 3 and 4. By utilising concepts, theories and notions from the domains of anticorruption, good governance, EU institutions and policy-making, legalisation, antifraud and lobbying, 5, 6 and 7 investigate the reasons behind the lack of a robust joint EU anticorruption response. They do so by presenting three case studies, that demonstrate the EU institutional stances on policies aimed at installing better accountability and transparency – in the ways EU bodies are managed, EU money is spent, and EU decisions are taken. Each chapter presents the peculiarities of the research domain, follows the policy processes as they develop in time, and by applying the theoretical framework, described in the previous chapters, analyses the policy outcomes and the institutional stances. By doing so, the empirical chapters suggest which are the institutional inhibitors/enablers of the creation of a unified EU anticorruption framework.

Chapter 5 analyses the accountability and transparency standards applied in the establishment and the operational framework of the European decentralised agencies.¹⁹ It

¹⁹ European decentralised agencies are distinct administrative structures set up to perform specific tasks under the EU law.

presents the role and characteristic features of the decentralised agencies, deliberating on the existing institutional arrangements. By doing so, the chapter argues that feasible mechanisms for holding the agencies to account for their actions are non-existent, a fact that is further backed up by a total lack of consistency and transparency in their creation and operations. The chapter then looks at the institutional responses to these failures. It presents the policy struggle of the European Parliament and the Commission to ensure transparency and accountability in the operational framework of the decentralised agencies, noting how these efforts have been brought to their knees by the Council's firm rejection of any binding standards being created. The chapter then argues that the Council's resistance to the conclusion of an interinstitutional agreement on the establishment and operational framework of the decentralised agencies relates more to a variety of national political considerations than to the opposition of the principles of good governance per se. The chapter concludes that these considerations have overcome the need to allow the practices of healthy good governance management to flourish. The chapter thus suggests that the Council may be the anticorruption institutional inhibitor.

Chapter 6 addresses a similar case, but this time looking at how fraud against EU money is prevented. It focuses on the development of legal framework for crimes committed against EU financial interests. The chapter deliberates on the main attributes of fraud and the similarities/differences between fraud, corruption and irregularities. While contemplating the negative impact of fraud against EU financial interests, the chapter presents the main institutional actors responsible for the protection of European money and elaborates the difference between fraud and irregularity. Further, the chapter discusses the difficulties that are inherent in the adoption of effective EU criminal policy on the

protection of EU financial interests and the institutional attitudes of the Council, the Commission and the Parliament. The chapter reveals that, while the Parliament and the Commission stand united in their stance regarding anti-fraud and anticorruption, the Council has been continuously blocking the adoption of major antifraud legislative initiatives.²⁰ This reflects the commitment of some member states to prevent interference in their national criminal systems, even at the expense of EU and national taxpayers. These findings support hypothesis 1, that the adoption of a common EU anticorruption framework is a result of the Council's legislative reluctance.

Chapter 7 deals with another important topic: the ways that decisions are made and the possibilities for infiltration of private or business interests in European policy-making. To this end, it examines the long process of establishing common enforceable standards in the work of the interest representatives in the EU. The chapter begins with a synopsis of the definitions of lobbying and deliberates on the reasons for regulating lobbying activities. Next, it provides a snapshot of current lobbying regulatory regimes and modalities and presents the Parliament's struggle to increase the transparency of the lobbyists' work. Here, unlike the cases in the previous two chapters, the Commission and Parliament have clashed about the founding concept of the regulation: the establishment of an obligatory lobbying register aimed at promoting fairness and equal access to the European policy-making process. The Council's general reluctance to support transparency and accountability measures remains unchanged, however. Although it has not stopped the

²⁰ When referring to the opinions expressed by the Council, the thesis refers to the final outcome of the Council's discussions. The thesis acknowledges that some member states may have more favourable attitude towards the adoption of robust anticorruption framework than others. Yet, as mentioned above, the thesis explores the officially published texts that express the official opinion of the Council and reflect the prevailing opinion of the member states.

efforts of any of the EU institutions, the Council did not take an active role, remaining instead a mere observer of the striving for transparency. The findings of the chapter suggest that when the interests of the member states are not directly affected, the Council is not likely to oppose or block anticorruption initiatives. These findings reflect the insights presented in chapter 3, which demonstrated similar behaviour pattern in the case with the conclusion of the UN Convention against Corruption by the European Union.

Chapter 8 concludes the thesis. It summarises the main empirical arguments, drawing out the key messages from each of the chapters and distilling the answer to the research question. Based on the findings of the previous chapters, chapter 8 points to the European Commission and European Parliament as potential drivers of anticorruption policy change and identifies the Council as hampering the development of a robust common European anticorruption approach: the institutional inhibitor. Further deliberation summarises the arguments which conclude that the recurrent reluctance of the Council to conclude binding anticorruption commitments has more to do with a number of national political considerations than with its opposition to anticorruption measures per se. Further on, chapter 8 argues the significance of the research findings and presents their importance both for advocacy strategies and future studies on anticorruption. Finally, the chapter proposes some questions for further research.

2. Corruption and Good Governance: Conceptual Framework

The roots of corruption can be traced back to the beginning of human civilisation. Yet, it was only at the start of the 1990s that corruption was acknowledged as a serious threat to the world's political and economic development. Since then the phenomenon has been labelled 'the single greatest obstacle to economic and social development around the world' (United Nations Office on Drugs and Crimes 2016:1), a 'cancer' (Wolfensohn 1996:1), and 'public enemy number one' (Kim 2013:1), and has prompted international organisations and national governments around the world to undertake robust anticorruption actions. The efficiency of such actions is strongly dependent on an in-depth understanding on what constitutes corruption, what are its underlying drivers, and which are its natural antidotes.

This chapter therefore discusses the intrinsic features of corruption and good governance and looks at the synergies between them. It reviews the theoretical studies dedicated to corruption, its definition, types and underpinning factors, and explains the adverse effects corruption has on the socio-economic and political welfare of the European citizens. By looking at the reasons that foster corruption, the chapter further argues that good governance is its natural antidote. Being among the key reinforcing factors that ensure impartiality in the execution of public function, transparency and accountability play an important role in this regard (Organisation for Economic Cooperation and Development 2013a).

The chapter is divided further into four sections. Section 2.1 introduces the different concepts of corruption, tracing its roots back to the beginning of human history. It presents in a comparative way the different notions used by the literature of political

science and by major international organisations. The section further presents the theoretical debate on the underlying factors for corruption existence and argues that good governance mechanisms play a key role in preventing this social phenomenon. Further, section 2.2 discusses the negative effects of corruption on the democratic, social and economic development of society at large. It presents an overview of the political and economic science literature on the correlations between different democratic and economic components such as rule of law, political participation, competitiveness and economic development. Section 2.3 links corruption and governance by examining both theories of governance and the qualitative elements that transform governance into its good or bad forms. It elaborates on the concept of good governance and argues that good governance is the antithesis of corruption. Transparency and accountability principles are presented as tools that realise the good governance concept and help its practical implementation. Next, section 2.4 connects the theories of good governance with their application in the EU policy domain. It focuses on the EU's strategic vision on good governance and deliberates on how the principles of accountability and transparency are engrained in the EU's governance system. Finally, section 2.5 concludes the debate, and defines the scope and further application of the concepts discussed in the chapter.

By presenting the notions of corruption and good governance and putting them in the EU context, the chapter provides the theoretical background for the policy content that is further used in the thesis. It shows that the application of the principles of good governance in the EU decision-making process can be used as a corruption deterrent. The willingness of the EU institutions to abide by those principles and adopt a policy framework that strictly adheres to the EU standards of accountability and transparency can,

therefore, be used as an indicator when trying to establish the anticorruption institutional enablers/inhibitors. By doing so, the chapter provides the theoretical background for the empirical chapters, which demonstrate why the EU has not adopted a robust anticorruption framework.

2.1 Defining corruption and its conducive environment

This section examines the various definitions of corruption and elaborates on the systemic processes that facilitate or deter corrupt activities. The section is focused solely on the public sector and does not discuss the implications of private-sector corruption. This limitation allows the thesis to focus on the EU interinstitutional processes of public policy-making and reveal the forces that facilitate or hinder the creation of a stronger European approach to fight corruption.

2.1.1 Corruption defined: practitioner and academic points of view

The question of what type of behaviour constitutes corruption has been widely debated in the literature of political science (Johnston 2005, Nye 1967, Warren 2004, Rose-Ackerman 1978, Klitgaard 1988) and in international development society. While, at academic level, the deeper the topic was explored, the wider the nuances between the different understandings of corruption became, at practitioner level, the process has led to the unification of the international terminology into a simple and easily comprehensive definition.

Faced with the need to support the implementation of robust anticorruption programmes, the international community²¹ was required to elaborate a concise operational definition that could be used in its development support activities. Thus, the World Bank defined corruption as the ‘abuse of public office for private gain’ (World Bank 1997:8), while the Organisation for Economic Cooperation and Development (OECD) described it as the ‘active or passive misuse of the powers of public officials (appointed or elected) for private financial or other benefits’ (Organisation for Economic Cooperation and Development 2007a:152). The European Bank for Reconstruction and Development, along with other major international financial institutions,²² contributed further to the development of a definition of corruption that went beyond the boundaries of the public sector, describing the phenomenon as ‘offering, giving, receiving or soliciting, directly or indirectly, of anything of value to influence improperly the actions of another party’ (European Bank for Reconstruction and Development 2006:1). This definition is largely similar to the legal definition given by the Council of Europe’s *Civil Law Convention on Corruption* (1999): ‘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’ (article 2).

All these definitions, however useful for legal and project management purposes, did not answer the development practitioners’ need for a concise, universal concept that

²¹ Represented by organisations such as the World Bank (WB), Council of Europe (CoE), United Nations (UN), European Bank for Reconstruction and Development (EBRD), International Monetary Fund (IMF), Organisation for Economic Cooperation and Development (OECD).

²² These include: African Development Bank Group, Asian Development Bank, European Investment Bank Group, International Monetary Fund, Inter-American Development Bank Group, World Bank Group.

was easy to explain, and applicable in diverse cultural, political and historical environments. The definition of Transparency International (TI) came to fill this gap, by explaining corruption in seven simple words: ‘misuse of entrusted power for private gain’ (Transparency International 2009a:14). This definition summarised the CoE’s legalistic construction and broadened those provided by the World Bank and OECD by including a wider spectrum of corrupt activities in both public and private sectors. Nowadays, the TI definition has become a common reference point for identifying corrupt activities in the work of the development practitioners.

In academic circles the debate on the definition of corruption itself became a subject of discussion in a large body of political science literature, comprehensively explored by Johnston (1996, 2005), Kurer (2005), Ney (1967), Philp (2002, 2006) and Warren (2004). The differences in the conceptualisation of corruption in official laws, the public understanding of corruption and the ways it affects the public, along with different cultural perceptions, were and still are among the many reasons contributing to the lack of a commonly agreed scientific definition (Gardiner 2002). Yet, despite the huge variations, the definitions of mainstream political science do not contradict those used by international organisations. Instead, they take them to a different level, by seeking to identify the different underlying components of corrupt behaviour. Good examples of this approach are the definitions provided by Johnston (2005) and Nye (1967). According to Nye (1967), corruption is ‘behaviour which deviates from normal duties of a public role because of private-regarding (family, close private clique), pecuniary or status gains; or violates rules against the exercise of certain types of private-regarding influence’. This definition leaves a lot of room for interpretation, accommodating not only such ‘classical’ forms of

corruption as bribery, but also activities such as embezzlement, trading in influence, illicit impeachment, and abuse of functions. Johnston (2005) went further in broadening the scope and understanding of what corruption means. He states that corruption is the abuse of public roles or resources for private benefit, noting that the interpretation of the terms 'public', 'private', 'benefit' and 'abuse' is different in different societies, with different levels of ambiguity.

The diverse interpretations of the meaning of corruption reflect not only the difference in the socio-cultural context, but also the variety of its manifestations. Corruption may take a variety of forms and shapes, clustered in four main categories: 1) incidental or systemic; 2) petty or grand; 3) administrative/bureaucratic²³ or political; and 4) individual or institutional (Dish et al.2008, Johnston 1998, Kaufmann and Vicente 2005, Philp 2002). The categories emerge based on the frequency and magnitude of the corrupt actions, their quantity and scale, the method and the parties involved.

Whether we observe incidental or systemic corruption depends on the frequency of the corrupt activities. Incidental corruption is sporadic in character and is typical for an environment where corruption is not widespread. This type of corruption is relatively easy to counteract because it affects isolated individuals and does not interfere with governance processes/systems. Systemic corruption, on the other hand, signals the infiltration of corrupt practices at all levels of social, economic and administrative interaction, thus creating a system, or a corruption net that is almost unavoidable (Heather et al.2011). Johnston (1998) describes systemic corruption as a situation in which the major institutions and processes are dominated and used by corrupt officials and groups. In such situations,

²³ The terms petty and administrative/bureaucratic corruption are often used interchangeably to indicate small-scale corrupt activities.

corruption is not seen as the exception, but rather as an attribute of the established processes, and it is embedded in the wider political and economic environment that sustains it.

Petty and grand corruption is distinguished by the quantity of the favours involved. The gravity of petty corruption usually derives, not from the effect of each individual transaction, but from the cumulative effect of its multiplication over the entire system and society. Petty corruption is very often related to bureaucrats who bend the rules for private gain and therefore is also described as administrative or bureaucratic corruption. Grand corruption, on the other hand, involves holders of public office elaborating rules that benefit certain political or economic interests. Hence it is often associated with political corruption. This is the type of corruption that is the most difficult to frame (Heidenheimer 2002). While the classical manifestation of individual corruption (bribery) resembles an economic transaction with well-defined parameters, the sophisticated manifestation of political corruption can take the form of vague social interactions where the direct benefit is less tangible. The idea goes beyond the general public's common understanding that corrupt activities are mainly related to bribery, but instead touches upon more 'refined' corrupt practices where parties are exchanging favours over time, and are paying with favourable legislative amendments or huge procurement contracts (for example). In this model, where political and business elites are manipulating and managing state policies and processes to their own advantage, corruption is very likely to lead to state capture (Dish et al.2008). In this perspective, grand corruption represents a particularly high threat because it damages the 'institutional fabric of the political culture' Philp (2002:43).

Irrespective of their type and form, corruption activities significantly weaken the established governance mechanisms and negatively impact the socio-economic and political development of society. These repercussions make the research into the underlying reasons for the existence of corruption particularly important for understanding how better to counteract this social phenomenon.

2.1.2 What are the underlying reasons for corruption?

The question of what are the underlying drivers that facilitate corruption has attracted the attention of many political science researchers (Johnston 1998 and 2005, Klitgaard 1988, Philp 2002, Rose-Ackerman 1978, Smith 2007) and has led to the formation of two major schools of thought, each seeing the roots of corruption as a ‘principal-agent’ or a ‘collective action’ problem.

The principal-agent problem school of thought sees the ‘agent’ (e.g. public servant or even a national state) as entrusted with authority to act on behalf of, and in the best interest of, the ‘principal’. The agent is therefore supplied with discretionary and monopoly powers to take decisions and in the execution of those powers, it is controlled by the principal through political, administrative and social accountability tools. Depending on the context, the principal can be a particular actor (e.g. state institution, a citizen) or society at large. The theory presumes that, in this constellation, the principal and the agent may not always have overlapping interests. In such situations, the agent may calculate its own foreseen benefits and possible losses (in the case of deviation from the interest of the principal) and depending on the outcome of these calculations may choose to act in an honest or corrupt manner (Klitgaard 1988, Rose-Ackerman 1978). The expected cost of

bribery is calculated by multiplying the likelihood of being caught by the likelihood of being convicted, times the punishment level (Rose-Ackerman 1997). The probability that the benefits of corruption are greater than the likely losses therefore occurs when the principal is not supplied with the tools to monitor and control the agent properly. This usually happens when the monitoring and sanctioning systems are weak, law enforcement and judicial structures are dysfunctional, legal and administrative systems are inconsistent and utterly complex, and the principal is not wholly aware of his or her rights and the way to exercise them. All these features form the underlying reason behind the existence of corruption and represent a governance structure where the monopoly of power and administrative discretion is not matched with strong accountability mechanisms.

Corruption can therefore be prevented by: transparent and open institutions, which are accountable for their actions; comprehensive legal frameworks, which make the agent's losses higher than the benefits; and effective law enforcement and judicial structures, capable of enforcing legal compliance. Acknowledging that corruption is a 'crime of calculation, not passion', Klitgaard (1998:4) suggests that effective corruption prevention calls for redesign of the governance frameworks. Hence, fighting corruption in the EU will require the establishment of a governance system that upholds honest behaviour and punishes non-compliance. The redesign of the system should therefore include the harmonisation of the diverse national legal frameworks and national judicial and law enforcement practices. This will entail the establishment of coherent mechanisms for monitoring of anticorruption compliance, sanctioning of misbehaviour, and greater transparency and accountability in the policy making and implementation processes. The

absence of any of these elements, as Klitgaard (1998) suggests, indicates either the lack of sufficient political will or/and capacities to fight corruption.

Mungiu-Pipiddi (2013) corroborates Klitgaard's theory by building a corruption control equilibrium model. By looking at the different factors that facilitate corruption, Mungiu-Pipiddi (2013) argues that corruption/control of corruption is an equilibrium between opportunities and deterrents. In this model, the opportunities encompass discretionary and monopoly powers entrusted to the agent/s, while the deterrents comprise legal and normative mechanisms, such as accountable, transparent and efficient legal bodies, capable of enforcing legislation; effective and comprehensive laws with strong anticorruption effect. Mungiu-Pipiddi (2013) argues that the normative deterrents should be built on social norms and culture endorsing integrity and condemning corruption, paired with strong civic monitoring mechanisms and a critical electorate. She also asserts that if such equilibrium does not exist, the most plausible explanation will be the lack of political will to fight corruption.

These explanations of the underlying reasons fostering corruption are challenged by another branch of anticorruption studies, which argues that corruption is a collective action problem, rather than principal-agent based. They argue that the presumption of the principal-agent theory that the principal will take an active role in controlling corruption is questionable in countries with systemic corruption. In the latter, the existence of agents who will enforce the rules and 'principled principals' who will demand accountability can be hardly expected, as corruption will usually bring rewards, at least in a short-term perspective (Persson, Rothstein and Teorell 2013). The collective action problem theory sees corruption not as an outcome of the deviating interests between the principal and the

agent, but rather as individuals' attempt to align to societal group dynamics. When society considers corruption as part of normal life, all individuals tend to act in a corrupt manner because otherwise they risk bearing 'losses' because of their honesty. In this case, individuals do not see any sense in being honest and acting against their own self-interest as "insofar as corrupt behaviour is the expected behaviour, everyone should be expected to act corruptly, including both the group of actors to whom the principal-agent framework refers to as 'agents' and the group of actors referred to as 'principals'."(Persson, Rothstein and Teorell 2013: 456-457). Looking at the results of anticorruption interventions in countries where corruption is rampant, Persson, Rothstein and Teorell (2013) assert that corruption exists not because of a lack of moral condemnation, but because of the high cost and low return of being honest in a society where everybody acts in a corrupt manner and everybody expects everybody else to be corrupt. The characteristics of such societies, where corruption is part of 'normal' life, are similar to those described by the principal-agent model: inconsistent legal frameworks are complimented by weak and dysfunctional administrative and judicial structures. The collective action problem school, however, argues that the fight against corruption requires not only transparent institutions and strong monitoring and punishment mechanisms, but also trust and institutional leadership, able to convince all agents and principals that most people will act in an honest manner. Thus, the way to counteract corruption is linked to the establishment of honest, transparent and accountable institutions, led by honest political leaders. In societies rampant with corruption, such transformational change is extremely difficult, as when leaders are not sure that others will follow their anticorruption drive, they will be less prompt and willing to introduce anticorruption reforms. In such cases, being an anticorruption flagship is

considered a high political risk, as such behaviour may bring effective losses/punishment for the political leaders who try to change the status quo.

Going beyond the principal-agent/collective action problem debate, Smith (2007) clusters the grounds for the existence of corruption in five distinct categories: political structures; motivations; political economy; institutions and cultures. He argues that the basic grounds for such classification lie in understanding that the presence of weak political structures facilitates the establishment of clientelist networks, which create dysfunctional states and ultimately promote corruption. Economic conditions and personal motivations also play important roles, as factors such as low salaries and/or weak accountability and punitive systems, boost corruption. Traditions and culture can also have a significant role, and yet, contrary to some public perceptions and beliefs,²⁴ even in countries where corruption tolerance is extremely high, corruption is not universally endorsed (Smith 2007).

By bridging the two schools of thought, Heather and Peiffer (2015) bring additional evidence that the principal-agent and collective action problem theories should be examined as complementary, rather than contradictory, concepts. The reason is that, to be successful, anticorruption policies and interventions should reflect on the principal-agent problem, providing explanations for the individual incentives to engage in corruption, while also considering the collective action behaviour model. Such an approach echoes the findings of Johnston (2012:490) that the notions of accountability, transparency,

²⁴ During my work as an anticorruption expert, many public servants and civil society activists from Central Asia, the Balkans, the Confederation of Independent States (CIS) and West Africa have explained to me that corruption is embedded in their culture and, as such, is almost impossible to combat or eradicate.

institutional controls and civil values are ‘as much the *outcomes* of corruption-checking political developments as their causes’.

The success of any anticorruption interventions will also be very much dependent on the political will to establish impartial and honest institutional mechanisms that are able to convince most agents of the willingness of all other agents to follow the new (honest) rules or be prosecuted for misbehaviour. Such an approach typically relies on the principles of transparency, openness and accountability for the creation of corruption-free systems, capable of delivering good-quality governance.

In reconciling the notions developed by the principal-agent problem and collective action problem schools of thought, Heather and Peiffer (2015:18) contend that corruption may act as a solution to ‘the political problems of maintaining stability, providing access to state services and serving as a mechanism for political redistribution in a challenging environment...’. Such an acknowledgement makes the political factors and social dimensions more visible, alongside the factors and incentives that drive anticorruption behaviour. In a similar vein, Johnston (1997:42) argues that the lack/presence of political will for fighting corruption is dependent on ‘the kinds of interests motivating ordinary political participation and economic activity in democracies’. This notion reflects the legalisation theory of Abbott and Snidal (2000; 2002), who suggest that the choice of legalisation tools depends on an assessment of the perceived benefits and possible losses that the policy makers may bear when introducing certain reform agendas.²⁵ In the area of anticorruption legalisation, values, as well as interests, may play an important role in shaping the political behaviour, thus making it difficult to assess the real existence of

²⁵ The theory of Abbott and Snidal (2000) is discussed comprehensively in chapter 3.

political will for pursuing anticorruption reforms. Recognising these complexities, Brinkerhoff (2000: 241), suggests that the presence/absence of political will should be assessed, based on five underpinning factors: '(1) locus of initiative for anti-corruption efforts; (2) degree of analytical rigour applied to understanding the context and causes of corruption; (3) mobilisation of constituencies of stakeholders in support of anti-corruption reforms; (4) application of credible sanctions in support of anti-corruption reform objectives; and (5) continuity of effort in pursuing reform efforts'. The five components, as Brinkerhoff argues, are the key indicators for the presence and degree of political will to pursue anticorruption reforms.

The locus of initiative is among the most obvious indicators for political will, as it shows that the reformers are well aware of the problem, they take ownership and are willing to champion the effort in fighting corruption. Thus, if the initiative for anticorruption reform lies with the reformer, its commitment for fighting corruption is high, and so is the political will.

The analytical rigour and in-depth understanding of the underlying factors that facilitate or prevent anticorruption activities is the second important ingredient of political will. The lack of a clear and sufficient grasp as to the real magnitude of the problem may lead to chronic anticorruption deficiencies, such as insufficient budget resources, capacities or institutional competences, as described by Klitgaard (1998). Such deficiencies lead to inefficient results, demonstrate the shallowness of the effort and question the real will of the reformers to tackle the problem.

The willingness of the reformers to identify and mobilise support that will be needed for the adoption and further implementation of the anticorruption agenda and the

continuity of the effort are the other key components demonstrating the level of political will. Anticorruption interventions have a long-time span and their results are rarely visible in the short term. This requires continuous and sustained anticorruption support and commitment throughout the entire policy chain.

Finally, the willingness of the reformer to provide incentives for compliance and impose sanctions for non-compliance exhibits the level of political commitment to reform effectively the principal-agent relationship and build strong corruption deterrents.

Brinkerhoff (2000) argues that in assessing the level of political will for anticorruption reform, these five elements should be seen as an integrated whole, not as single measure indicators. Such an approach builds a broader governance picture, focusing on the key elements that should be present in any anticorruption related reform package, irrespectively of the particular subject area/sector that the latter targets. The presence of political will is therefore the cornerstone on which the effective anticorruption interventions are built.

The concepts of political will (Brinkerhoff 2000), the principal-agent (Klitgaard 1988, Mungiu-Pipiddi 2013, Rose-Ackerman 1978) and the collective action problem (Persson, Rothstein and Teorell 2013, Smith 2007),) as used in the anticorruption literature, are intrinsically linked to the notion of political agency. In its classical form, political agency²⁶ encompasses citizens or voters, who act as principals and the politicians/bureaucrats or even national states, who are the political agents. Their agency is

²⁶ The questions who may be considered as an agent, what qualities/abilities are needed for agency and what is the efficiency of the agents in determining the political outcomes are subject to broad theoretical debate (see Kiser 1999). For the purposes of the current discussion, the thesis adopts the generic understanding that public governance is executed by agents, whose agency inheres in their ability to produce policy outcomes.

either described as based on their ability to make strategic choices (rational choice approach) or their capacity to assume responsibilities and bear rights (moral approach). Within these frameworks, the agents are expected to devise public policies to satisfy the needs of the principals. To avoid the crafting of policies, driven by self-interests of the agents, accountability mechanisms are established. These aim to solve the information imbalance between the agents (who possess the information) and the principals (who may be ill-informed) by devising systems able to monitor the agent's behaviour and replace the agents (e.g. via elections), if they do not meet the principal's expectations. Besley (2006:128) argues that 'the political agency model is a natural vehicle for thinking about the role of information in achieving political accountability' and attests that the political equilibrium and the election results are therefore influenced by the level of information that citizens have. He further argues that the efficiency of democracy, within the context of the agency model, is dependent on establishing structural and continual processes for reinforcing the ability of the principals to achieve their goals and hold the agents to account by a variety of disciplinary and selection methods. In this setting, the principal-agent theory is the natural framework for studying the accountability of political institutions, as it focuses on 'the responsiveness of the agent's decisions to the principal's goals, and how this responsiveness is mediated by actions available to each actor as well as institutional settings in which they interact' Gailmard (2014:1). Agency and structures are therefore closely interconnected, as agency can be viewed as an element of the structure, while the institutions can be among the sources of the agent's behaviour (Servent, Busby and Busby 2013). At the intergovernmental level, next to the challenges of accountability and responsiveness presented by the classical principal-agent model, the

design of accountability structures is embroiled by tensions between the expectations of one's 'home' principals and the common interests of the collaborative entity, and the need for coordination between several institutional actors with different structures, expertise and procedures. In these cases, Romzek (2014:315), referring to Page (2004),) argues that the 'strength of accountability in intergovernmental collaborations rests in the shared institutional culture, clarity of performance standards and reporting relationships, complementary capacities and expertise, and deference to discretion and expertise of workers'. By investigating the anticorruption policy stances of the Commission, Parliament and the Council, the thesis tests the willingness of the main EU decision-makers to foster such intergovernmental processes of collaborative accountability, by establishing clear rules and standards (in the EU decentralised agencies and work for EU lobbyists) and creating legal coherence (in the case of the EU antifraud criminal law directive).

This section provided an overview of the theoretical literature related to corruption, its definitions, forms and reasons for its existence. It introduced the main elements that should be present in every governance system, if it is to counteract corruption, and deliberated on the notion of political will playing a key role in the establishment and maintenance of such deterrent systems. These notions form part of the corruption-related theoretical framework to be further used in the research.

2.2 Corruption correlations

This section gives an overview of the theoretical and empirical research on the correlations that exist between corruption and the political, social and economic determinants of public welfare. In so doing, it deliberates on the economic costs of corruption and the ways it

affects democratic stability, security and the rule of law. By exploring these impacts, the section provides an explanation of why anticorruption policies should be prioritised and vigorously pursued at EU and national member state level.

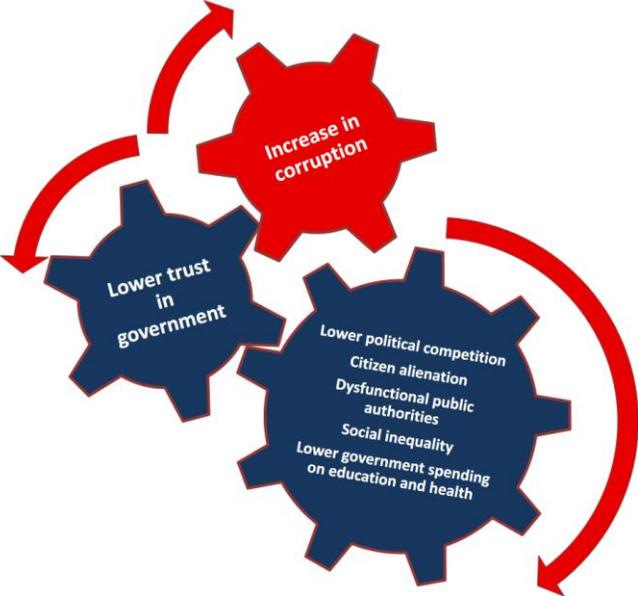
2.2.1 Corruption, democracy and the rule of law: the chain reaction

The correlations between corruption, democracy, the rule of law and social welfare have been extensively explored by scientists such as Ades and Tella (1997), Elliot (1997), Kaufman, Kraay and Mastruzzi (2010), Kolstad and Wiig (2011), Rose-Ackerman (1997) and Ulsaner (2008). Their research concluded, beyond any doubt, that corruption has a strong and negative effect on the democratic development of society and its social structures (see Figure 2.1).

Corruption has been estimated to be strongly and inversely related to levels of public trust. Ades and Tella (1997) argue that a higher level of corruption brings lower levels of trust in the political system and leads, subsequently, to weaker political competition and citizen disengagement. Elliot (1997) adds to these arguments, asserting that the primary political cost of corruption is an increase in citizen mistrust and the alienation of the voters from their government. These costs lead to a decrease in efficiency, as well as in the fairness and legitimacy of the state's activities (Rose-Ackerman 1997) and destabilised and politically influenced judicial systems (Ades and Tella 1997). The dysfunctionality of the government systems further deepens the citizen mistrust and fosters social inequality, creating a vicious circle, where inequality, mistrust and corruption are mutually reinforcing (Ulsaner 2008). Increased inequality brings less trust, prompting corruption which, in turn, leads to more inequality (Ulsaner 2008). The links between

corruption and social inequality are further explored by Mauro (1996), who looks at the composition of government expenditures and their interplay with corruption, ascertaining that government spending on education and health is significantly and negatively related to higher levels of corruption. Thus, the more corrupt a country is, the less it spends on education and healthcare, factors that determine levels of life expectancy, child mortality, the competitiveness of the workforce and life welfare in general. Rose-Ackerman (1997) comes to the same conclusions, arguing that corruption distorts a fair distribution of resources, favours the rich over the poor, and leads to less equitable income distribution. Corruption diminishes public choices for increasing public welfare, as it leads to an increase in the shadow economy and loss of budget revenues (Buehn and Montenegro 2010, Mungiu-Pipiddi 2013).

Figure 2.1 Correlations between corruption, trust, democracy and governance



Source: Author’s elaboration

These theoretical findings are supported by more than 15 years of empirical research conducted under the World Governance Indicators (WGI) research project.²⁷ Relying on information gathered from 35 separate data sources and measuring perception of governance based on several hundred individual variables, the WGI explore six aspects of governance: 1) voice and accountability; 2) political stability and absence of violence; 3) government effectiveness; 4) regulatory quality; 5) rule of law; and 6) control of corruption.²⁸ The continuous research conducted under the WGI project showed that all these six composite indicators are positively correlated. The cross-country comparison registered that the decrease in the scores of the control of corruption index is mirrored by the same tendency in the rule of law and voice and accountability indexes (Kaufman, Kraay and Mastruzzi 2010). Exploring the correlation between the Transparency International Corruption Perception Index (TI CPI) and the World Bank Rule of Law Index (WB RLI), Mendonca and Fonseca (2012) report the same results. They assert that corruption and the rule of law are negatively correlated for both developing and developed countries. This means that more corruption leads to less justice, which increases the threat to security and facilitates the expansion of criminality. Buscaglia and van Dijk (2005) made similar findings, outlining that organised crime and public-sector corruption are strongly interdependent and reinforce each other in many ways. The same argument was further delivered in the Commission's communication on the *European Agenda on Security* (European Commission 2015a), which recognised that the activities of organised crime

²⁷The Worldwide Governance Indicators (WGI) project is funded by the World Bank with the aim of producing aggregated and individual governance indicators for 215 economies over the period 1996–2016, for six dimensions of governance. The project is led by D. Kaufman. More information is available at: <http://info.worldbank.org/governance/wgi/#home>. Source last retrieved on 16 March 2017.

²⁸ Each indicator is assessed on a scale of 1 to 100, where 0 indicates the minimum and 100 the maximum achievement.

networks are often inherently linked to corruption and fraud. Nowadays, this link becomes even more perilous, because corruption has also been used as a tool in the activities of terrorist groups (Teets and Chenoweth 2009). The link has also been acknowledged by the *on renewing Internal Security Strategy* (European Parliament 2014c). This called for an integrated, comprehensive and holistic approach that takes into consideration the fact that corruption, money laundering and organised crime are the underground springs which feed terrorism, cybercrime and the trafficking of human beings.

By distinguishing the ways that the ‘new’ and the ‘old’ crime groups use corruption as an instrument for criminal business development, Shelley (2005) underlines the relationship between corruption and organised criminality and terrorism. He argues that while the ‘traditional’ criminal groups (a typical example being mafia organisations) have a parasitic nature and use corruption as an operative tool for influencing state officials and minimising the risk of prosecution, the ‘new’ transnational crime groups depend on a high level of systemic and institutionalised corruption, which flourishes in weakened states where chaos and lack of effective governance prevail. This dependence prompts organised criminality either to seek contacts with terrorist organisations or to act as such itself. In both cases, corruption broadly contributes to the objectives of crime organisations being achieved. Thus, not only are the security risks increased but the concept of statehood as such is also undermined.

2.2.2 Corruption, economy and social welfare: how do they interact?

The research on the causes and interrelations between corruption, economic and social welfare also has a long-standing history in economic science. By determining the

approximate correlation between corruption and different economic indicators, these studies are a major help in the forecasting of the possible adverse effects of corruption. They also serve as invaluable support for policy-makers estimating the cost-benefit impacts of alternative regulative options. Like the studies discussed in the previous subsection, the economic research shows a strong interdependence between levels of corruption and social and economic welfare (Ades and Tella 1997, Keefer 1995, Kaufman and Wei 1999, Lambsdorff 2003, Mauro 1996, Zeckhauser 1999). A synopsis of these correlations is presented in Figure 2.2.

Based on the hypothesis that effects on economic growth take place through investment, Mauro (1996) estimates that a single standard deviation improvement in the corruption indices drawn from Business International leads to a 5 increase in investment as a proportion of gross domestic product (GDP). By using cross-country regression, and comparing corruption indexes gathered by Business International,²⁹ World Competitiveness Report and Impulse³⁰, Ades and Tella (1997) also corroborate that corruption is strongly and inversely related to a country's level of development, supporting Mauro's arguments and rejecting the theories that corruption can be the 'oil' that makes an economy move more smoothly (Leff 1964). Such theories have also been proven wrong by Kaufman and Wei (1999), who analysed the relationship between bribery and effective bureaucratic harassment. Kaufman and Wei (1999) affirm that an increase of bribery payments does not lead to a decrease in delays and lower administrative burden. On the contrary, their model shows that there may be a positive correlation between the bribes that

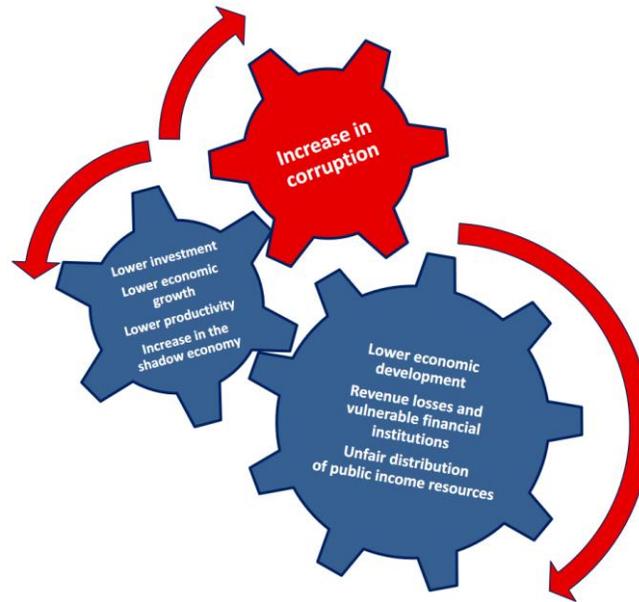
²⁹ Business International was publishing and advisory company, assisting American companies in operating abroad. It was acquired by the Economist Group in 1986 and is now part of the Economist Intelligence Unit.

³⁰ German business magazine.

companies have to pay and the effective harassment they face. Knack and Keefer (1995) reach similar conclusions in their study of institutions, investments and economic performance. They assert that in countries where corruption is rampant, entrepreneurs have to operate in a highly unpredictable environment, characterised by low credibility of government commitments. This latter significantly discourages investment and encourages unethical business practices. The study of Lambsdorff (2003) is one further contribution to the correlational studies, producing evidence of repeated instances in which corruption is lowering company productivity. He estimates that a single point increase in corruption with 1 per cent (on a scale of 0 to 10) lowers productivity of capital by 2 percent.

Further to these findings, Wei and Zeckhauser (1999) find another correlation, which was empirically proven by the collapse of the Greek banking system in 2014–2015. Based on the analysis of data from the Global Competitiveness Report concerning perceived levels of corruption, perceived bank vulnerability and the inadequacy of bank regulations, they estimate that banks are more vulnerable, financial regulations are less adequate and there is less supervision of financial institutions in countries with high levels of corruption.

Figure 2.2 Correlations between corruption and economic indicators



Source: Author's elaboration

2.2.3 What do these correlations mean for the European Union?

The highly secretive nature of corrupt transactions, the multiple variations and forms of corrupt activities,³¹ along with the difference in the scope and definitions of corruption-related crimes makes the estimation of the total cost of corruption an extremely difficult task. Nevertheless, some empirical studies have been carried out specifically to quantify the absolute losses that the phenomenon brings to the everyday lives of EU citizens.

In 2014 the European Commission (2014b) estimated that the EU economy is losing €120 billion a year in tax revenues and foreign investment because of corruption. This figure accounts only for the direct losses and, as large as it seems, has been challenged by a number of studies (Mungiu-Pipiddi 2013, Hafner et al.2016).

³¹ High level corruption differs significantly from low level administrative corruption in terms of effects and methods.

Applying a similar methodology to Mauro's methods of regression analysis, but using different dependent variables (control of corruption index and the tax revenue index, measured as a percentage of GDP), Mungiu-Pipiddi (2013) estimated that in 2010 corruption facilitated tax evasion in the amount of € 323 billion, a sum equivalent to 7 per cent of EU tax revenue or twice the EU budget.

Looking at the cost of corruption in public procurement procedures, PwC EU Services and Ecorys (2013) determined that direct public losses in corrupt or 'grey'³² cases amounted to 18 percent of the overall project budget (of which 13 percent could be attributed to corruption). Based on the sample research in five sectors³³ in 8 member states,³⁴ the overall direct public losses due to corruption in 2010, only in the sampled sectors, was approximated by PwC EU Services and Ecorys (2013) to be between €1.4 billion and €2.2 billion. By including all the member states and most of the sub-sectors involved in public procurement, Hafner et al. (2016) asserted that the actual losses amount to €5 billion.

These numbers represent only the direct calculated losses. When the indirect effects of corruption are added to the overall performance of the EU in all economic and social sectors, the above numbers increase dramatically. The findings of Hafner et al. (2016) suggest that, depending on the scenario applied and the benchmarking of the countries, corruption costs to the EU vary between €179 billion and €990 billion per year. However high they may seem, these estimates are much in line with the World Economic Forum's

³² Cases with weaker indications of being corrupt.

³³ These are: road and rail; water and waste; urban/utility construction; training; research and development.

³⁴ France, Hungary, Italy, Lithuania, the Netherlands, Poland, Romania and Spain.

calculation of the cost of corruption. The latter estimated corruption costs to be approx. 5 per cent of global GDP (Wickberg 2013).

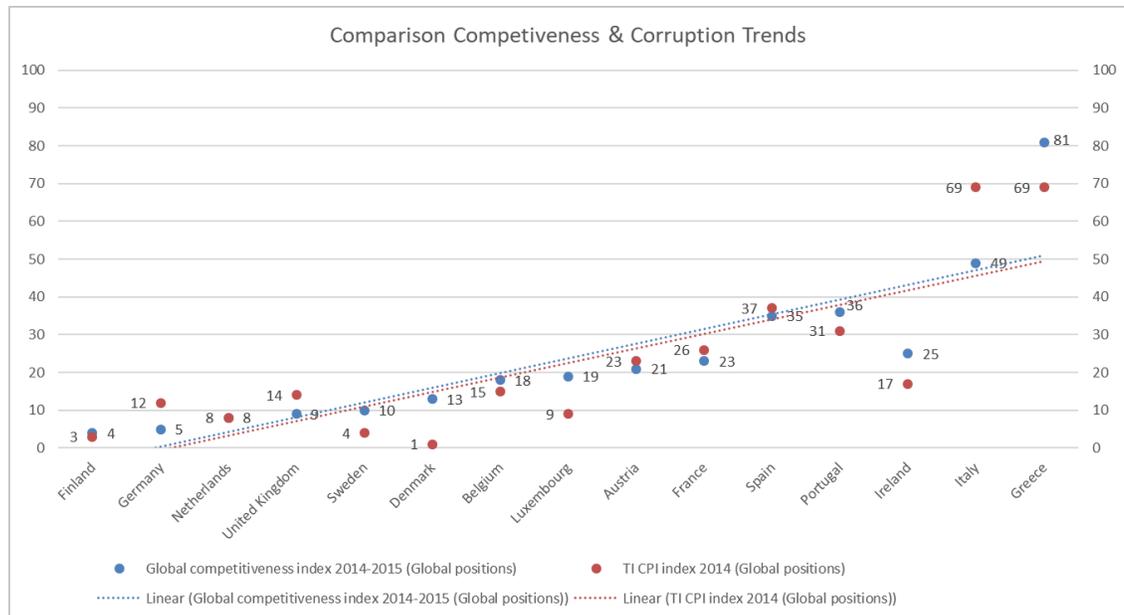
The sheer size of these figures indicates the significant economic losses caused by corruption in the European internal market and monetary union, and the threat it poses. They also show the level of vulnerability to corruption of a governance system that links the administrative structures of 28 sovereign states and operates in an environment where the capital, goods, services and workers can move freely without encountering any borders. If this system is not protected by efficient safeguards, a corruption flaw/weakness in the system of a single member state can lead to a chain reaction and negatively affect millions of people throughout the EU, threatening their security, financial stability and wellbeing.

The negative socio-economic impact of corruption on the everyday life of EU citizens was vividly exhibited by the latest world economic crisis (Perty 2013) which hit most severely the countries considered to be among the most corrupt in the EU. By analysing the performance of 25 EU member states, Mulcahy (2012) asserted that the countries finding it the most difficult to sustain their economies (such as Greece, Portugal, Italy and Spain) were among the worst anticorruption performers. These countries eloquently exemplified a weak national anticorruption framework, non-compliance with fiscal and financial requirements and poor economic performance. All these factors contributed in addition to the so-called north–south anticorruption divide, signalling the huge variation of anticorruption compliance across EU member states. The strong positive correlation between anticorruption and economic performance is easily asserted by a simple analysis of the correlations between a country's Global Competitiveness Index (GCI)³⁵ and

³⁵ The Global Competitiveness Index comprises 12 pillars which define the institutions, policies and processes that determine the level of productivity of the country.

its corresponding standing in Transparency International’s Corruption Perception Index (CPI).³⁶ The comparison shows that countries with a high anticorruption performance score highly in economic performance and competitiveness, and vice versa. It also clearly marks the huge discrepancies between the level of competitiveness and corruption of the frontrunners (Finland, Germany, Netherlands, UK, Sweden and Denmark) and the laggards (Italy, Greece). While the first group ‘occupies’ places ranging from 1 to 15 in the GCI and CPI rankings, the second group is more than 50 places behind them, thus reflecting the huge deviations in corruption levels in the old EU.

Figure 2.3 Comparison: Global Competitiveness Index and the TI Corruption Reception Index for EU of 15



Source: Author’s elaboration. Global competitiveness Report 2014-2015 and TI CPI Index 2015

³⁶ The GCI measures the macroeconomic and microeconomic foundations of national competitiveness (including stability of economy and its functioning), while the CPI provides a snapshot of the corruption perception levels.

And while the link between corruption and economic performance is undoubtedly of significant importance, the Greek debt crisis raised much greater concerns that go beyond economic reasoning and raised questions of trust and honesty which are at the heart of the whole European system (Lehmann 2010). Lehmann expresses these concerns by looking at the north–south divide in anticorruption indexes, and questioning whether, given the large discrepancies in the levels of corruption, the unity of the EU can be upheld. The presence of widespread corruption in some member states also puts in doubt another founding assumption of the EU, namely the premise that the EU acquis is correctly implemented by national authorities and is properly enforced by national judicial systems (Szarek-Mason 2010).

By presenting the negative impact of corruption on political, social and economic welfare of European citizens, this section has outlined the need to reinforce a robust European anticorruption approach. The necessity of such an approach is discussed further in chapter 3.

2.3 Corruption and anticorruption: what makes governance good?

Corruption operates in the context of governance and shapes its quality. The present section therefore looks at the concepts of governance, its good and bad forms, and explores the synergies between corruption, bad and good governance. It elaborates further on the principles of transparency and accountability as key features in the maintenance of a corruption-free environment.

2.3.1 Governance concepts: from practice to theory

Public governance can be defined as ‘traditions and institutions by which the authority in the country is exercised’ (Kaufman, Kraay and Lobatón 2002:4). The modern comprehension of public-sector governance refers to the political system and the ways that it functions in the domains of legal and public administration (Landell-Mills and Serageldin 1991). The aspects that are of primary importance for ensuring ‘healthy’ governance are those covering: ‘(a) the form of political regime; (b) the process by which authority is exercised in the management of a country’s economic and social resources for development; and (c) the capacity of governments to design, formulate and implement policies and discharge functions’ (World Bank 1994: XIV). The EU Toolbox on the Quality of Public Administration provides a similar understanding, defining governance as ‘the manner in which power is exercised in the management of a country’s economic and social resources for development’ (European Commission 2015b:10), and considers governance good when it is ‘able to achieve stated policy goals, in line with the principles and values of integrity, rule of law, transparency, accountability, effectiveness and efficiency, among others’(European Commission 2015b:10).

These modern definitions of governance (and its good forms) derive from a long-standing debate which, like the one on corruption, can be traced back as far as the works of the ancient philosophers. Looking at the concepts of common good in the work of Aristotle, Sison and Fontrodona (2012) argue that the governance concept is seen as a way of enabling people to achieve a common and better (more divine) good than the exclusive good achievable by the individual. Therefore, the work of the government for the common

good of the people is the main criteria that distinguishes true governments from false and despotic regimes. Hence, if the government is corrupt, it is by default bad.

Nowadays, international institutions such as the World Bank (2007) continue to adhere to this ancient notion, stating that corruption is one of the outcomes of poor governance or is a symptom of a failure in governance. Good governance therefore creates an environment that is not conducive to corruption, while bad governance is characterised by the personalisation of power, a violation of human rights, endemic corruption, unelected and/or unaccountable government (Bøae 1998).

The good governance that derives from this understanding comprises a set of principles related to the promotion of the rule of law, one that respects human rights and describes governance operations that are transparent, accountable, effective, efficient and participatory (UNDP 1997). Good governance is also described as ‘predictable, open, and enlightened policy making (that is, transparent processes); a bureaucracy imbued with a professional ethos; an executive arm of government accountable for its actions; and a strong civil society participating in public affairs; and all behaving under the rule of law’ (World Bank 1994:VII). These notions, promoted by the international development community, attribute two distinct dimensions to the concept of good governance: whereas the principles of human rights, participation and democratisation have political implications, the principles of accountability, transparency, and openness reflect the administrative core of good governance (Borzel et al. 2008).

The explicit link between good governance and corruption has been clearly established during the past decade when the international community highlighted good governance as the antithesis of corruption (Jakobi 2013a) and linked it to the political and

economic conditionality for multilateral or bilateral financing (Weiss 2000). The Monterrey Consensus on Financing for Development (United Nations 2002)³⁷ furthered this concept by naming good governance and the fight against corruption as the two essential preconditions for sustainable development. In so doing, the international donors focused on the concept of governance and its good forms as possible mechanisms for promoting corruption-free systems (Doornbos 2001, Landell-Mills & Serageldin 1991, World Bank 2007). Moreover, by introducing the concept of good governance as the obverse of corruption, the international donor society solved another difficult political dilemma. Given the political sensitivity and implications of accusing a particular country of being corrupt, the notion of good governance became a ‘coded language’ (Rothstein 2014) used by international organisations to urge for anticorruption policy changes under the ‘good governance’ rather than the ‘anticorruption’ umbrella (Smith 2007).

And while the international development society has largely consolidated its position around the definitions provided by the World Bank and UNDP, the academic debate on what constitutes good governance is still ongoing (Rothstein 2014). This is largely because the ‘definitions, which scholars use, depend for the most part on their respective research agenda or on the understanding of the actor under scrutiny’ (Borzel et al. 2008:5). Rothstein (2014) adds to the debate by stating that, in social science literature, there are at least three, very different ideas of what constitutes governance. He summarises these three main streams: 1) studies that criticise the top-down, rule of law, Weberian public administration approach and focus on public–private partnerships, use of networks

³⁷ The Monterrey consensus is a strategic development agreement reached by 50 heads of states, World Bank, International Monetary Fund and World Trade Organisation representatives during International Conference in Monterrey, Mexico.

and pseudo-market models; 2) studies that deal predominantly with participatory governance; and 3) development studies, where the term good governance was established. These latter are centre-state oriented and focus on administrative capacities, rule of law, integrity and good governance. Thus, depending on the school of thought, the key components of good governance may vary.

Despite the lack of a precise definition, the governance concept is often used as a yardstick for policy development oriented towards processes and governance structures (Rothstein 2014). In this framework, good governance is measured by the ‘extent to which a government is perceived and accepted as legitimate, committed to improving the public welfare and responsive to the needs of its citizens, competent to assure law and order and deliver public services, able to create an enabling policy environment for productive activities, and equitable in its conduct’ (Landell-Mills and Serageldin 1991:310). Such a loosely described concept provides flexibility and at the same time bridges public management and political leadership dimensions (Doornbos 2001). In this way, the concept of good governance provides an opportunity to focus on the ways in which political processes are carried out and are embedded in structures of public administration. The principles of transparency, openness and accountability form the framework of this concept and ensure its practical implications.

2.3.2 Operationalising good governance via transparency and accountability

‘Transparency’ as a governance concept became a buzzword only at the end of the twentieth century and since then, along with the accountability principle, it has become the most prescribed ingredient in the recipe for good governance (Dyrberg 2002, Hood 2007).

Among the main reasons for this is that increased transparency is directly linked not only to an improvement in socio-economic and human development indicators, but also better competitiveness and lower corruption levels (Kaufman 2005). In parallel, the accountability concept has become ‘the ultimate principle for the new age of governance in which the exercise of power has transcended the boundaries of the nation state’ (Fisher 2004:495). It became a ‘powerful conceptual construct that plays a major role in how we perceive the operations of modern government’ (Dubnik 2014:30).

Nowadays, transparency and accountability are often seen as ‘Siamese twins’, as ‘matching parts’ or as an inseparable ‘awkward couple’ (Hood 2010). Koppel (2005) notes transparency among the main accountability dimensions, along with liability, controllability, responsibility and responsiveness. While accountability in the public sector requires the public office holder to be answerable for his or her actions, the transparency principle implies that decisions or policies are adopted and managed in a way that allows public scrutiny and enables a citizen better to hold public officials or offices to account for their actions. Bovens (2010: 946) summarises the many facets of the concept of accountability, referring to Behn (2001:3-6), Dubnik (2007a) and Mulgan (2000:555). He argues that accountability ‘is used as a synonym for many loosely defined political desiderata, such as good governance, transparency, equity, democracy, efficiency, responsiveness, responsibility and integrity.’ Elaborating on the lack of common understanding and conceptual confusion over what exactly accountability is, Bovens (2010) distinguishes between accountability as a virtue and accountability as a mechanism. He argues that while accountability as a virtue is usually associated with substantive behavioural norms, these are not standardised, because they depend on the role,

institutional context, era and political perspective of the actors involved. Accountability as a mechanism, on the other hand, encompasses the obligation to explain and justify conduct. Staying close to its historical roots, Bovens (2007:107) describes accountability as a ‘relationship between an actor and a forum, in which the actor has an obligation to explain and to justify his or her conduct, the forum can pose questions and pass judgment, and the actor may face consequences’. The relationship between the forum and the actor assumes the form of principal-agent relation, comprising at least three stages: an obligation to provide information, the opportunity for questioning the decisions, and the passing of judgements (Bovens 2010). This relationship is usually manifested in three forms: accountability for finances; accountability for fairness and accountability for performance (Behn 2001). These three forms and their practical implementation in the EU policy arena are further examined in the empirical chapters that follow.

The theoretical concepts of good governance presented in this section are employed again in the empirical chapters, demonstrating the different manifestations of those principles in the anticorruption domain. The good governance concept is examined from the perspective of development studies, enabling the research to focus on its practical implications at the EU level, while discussing the link between corruption and good governance.

2.4 Good governance principles and the EU

Following the general debate on what is good governance, and which are its core elements, this section illustrates the ways in which the principles of good governance are embedded in the EU’s policy framework. It deliberates on how the principles of accountability and

transparency enable the empirical application of good governance in EU administrative structures and processes.

2.4.1 Good governance: the EU response

In 1991 the EU responded to the international debate on good governance by adopting a *Resolution of the Council and of the Member States meeting in the Council on human rights, democracy and development* (Council of the European Union 1991). Among the basic governance principles that should take a prominent position in the political and cooperation agenda of the EU's development partners, the Resolution named democratic decision-making, adequate governmental transparency and financial accountability, measures to combat corruption, and respect for the rule of law, human rights, and freedom of the press and expression. Likewise, with the issue of corruption, until the beginning of the 1990s the concept of good governance was only discussed in the EU's development discourse, predominantly linked to the EU's assistance programmes. This approach gradually changed in the late 1990s, prompted by the growing public alienation from EU policy creation and the anticipated eastern enlargements. The so-called 'good governance turn' brought quality governance onto the EU's agenda and reinforced the principles of accountability, transparency, participation and representation in the EU's internal governance setting (Cini 2015). It resulted in the adoption of a number of policy initiatives, the most prominent of which are the *White Paper on European Governance*, adopted by the European Commission (2001a), and the *Green Paper on the European Transparency Initiative* (European Commission 2006).

The 2001 *White Paper on European Governance* serves as a cornerstone of the EU governance concept. It describes it as ‘rules, processes, and behaviour that affect the way in which powers are exercised at European level, particularly as regards openness, participation, accountability, effectiveness, and coherence’ (European Commission 2001a:8). The definition engrains the quality standards of good governance, thus enforcing an understanding that the above principles are indispensable part of EU governance. With this understanding as a foundation, the White Paper provides practical guidelines on how the EU good governance concept should be implemented in the everyday work of the EU’s institutions and the administrations of the member states. It prescribes that all European and national institutions should: work in an open manner and communicate in a clear and understandable way what the EU does (the principle of openness); involve with citizens and experts throughout the whole policy chain, from conception to implementation of European and national policies (the principle of participation); and give reasoning and take account for their actions (the principle of accountability). In addition, the White Paper urged the EU institutions and member states to adopt policies that are effective and timely, consistent, easily understood and clear to everyone (the principle of coherence) and responding to people’ needs in the most appropriate manner³⁸ (the principle of effectiveness). These principles largely coincided with those proclaimed by the UNDP and largely followed by the World Bank (see table 2.1 below).

³⁸ The policies should be taken at the most appropriate level (national or European) and be based on evaluations of past experience and future impacts.

Table 2.1 Administrative dimension of good governance principles

<p align="center">European Union (White Paper on European Governance, European Commission 2001)</p>	<p align="center">United Nations Development Programme (Governance for sustainable human development, 1997)</p>	<p align="center">World Bank (Development in Practice. Governance: The World Bank’s Experience, 1994)</p>
<p align="center">Openness Accountability Participation Effectiveness Coherence</p>	<p align="center">Openness & transparency Accountability Participation Predictability Integrity</p>	<p align="center">Predictable, open and transparent policy making Accountable government Public participation Professional ethos Rule of law</p>

Source: Author’s elaboration

The importance of the above principles has been further reinforced by the EU’s founding treaties. Article 1 of the *Treaty of the European Union* (as amended after Lisbon) underlined the EU’s political commitment to creating ‘an ever closer union among the peoples of Europe, in which decisions are taken as openly as possible and as closely as possible to the citizen’. The practical implementation of these principles was reaffirmed by art. 298 of the *Treaty on the Functioning of the European Union*, which stated that in ‘carrying out their missions, the institutions, bodies, offices and agencies of the Union shall have the support of an open, efficient and independent European administration.’ In the same spirit, the *European Charter of Fundamental Rights* proclaimed among the fundamental human rights of the European Union the right to good administration (art. 41) and the right of access to documents (art. 42). Thus, by including the good governance principles in its legal framework, the EU and its member states made them internal premises on which the European administrations should be built (Addink 2005).

2.4.2 Transparency and accountability in the context of EU governance

Premised on the EU treaties and engrained in the *White Paper on European Governance*, the principles of accountability and transparency have become cornerstones of the development of the EU's institutional and political structures. The principle of accountability has been closely linked to the notions of democracy and delegated powers (Bovens 2006, Fisher 2004), while transparency has become a key feature of government legitimacy, forming its input-oriented goals (Héritier 2003).

In the EU's governance framework, the two principles coexist as 'matching parts', complementing each other in building EU governance systems and structures. The close correlations between the two principles along with some language implications,³⁹ have prompted the European Commission to apply the term accountability loosely and use it also as a synonym for 'clarity', 'transparency', 'responsibility', 'involvement', 'deliberation', and 'participation' (Bovens 2007).

Regardless of these different facets, the term accountability has been institutionalised through its association with constitutional and electoral arrangements viewed through four discourses: 1) accountability arrangements designed to restrain power and make governmental representatives responsive and accountable; 2) accountability as a tool for monitoring and controlling performance in an organisational context; 3) accountability as formal rules and procedures aimed to prevent and punish undesirable or unacceptable behaviour; and 4) accountability as standards designed to influence behaviour (Dunbik 2014). All these aspects are embedded in the distinctive nature of the EU concept

³⁹ In many European languages, the terms responsibility and accountability have the same translation, thus making the distinction hardly possible at national level.

of accountability, where political and administrative executives exercise powers that go beyond the national boundaries (Curtin, Mair and Papadopoulos 2010). The functioning of this complicated accountability construct requires the utmost transparency in the ways that EU policies and decisions are taken.

The practical implementation of the transparency principle at EU level can be described as a cluster of elements, comprising, among others, the simplification of the treaties, clear drafting, simple legislation, the tracing of the influence of interest representatives in the decision-making process, transparent enforcement procedures, public access to documents, freedom of expression and the protection of whistle-blowers (Dyrberg 2002). Transparency can be therefore seen as an umbrella term encompassing five main elements: access to documents; knowledge of who takes the decisions and how they are adopted; comprehensibility and accessibility of the decision-making process; openness (as a consultation mechanism); and a duty to give reasons (Chalmers et al. 2006). By using the term openness (instead of transparency), the *White Paper on European Governance* (European Commission 2001a) embeds all these elements. It prescribes that EU institutions should be open to public scrutiny and, together with the member states, should communicate to the citizens what they do and what type of decisions they take. The *Green Paper on European Transparency Initiative* (2006) reasserted the same idea, underlining that transparency is a key feature that enables public scrutiny and ensures that the EU is accountable for its actions (European Commission 2006). This notion is based on an understanding that transparency empowers people to hold their governments to account for their spending and their policy choices, thus reducing the opportunity for corruption

and the mismanagement of public resources (Kosack and Fung 2014). In practical terms dedicated measures were introduced for increased:

- transparency in the EU's policy making, via the creation of a structured framework for the activities of interest representatives (lobbyists); and
- accountability, enabling closer scrutiny of the application of the EU's minimal standards of consultation and installing mandatory disclosure of information about the beneficiaries of EU funds under shared management (European Commission 2006)

By describing the ways in which the concept of good governance is embedded in the EU's general legal and policy framework, the present section defined the EU principles facilitating the establishment of a healthy public environment that opposes corruption. The section argued that, since the late 1990s, the EU has demonstrated a strong policy commitment, engraining transparency and accountability in its key strategic documents and policies. The following empirical chapters will show how these principles are applied in practice – the principles of accountability for performance, accountability for finances and accountability for fairness (Behn 2001) – with a view to revealing the institutional enablers and/or inhibitors of anticorruption.

2.5 Concluding remarks: fighting corruption with transparency and accountability

This chapter introduced the major theoretical concepts used in the thesis. Acknowledging the presence of a huge literature on the notions of corruption and good governance, the chapter focused on presenting operational definitions that create and underpin the basis of policy formulation at EU level. The chapter revealed that because of the differences in the

officially adopted legal concepts, the public perceptions of what corruption is, and the different cultural and administrative interpretations, a commonly agreed scientific definition of corruption does not exist. Yet, anticorruption practitioners around the globe use an operational definition which captures the essence of the phenomenon: ‘abuse of entrusted power for private gain’ (Transparency International 2009a:14). This definition is largely consistent with the definitions elaborated by scientists such as Nye (1967) and Johnston (2005) and reflects an understanding that corruption comprises behaviour that deviates from the public norm and seeks to acquire undue private advantages at the expense of the common good. The chapter presented further the underlying reasons for the presence of corruption and deliberated on the elements that manifest the existence of political will. The latter are clustered by Brinkerhoff (2000) in five categories, related to the locus of initiative, degree of analytical rigour, mobilisation of support, application of effective sanctions and continuity of the reform efforts. The presence of these elements, as exhibited by the EU institutions in each of the empirical cases, will be used as a measurement, demonstrating the political will for implementing a common anticorruption framework at the EU level. In building the argument that stronger and more coherent anticorruption interventions at EU level are needed, the chapter also showed the devastating impact of corruption on the political and economic development of any country and highlighted that the EU is by no means an exception. By analysing the perils that corruption brings to the democratic and economic fabric of the EU, the chapter indicated that, if not tackled properly, corruption may pose a threat to the foundations on which the EU is built. The remainder of the thesis, which advocates the need for a stronger EU anticorruption approach, has the understanding of this threat at its core.

Acknowledging that corruption operates in the governance context and shapes the quality of governance, the chapter deliberated on the explicit link between good governance and anticorruption. Good governance was presented from the perspective of development studies, and described as open, transparent, accountable, inclusive, participatory and coherent. The chapter further deliberated on this notion and presented a set of good governance processes and procedures that might create a corruption-free environment. The principles of transparency and accountability were explored in their anticorruption policy perspective, as tools for the achievement of impartial governance (Bovens 2010).

Building upon the concepts presented in this chapter, the remainder of the thesis seeks to identify the institutional enablers and inhibitors in the establishment of a stronger EU anticorruption framework. The thesis further explores EU and international approaches in tackling corruption, revealing the feebleness of the EU's efforts to uphold strong anticorruption standards throughout its member states (chapter 3). It further examines whether the current EU approach is based on legal constraints imposed by the EU treaties and concludes that the existing legal and policy framework allows for the adoption of robust anticorruption rules, applicable to all member states (chapter 4). Given that such rules do not exist, the thesis analyses further the competences and policy stances of the EU institutions that might enable or hamper the establishment of a common anticorruption EU framework. It does so by looking at the application of the principles of accountability for performance, finance and fairness in the creation of EU policy. By examining the applications of the principles of good governance as the antithesis of corruption (Rothstein 2015), this thesis goes beyond the classical discussions of what type of prevention, law-

enforcement or awareness-raising anticorruption measures should be applied by the EU. Instead, it offers a broader picture of the ways in which the EU is striving to provide impartial governance that serves the interests of the European citizen. The latter is the ultimate prerequisite not only for the diminishing corruption level right across the EU, but also for upholding the EU's democratic legitimacy. Based on this, chapter 5 looks at the procedures for the establishment and management of the European decentralised agencies and elaborates on the struggle of both the Commission and the Parliament to ensure transparent and accountable governance procedures that are compliant with EU principles of good governance. Chapter 6 further elaborates on the application of the principles of transparency and accountability by exploring the policies for the protection of EU taxpayers' money against fraud and corruption. Chapter 7, which deals with the policy stances of the Commission, the Parliament and the Council on the establishment of a regulatory framework for EU interest representatives, focuses mainly on the application of EU good governance principles of transparency and accountability of the public participation in an EU decision-making process. By focusing on the mechanisms of financial, political and administrative transparency and accountability, established to prevent corruption and reinforce the control of the citizen over the EU decision-making process, the thesis tests the willingness of each of the three main EU decision-making bodies to promote good governance standards and prevent corruption in the EU. It does so, by examining the presence/absence of the elements manifesting the level of political will, as defined by Brinkerhoff (2000).

3. Regulating the Fight against Corruption: EU and International Approaches

Corruption and the ways it is prevented and counteracted has gradually, from a problem that was widely discussed only in the context of international development (hence targeting only poor and lesser developed countries), come to take a prominent place in the international political agenda. The overwhelming consequences of corruption in the everyday life of the citizen has prompted the international community to join its efforts and look for effective ways to deter its wider proliferation.

In the past two decades, major international organisations such as the United Nations (UN) and the Council of Europe (CoE) have focused their efforts on the creation and dissemination of a common set of policies, principles and multilaterally agreed legal norms and standards. The EU did not lag behind, but it did follow a slightly different path.

This chapter presents the European and international anticorruption framework within which the EU and its member states operate. It looks at the internationally agreed anticorruption mechanisms and the ways that they are applied in the EU. The chapter compares the efforts of the EU, CoE and the UN to establish a comprehensive anticorruption framework, capable of ensuring a certain level of implementation compliance. By doing so, the chapter reveals the trends in European and international anticorruption policy creation and deliberates on the different approaches adopted by the EU, on one hand, and the CoE and UN on the other, to ensure anticorruption compliance. While the CoE and UN have taken concrete steps to establish a common obligatory anticorruption framework, the EU has opted for a softer, non-binding policy in its attempt to ensure a level anticorruption playing field across its member states. The chapter further looks at the adherence of the member states to their international commitments,

demonstrates the lack of clear political will (as described by Brinkerhoff 2000) and deliberates on the reasons behind the hesitancy of their compliance. By presenting the international and European anticorruption framework and the member states' adherence to their international anticorruption commitments, this chapter suggests two possible hypotheses that might explain the lack of a robust EU anticorruption framework.

The chapter consists of four remaining sections. The next section provides a comparative historic overview of EU, UN and CoE anticorruption policy and legal initiatives (1994-2016). The research focuses on the approaches of the UN and CoE in particular, as these two organisations are the flagships in the international battle against corruption. Moreover, given that all the EU member states are also members of these organisations, the trends outlined by the EU, CoE and UN are expected to be mutually reinforcing. This proves largely to be the case, although while the UN and CoE have codified the expected anticorruption standards in mutually agreed international conventions (applicable to all member states), the EU has chosen to transmit its expectations through policy guidelines such as white and green papers, communications and codes of conduct. Such an approach would be entirely justified if the EU member states were to choose to adhere to their international legal commitments. The second section of this chapter therefore investigates if this is the case. It explores the process of transposition into the member states' own national legal frameworks of the internationally agreed anticorruption conventions and finds a striking mismatch between the states' proclaimed willingness jointly to address corruption and the actual resistance to honour the internationally agreed binding commitments. The section further argues that the painfully slow ratification process raises questions regarding the political will of the member states

to establish joint anticorruption approaches across the EU. It investigates the motivational factors driving the member states' willingness/resistance to conclude legally binding agreements, focusing on the strong legislative resistance of Germany to obey the international obligations to which she has committed in the international arena.

Finally, the fourth section of the chapter tries to identify the reasons behind the lack of a EU legal anticorruption framework, deliberating on two possible explanations. Both hypotheses are further examined in the empirical chapters, which look at the policy responses of the European Commission, European Parliament and the Council on key transparency and accountability issues.

3.1 Streamlining the international anticorruption efforts: the European Union, United Nations and Council of Europe modes of operation

The adoption of an international legal regime in any sphere of public life involves a complex mosaic of interactions of various political players, each having its specific agenda and interests. The legalisation process most often operates in an environment where law and politics are intertwined in a way that makes the distinction between the motivational factors hardly possible (Abbott and Snidal 2000, Kahler 2000).

Deriving from the notion that law reflects public values and serves and shapes the interests of those it governs, Abbott and Snidal (2002) argue that values and interests are the two main components that feed the preferences of political actors and thus shape the international law and legal institutions. These two components can change over time, thus also changing the preferences of the actors. Based on their study of the adoption of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the reasons that made the OECD member states adopt rapidly

the convention, after years of resistance, Abbott and Snidal (2002) attest that in the anticorruption area, interests and values (sometimes expressed by external value actors such as NGO and media) shape the national political strategies and the adopted framework. Analysing the hurdles in adoption of the OECD convention, Abbott and Snidal (2002) argue that the interest-based resistance to anti-bribery regulations on the part of the OECD member states was overcome by the pressure put on them by the European media and civil society. They suggest that fearing public criticism and loss of credibility, national governments weakened their legalisation resistance that led to the signing of OECD anti-bribery convention.

The changing dynamics of values and interests and their role in shaping the global anticorruption efforts are distinctively exhibited in the process of international anticorruption policy development. Looking at the political history of the evolution of international anticorruption efforts, Wolf and Schmidt-Pfister (2010) describe five distinct phases of international anticorruption development: 1) no-evolution period; 2) attitude shift; 3) global anticorruption boom; 4) focus on implementation; and 5) legitimacy crisis. These phases were very closely linked to the values that the general public was placing as regards to the corruption phenomenon and the need for its counteraction. The first phase lasted until the mid-1970s and is described as the 'no-evolution' period. At this stage, corruption was considered a purely national problem and no attempts were made to establish joint international approaches to counter it. Any such approach would have been regarded as an intrusion into the national sovereignty of the member states. An attitude shift introduced the second phase and led to the initiation of unilateral programmes to fight overseas corruption and then, in the 1990s, resulted in an unprecedented global

anticorruption boom (phase 3). While this third phase was focused on the establishment of global anticorruption norms, the fourth phase was marked by efforts to apply them in real life. Finally, after a period of years during which implementation was uneven and sometimes characterised by unwillingness, the international anticorruption regimes entered their legitimacy crisis (phase 5). Prompted by the mixed outcomes of the global anticorruption fight, fears about economic crisis, growing concerns regarding the spread of cross-border corruption, and the ineffective implementation of anticorruption policies (Wolf and Schmidt-Pfister 2010), this crisis emerged at the beginning of the 2000s.

This section focuses on the third and subsequent phases of the development of international anticorruption policy. It presents the main international anticorruption initiatives, which should frame the national anticorruption efforts of the EU member states. It deliberates further on the contrasting approaches chosen by the UN, CoE and EU in their creation of common anticorruption standards.

3.1.1 Development of the European Union anticorruption setting (1996-2016)

The early policy response of the European Union in the fight against corruption was predetermined by the understanding that corruption is archetypal for less-developed and non-democratic countries and therefore could not threaten the EU and its member states (Hough 2013). In the late 1990s, however, this understanding gradually evolved, shaped by changing political realities (the fall of the iron curtain and the prospect of EU enlargement in the east) and the constant corruption scandals that were popping up in the heart of Europe (Bull and Newell 2015). Following a number of discussions on the threats posed by corruption to the democracy and welfare of the European citizen, in 1996–1997 the

European Union established its conceptual framework on the fight against corruption. This was largely based on: the *European Parliament Resolution on combating corruption in Europe* (European Parliament 1996); the adoption of special provisions in the *Treaty of Amsterdam* (European Council 1997); the activities included in the *Action Plan to combat organised crime* (European Council 1997); the adoption of the *Convention drawn up on the basis of Article K.3 of the Treaty on European Union, on the protection of the European Communities' financial interests in 1995* (discussed in greater depth in chapter 5); the *EU Convention on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union* (1997); and the 1997 *Communication from the Commission on Union policy against corruption* (European Commission 1997). Those documents were supplemented at a later stage by the Commission's *Communication on a Comprehensive EU Policy against Corruption* (European Commission 2003); the *Green Paper on European Transparency Initiative* (European Commission 2006); and the *Communication on fighting corruption in EU* (European Commission 2011a).

The *European Parliament Resolution on combating corruption in Europe* (1996) was among the EU early-bird initiatives aimed at focusing political attention on the need to establish a coherent approach to fighting corruption in Europe. The Resolution acknowledged that corruption 'particularly in conjunction with organized crime, poses a threat to the functioning of the democratic system and thus destroys public confidence in the integrity of the democratic constitutional State' (point C) and emphasised the need for all the member states to combine their efforts to protect national and EU common interests. The Parliament called upon the Council to urge the member states to take appropriate and

effective anticorruption measures and approximate their legal systems. The Resolution also contained guidelines about: the criminalisation of corruption acts; strengthening the role of audit institutions; improving the integrity of the members of national parliaments; enhancing transparency; and improving coordination in the investigation and prosecution of corruption-related acts.

Shortly after the Parliament Resolution was adopted, the EU made a major leap forward in establishing the legal grounds for any EU joint anticorruption interventions. The *Treaty of Amsterdam* qualified corruption as crime that threatens the European area of freedom, security and justice (art. K.1. *Treaty of Amsterdam*⁴⁰ 1997). By doing so, it significantly widened the scope for law enforcement and judicial cooperation and laid the foundations for joint operational approaches in the investigation and prosecution of corruption. Fighting corruption became a top priority for the law enforcement bodies of the EU and its member states alongside crimes such as terrorism, trafficking of persons, arms and drugs. Twelve years later the EU once again emphasised the exigency for strengthening the collaboration of law enforcement agencies when it categorised corruption as a particularly serious crime with a cross-border dimension (art.69 B, *Treaty of Lisbon* 2009).

The EU's understanding of the treacherous nature of corruption and the need for its effective counteraction reached a crucial milestone when it recognised corruption as a peril that threatened some of the fundamental EU principles. The *1997 Action plan to combat organised crime* (European Council 1997) came to reaffirm the dedicated commitment of the member states robustly to fight corruption. The plan prescribed the adoption of a

⁴⁰ The *Treaty of Amsterdam* from 1997 amended the *Treaty on the European Union*, the *Treaty establishing the European Communities* and certain related acts.

comprehensive policy against corruption, focusing on ‘elements of prevention, addressing such issues as the impact of defective legislation, public-private relationships, transparency of financial management, rules on participation in public procurement, and criteria for appointments to positions of public responsibility, etc.’ (European Council 1997:8).

The anticorruption work continued with the adoption, in 1997, of the *EU Convention on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union* (hereafter the *EU Anticorruption Convention*). The adoption of the Convention was a ground-breaking event in the EU anticorruption effort, because it presented the first comprehensive legal effort to criminalize corruption in the public sector. Until then the only legal definition of corruption had been included in the *First Protocol to the Convention of the Protection of the European Communities’ Financial Interests*, adopted in 1996. This differentiated between the active⁴¹ and passive⁴² corruption of public officials but referred to it as a crime only if and when the financial interests of the Communities were involved. The *EU Anticorruption Convention* widened the scope of punishable corruption-related crimes by including all acts of corruption committed by officials of the European Communities or officials of the member states in general. It contains provisions requesting effective, proportionate and dissuasive criminal penalties (article 5) and envisions criminal liability for heads of businesses involved in the active corruption of public officials (article 6). The

⁴¹ Active corruption is defined as any deliberate action of whosoever promises or gives, directly or through an intermediary, an advantage of any kind whatsoever to an official for himself or for a third party for him to act or refrain from acting in accordance with his duty or in the exercise of his functions in breach of his official duties (art 3).

⁴² Passive corruption is defined as any deliberate action of an official, who, directly or through an intermediary, requests or receives advantages of any kind whatsoever, for himself or for a third party, or accepts a promise of such an advantage, to act or refrain from acting in accordance with his duty or in the exercise of his functions in breach of his official duties (art.2).

Convention also clarifies the principles of national jurisdiction and the modalities of extradition, prosecution and cooperation.

While the adoption of the Convention marked the first dedicated anticorruption legislative effort on EU territory, the scope of this effort remained extremely limited. Although the Convention broadened the provisions of the First Protocol by criminalising even corrupt activities unrelated to the abuse of European financial interests, it included in its scope only very basic acts of corruption (passive and active bribery), and failed to criminalise other widespread corruption-related crimes such as trading in influence, embezzlement, misappropriation or other diversion of public funds, abuse of power, account offences, concealment, participation and bribery attempt. This limited criminalisation was complimented by the Convention's failure to introduce mechanisms aimed at removing the incentives for corrupt activities. There was no confiscation of instrumentalities and proceeds of corrupt crimes nor did the *EU Anticorruption Convention's* provisions set out possibilities for compensation for damages suffered from corruption-related activities. These major weaknesses, combined with the fact that the *Convention* was only finally ratified and put into force only in 2005,⁴³ made its stipulations largely redundant. Finally, the feebleness of this legislative effort was demonstrated also by the lack of any mechanisms for monitoring the Member States' compliance with the Convention's provisions. The creation of a monitoring mechanism to monitor the member states' compliance with the *Convention's* provisions was considered unnecessary, because it was perceived as leading to an unreasonable duplication of the monitoring mechanisms

⁴³Convention entered into force on 28 September 2005.

already established by other international organisations such as the UN and CoE (European Commission 2003).

In parallel to the anticorruption legislative efforts of the Council, the European Commission published a set of soft policy guidelines aimed at establishing a common understanding regarding EU priorities in the fight against corruption. Four major strategic documents are relevant in this regard: the *Communication on a Union policy against corruption* (European Commission 1997); the *Communication on a Comprehensive EU Policy against Corruption* (European Commission 2003); the *Green Paper on European Transparency Initiative* (European Commission 2006); and the *Communication on fighting corruption in the EU* (European Commission 2011a). Although these Communications have no mandatory character and merely express the Commission position on a particular topic, they sought to provide guidelines and unify the actions of the EU and its member states.

The first *Communication on a Union policy against corruption* from 1997 ambitiously aimed to identify the main elements of EU anticorruption policy. It overviewed the previous initiatives undertaken by the EU and clearly deliberated on the need for adopting a comprehensive common EU approach. International trade and competition, community expenditure abroad, community resources, development co-operation policies and the pre-accession strategy were the main areas where the Commission called for urgent joint anticorruption action. The document reflected upon the harmonisation of corruption offences across the EU, noting that while bribery is criminalised in all member states, there are, however, large divergences in the definitions of corruption-related crimes and in the approaches towards bribery of foreign officials and

private sector corruption. Considering these deviations, the Commission urged the member states to ratify and implement the *First Protocol to the Convention on protection of EU financial interests* and to adopt the *EU Anticorruption Convention*. The criminal aspects of corruption were not, however, the core of the Commission's Communication. Recognising that the mere use of law enforcement tools is not sufficient to achieve long-term results, the Commission proposed a wide range of preventative measures in the areas of taxation, procurement, financial transactions and institutional arrangements, civil remedies and whistle-blowers' protection.⁴⁴

Six years after its first communication, the Commission issued a new the *Communication on a Comprehensive EU Policy against Corruption* (2003). Corruption was examined from both its narrow criminal law perspective and in its broader socio-economic sense. Stressing that corruption undermines all principles stipulated in article 6 of the *Treaty of the European Union*,⁴⁵ the Commission reiterated the need for commonly enforced anticorruption efforts. A new call for the ratification and implementation of an international anticorruption legal framework was made. The Communication also addressed other major points of concern: the prevention of corruption within the framework of EU institutions and upholding integrity in public and in private sectors.

In May 2006, the European Commission further extended its anticorruption engagement by publishing its *Green Paper on European Transparency Initiative (ETI)*. The initiative was based on the previous measures undertaken by the EU and on the policy

⁴⁴ Such measures include, for example: abolition of tax allowances that may induce corruption; blacklisting of companies that have committed corruption-related crimes; commitments against corruption in the bidding procedures; introduction of civil remedies for corruption; mechanisms for effective protection of whistle-blowers.

⁴⁵ These are: liberty, democracy, respect of human rights and fundamental freedoms and the rule of law.

highlights of the *White Paper on Good Governance*. It was aimed at overcoming citizen alienation and building trust in the work of the EU institutions. The initiative was geared around three main pillars: transparency of interest representatives; disclosure of beneficiaries of EU funds; and feedback on the minimal standards for consultations. The proposed measures were oriented towards the modus operandi of the Commission and other EU institutions, and although they had no direct effect on the member states, they aimed to provide in their leadership an example that might be followed by the national governments. In 2011 the Commission issued a new *Communication on fighting corruption in the EU* (European Commission 2011a), which presented a new vision of the tools needed properly to counteract corruption in the EU. The Communication recognised the failures of the member states to address corruption and noted that because of the inefficiency of the EU and its member states' efforts corruption had grown to cost in the order of €120 billion per year, representing losses of around 1 percent of EU GDP. Deliberating on the rationale behind the spread of corruption, the Commission argued that, among the reasons leading to these anticorruption failures, is the member states' uneven and scattered implementation of an international anti-corruption legal framework (European Commission 2011a). As an immediate attempt to 'fix' this problem, the Commission introduced the *EU Anticorruption report*, the first EU tool geared towards analysing the activities of the member states in the anticorruption domain. This new monitoring mechanism aimed to outline the overall domestic situation, summarising the good practices and providing recommendations for improvement. The *EU Anticorruption report* is not geared towards monitoring compliance with particular legal instrument but rather seeks to identify the overall progress/regress of the member states in their efforts to

fight corruption. In practice, the report provides a snapshot of the corruption situation in a particular member state but lacks any mechanism that might request better anticorruption compliance.

3.1.2 Developments in the establishment of the overall international anticorruption framework: the UN and CoE approach (1997-2016)

From the early 1990s up until now the United Nations, the World Bank, the CoE and the Organisation for Economic Cooperation and Development (OECD) have been among the key international players shaping global anticorruption efforts. And while the OECD and World Bank have been traditionally focused on preventing and fighting corruption in the business sector, the UN and CoE have concentrated their efforts on providing comprehensive anticorruption tools that deal with all aspects of public and private life.

The cornerstones of the common European anticorruption approach were laid down by the CoE,⁴⁶ which became the first international organisation to provide a joint pan-European response to the overpowering problem that corruption was becoming. In a timespan of five years (between 1994 and 1999) the CoE adopted a number of anticorruption initiatives that shaped the EU member states' existing national approaches for fighting corruption. The main building blocks of these initiatives are the *Twenty Guiding Principles for the Fight against Corruption*, the *Criminal and Civil Law Conventions on Corruption*, and the Group of States against Corruption (GRECO).⁴⁷

⁴⁶ Established in 1949 with the main objective to promote democracy, protect human rights and rule of law, the CoE encompasses 47 member states and addresses its objectives within a wider European context. All EU member states are also members of the Council of Europe.

⁴⁷ GRECO is an independent anticorruption monitoring body, established within the structure of the Council of Europe. It is open for participation not only for members of the Council of Europe but also for external parties who wish to join the mutual evaluation exercise. Currently, it comprises 49 member states (48 European states and the USA).

The *Twenty Guiding Principles for the Fight against Corruption* (Council of Europe 1997) was the first important milestone. It outlined an unified set of European anticorruption standards and presented a common multidisciplinary model⁴⁸ for counteracting corruption at a national level. This model was based on the understanding that the effectiveness of the fight against corruption is dependent on the joint and targeted measures being adopted by all the CoE's member states at national and international levels. Within the frame of the *Twenty Guiding Principles*, the CoE's member states resolved to combine their efforts in areas such as corruption prevention, the criminalisation of national and international corruption, and the promotion of transparency and accountability. To do so, the CoE member states agreed to undertake a series of measures to adapt their national laws and state institutions to conform to a set of commonly endorsed anticorruption standards.

Two key legal instruments, namely the *CoE's Criminal Law Convention on Corruption* and the *CoE Civil Law Convention on Corruption*, both adopted in 1999, acted as supplements to the *Twenty Guiding Principles for the Fight against Corruption*. They were aimed at synchronising the national legal bases and enabling international collaboration in matters of law enforcement and prevention.

The former's main objectives were to define common standards for corruption offences, deal with major substantive and procedural law matters, and improve international cooperation. In the fields of active and passive bribery of domestic and foreign officials, and trading in influence and money laundering, the Convention

⁴⁸ The multidisciplinary model acknowledges that the effective fight against corruption must deploy a variety of measures that cut across different governance areas and cover not only criminal law enforcement, but also corruption prevention and awareness-raising aspects.

establishes a number of measures to be undertaken by national authorities. For all those offences, the Convention obliged the state parties to provide sanctions that are ‘...effective, proportionate and dissuasive including penalties involving deprivation of liberty which give rise to extradition’ (art. 19.1 *CoE Criminal Law Convention on Corruption*). The introduction of imprisonment, one of the heaviest sanctions in the penal system, made explicitly tangible the State Parties’ commitment to counteract corrupt offences.

In the same year that the *Criminal Law Convention on Corruption* was adopted –in 1999 – the CoE adopted a second instrument, the *Civil Law Convention on Corruption*, this time to introduce civil law remedies for the victims of corruption crimes. This was the first legal instrument that bridged international civil law and the fight against corruption, and it established both the right of protection and effective remedies for persons suffering damage as a result of acts of corruption, including the possibility of obtaining compensation for damage. The Convention also provided a definition of corruption⁴⁹ and dealt with the validity of contracts, limitation periods, the protection of employees, compensation for damage, liability, contributory negligence, accounts and audits, and the acquisition of evidence. Moreover, it describes the main obligations of national authorities to provide effective remedies, as well as standards for cooperation and the monitoring of the Convention.

The adoption of the CoE’s legal instruments was followed by the establishment of worldwide international anticorruption standards. The phase of rapid elaboration of international legal anticorruption tools culminated in 2003 when the *UN Convention*

⁴⁹ Following article 2, corruption means ‘requesting, offering, giving or accepting, directly or indirectly, a bribe or any other undue advantage or 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’.

against Corruption (UNCAC) was adopted. This incorporated all the anticorruption principles and existing legal instruments already established in Europe, the USA, Africa and Latin America,⁵⁰ thus becoming the most comprehensive international anticorruption legal document in existence. The main objectives of *UNCAC* were to promote and facilitate efficient and effective measures in the prevention of corruption, combating corruption, international cooperation and mutual legal assistance. In so doing, *UNCAC* provided a unified set of obligatory measures to be followed by its state parties, along with an extended set of non-binding, recommendable actions. The convention was geared around four main pillars: prevention, criminalisation, international cooperation and technical assistance, and asset recovery.

The adoption of the *CoE Twenty Guiding principles against corruption, the Criminal and Civil Law Conventions on Corruption and the UN Convention against Corruption*, along with their monitoring mechanisms formed the foundations of the EU approach in targeting corruption. Given that all the EU member states are also members of the UN and CoE, their legal frameworks are expected to provide unified anticorruption standards that will ensure an equal level of anticorruption compliance throughout the EU. Together with the EU policy guidelines, these standards could lead to mutually reinforcing results in the fight against corruption.

⁵⁰The UN Convention incorporates the principles of the Inter-American Convention against Corruption (1996), the Convention on the Fight against Corruption involving Officials of the European Communities or Officials of Member States of the European Union (1997), the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (1997), the Criminal Law Convention on Corruption (1999), the Civil Law Convention on Corruption (1999), and the African Union Convention on Preventing and Combating Corruption (2003).

3.1.3 Compliance with the international anticorruption framework: are there any enforcement mechanisms?

The adoption of *UNCAC* and the CoE's *Criminal and Civil Law Conventions on Corruption* signalled the end of the third anticorruption phase in the global fight against corruption and prompted the beginning of the real-life implementation cycle (Wolf and Schmidt-Pfister 2010). Two monitoring mechanisms were established to support the state parties in their efforts to implement the CoE and UN Conventions.

In 1999, recognising the vulnerability of unmonitored standards, the Council of Europe created the Group of States against Corruption (GRECO). This group monitors the implementation of the *Twenty Guiding Principles for the Fight against Corruption* and the *Criminal and Civil Law Conventions on Corruption* by conducting peer to peer evaluations⁵¹ and asserting peer pressure. The ultimate aim of such evaluations is to improve the member states' capacity to fight corruption by monitoring compliance with the CoE's guiding tools, identifying the main obstacles and insufficiencies in national anticorruption policies/laws, and stimulating the promotion of the necessary legislative and institutional reforms. Each evaluation⁵² comprises a legal and policy analysis of the ways in which the CoE Member under review has assimilated into its national legislation, specific areas, covered by the CoE conventions. The evaluation process itself involves the collection of information through a questionnaire (self-assessment), on-site country visits, meetings with key domestic stakeholders and the drafting of evaluation reports. The procedures envision that the country under review should, once the text of the evaluation report has been agreed, comply with the recommendations contained in it and should then

⁵¹ The evaluation team comprises of three representatives of other member states, selected on random basis.

⁵² Since its creation, GRECO has conducted four evaluation rounds: 2000, 2003, 2007 and 2012.

prepare a compliance report. This compliance report is further examined by a second evaluation team, which assesses the level of compliance against the recommendations. However, the recommendations delivered in the framework of these evaluations are non-binding and rely on the individual state's willingness to comply with them.

Following on from the understanding that the national transposition of international commitments should be robustly monitored, the UN also established a special review mechanism for monitoring the implementation of *UNCAC*. In a similar way to GRECO, the *UNCAC* review mechanism operates in cycles dedicated to different chapters of the Convention. There are three main stages in the monitoring process: self-assessment, expert review, and dialogue with the country under review.⁵³ Elements of internal and external assessment are combined in an attempt to find the optimal balance between the opinions of the external reviewers and the national beneficiaries. The final monitoring report contains recommendations for improvement which like those produced by GRECO, are non-mandatory in character.

Ultimately, the presence of an internationally agreed legal framework, combined with a series of monitoring mechanisms, was expected to create a level playing field across all member states and eventually to lead to a notable decrease in corruption levels throughout the EU. Such achievements would depend on some major preconditions. Because none of the Conventions, as instruments of international law, had supremacy over national law, adherence to their stipulations was not automatically granted. The

⁵³ During the first phase, each individual country fills in a self-assessment checklist. During the second phase an expert review team (comprising two experts representing different countries, selected on a random basis) conducts desk review of the self-assessment checklist and all other relevant materials. The experts may visit the country under review and request additional information. During the final stage the expert team produces a draft country review report. This is sent to the reviewed country for feedback. In cases of dispute a dialogue is sought to reach agreement on a final text. During the assessment, the team of experts focuses on those areas previously agreed by the members of *UNCAC* as being priority areas.

incorporation of the mutually agreed standards was subject to individual signature, national ratification and transposition into the national legal systems of the member states. Hence, ‘there is no guarantee that states will institute the legal protections necessary to secure their international obligations, especially because the institutional characteristics, monitoring mechanisms and substantive content of these treaties vary greatly.’ (Khaghaghordyan 2014:4) The process of ratifying and implementing the common anticorruption legal framework nationally is, therefore, highly dependent on two main factors: the national political will to implement anticorruption reforms (discussed in the next section) and the presence of enforcement mechanisms that will ensure their implementation. These two elements proved to be highly problematic.

GRECO and *UNCAC* reviews and recommendations have only a non-binding, advisory capacity, primarily because of their intergovernmental character and the nature of their conception. What is more, the publication of the outcomes of the anticorruption reviews is fully reliant on the goodwill of the country being monitored: it has the right to decide if its monitoring report should become public or should remain confidential.

In the case of GRECO, for example, Austria, Belgium, Italy and the Netherlands⁵⁴ (fourth evaluation, still ongoing),⁵⁵ and Belarus, Italy, Monaco and Portugal (third

⁵⁴ The case of the Netherlands, considered one of the least corrupt countries in the world, is significant in this respect. During the fourth evaluation round, GRECO identified shortcomings as regards the prevention of corruption of judges, prosecutors and Members of Parliament. In June 2013 GRECO issued seven recommendations for improvement. The follow-up on the implementation of the recommendations was carried out in 2015. GRECO noted that only two of the recommendations had been implemented in a satisfactory manner, with five still pending. The Netherlands has requested that a second report on the implementation of the remaining recommendations (2016) will remain confidential and therefore it is not to be published for public scrutiny (information published on GRECO website as of 23 November 2016).

⁵⁵Source last retrieved on 22 November 2016 at http://www.coe.int/t/dghl/monitoring/greco/evaluations/round4/ReportsRound4_en.asp.

evaluation)⁵⁶ have exercised their right to keep some evaluation reports out of public scrutiny. Various reasons may be behind such requests, but the end result is that it allows the countries, which are not compliant with their international commitments, to conceal their shortcomings, thus avoiding the scrutiny of both their own national public and the international community. The non-binding nature of the recommendations, along with the confidentiality option, transforms the review mechanisms of GRECO and *UNCAC* into helpful but ‘toothless’ checks as regards compliance with international anticorruption standards. These pitfalls have prompted Transparency International to describe the *UNCAC* review mechanism as falling ‘short of effectively tackling the devastating effects of corruption’ and not adequately reflecting the principles of transparency, inclusiveness and effectiveness (Transparency International 2009b:1).

A lack of continuity in monitoring practices further undermines these inherent enforcement weaknesses of the anticorruption evaluation mechanisms. The cyclical evaluation method, practised by both GRECO and *UNCAC*, poses another compliance challenge, because once evaluated on a certain matter, the *UNCAC/CoE* signatories will not face monitoring on the same matter in the foreseeable future –potentially up to 15–20 years. Given the constantly changing realities of corruption, these cyclical mechanisms, functioning on a long timescale, can hardly provide a sufficient overview and updated data on the legal framework and strategic efforts of the member states to fight corruption.

These described weaknesses of the review mechanisms mean that, in practice, the internationally agreed anticorruption standards lack the tools of enforcement. Thus they

⁵⁶Source last retrieved on 22 November 2016 at http://www.coe.int/t/dghl/monitoring/greco/evaluations/round4/ReportsRound4_en.asp.

rely entirely on the good will and commitment of the national governments (Anagnostou et al. 2014).

This section described the development of the major legal anticorruption standards established by the EU, UN and CoE. It showed that the EU did create its strategic anticorruption framework but choose to rely on the intergovernmental tools adopted by the CoE and UN when it comes to achieving anticorruption legal coherence. The section further demonstrated that the latter may not prove to be the most effective mechanisms for building a common European anticorruption response: the intergovernmental legal nature of the international conventions does not require the existence of any enforcement mechanisms ensuring compliance. Thus, any adherence to the agreed common anticorruption framework is reliant only, currently, on the political will of the signatories of the Convention to honour their international commitments.

3.2 Implementing the international regulatory tools in EU member states: strong commitment, weak performance?

By analysing the levels of national ratification of the *UNCAC* and CoE Conventions, this section finds a remarkable mismatch between the member states' internationally expressed commitments and their actual national transposition on the ground, so to speak. The section argues that while the majority of member states are keen to sign up to, and express support for, the adoption of legally binding anticorruption commitments in the international arena, the process stumbles when these commitments have to be adapted in a national legal framework, thus creating a patchwork of anticorruption approaches across the EU.

3.2.1 National ratification of the international anticorruption tools: the cases of CoE Anticorruption Conventions and UNCAC

As discussed in the previous section, the combined forces of the *CoE Criminal and Civil Law Conventions on Corruption* and *UNCAC* form the backbone of the European anticorruption legal framework. The adoption of these Conventions was, for a long while, believed to be the way to ensure coherent and synchronised anticorruption interventions throughout the entire EU. Such an approach is built on the premise that each individual member state, given its strong anticorruption stance, will smoothly ratify and transpose the internationally agreed standards into its national legal framework. This, however, proved not to be the case in the cases of the CoE and UN anticorruption conventions.

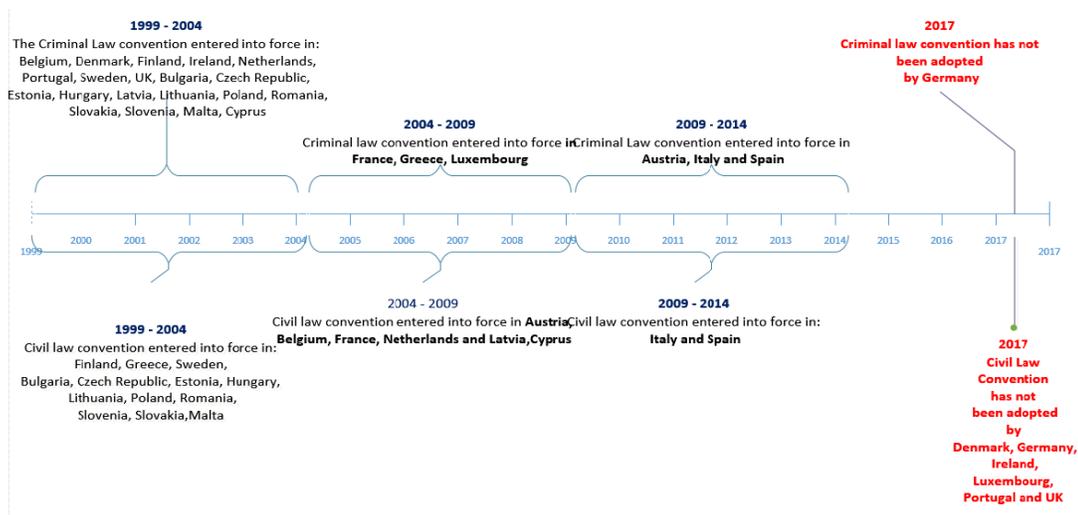
The overview of the national transposition phase reveals that more than 15 years after the *Council of Europe Civil and Criminal Law Conventions on Corruption* had been opened for signature, one quarter of the member states had not managed to implement the international commitments that they had made in principle by signing the two Conventions (see Figure 3.2).⁵⁷ Explicit examples of this are Denmark, Germany, Ireland, Luxembourg and the UK, which signed the *CoE Civil Law Convention on Corruption* in 1999–2000, but so far has failed to ratify it.⁵⁸ Portugal is another negative example but unlike the above countries, it has never expressed willingness even to sign the Convention.

⁵⁷ Following the principles of international law, the first phase of adoption of any international convention is its signature. By signing an international convention, each country agrees with its provisions and declares its commitments to adhere to the mutually agreed texts and principles. Following the signature stage, the convention should be ratified by the national parliaments and its provisions should be transposed into the national legal framework of each state.

⁵⁸ Information on the signatories of the CoE Civil Law Convention on Corruption. Available at: http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/174/signatures?p_auth=n4UAIZIQ. Source last retrieved on 16 February 2017.

The ratification progress of the *CoE Criminal Law Convention on Corruption* is slightly better. Although it was more than 10 years after its adoption before Austria, Italy and Spain ratified the convention, by April 2016 all the member states – with the exception of Germany – had done so. Similarly, Germany signed the *Civil Law Convention on Corruption* in 1999 but never ratified it.

Figure 3.1 Mapping the member states’ efforts to ratify the CoE’s anticorruption conventions



Source: Author’s elaboration. Last updated on 5 February 2017.

Similar ratification reluctance was also observed in relation to the *UN Convention against Corruption* and the endorsement of the *EU’s Anticorruption Convention*. In the case of the *EU’s Anticorruption Convention*, the time lapse between its opening for signature and entry into force was 8 years. The same process took 11 years for *UNCAC*,

but, despite this delay, by 2014 the *UN Convention against Corruption* had entered into force in all the EU member states.⁵⁹

The long-time lapse between the signature of the conventions and their national ratification strongly contradicts the member states' loudly proclaimed willingness to unify their anticorruption efforts. This is explicitly visible in the adoption of the CoE Conventions and *UNCAC*: the majority of the member states immediately signed the conventions in support of the establishment of a common anticorruption framework and yet conveniently forgot to embed them in their national legal frameworks. In doing so, they demonstrated that the locus of initiative (to agree and sign the conventions) is an important, yet not sufficient, factor to demonstrate real anticorruption commitment (Brinkerhoff 2000). The prolonged ratification, clearly demonstrated the lack of desire effectively and continuously to engage in establishing common foundations for the fight against corruption in the EU.

The demonstrated discrepancy between words and actions dazzlingly contrasts with the political pressure that is imposed on third countries and EU institutions. The double standards were particularly evident in the EU ratification of the *UN Convention against Corruption*.⁶⁰

Two years after *UNCAC* was opened for signatures, the Council authorised the European Commission to sign the *UN Convention against Corruption* on behalf of the European Union. In 2008 the Council adopted *UNCAC* (Council of the European Union

⁵⁹ Although *UNCAC* was signed in 2003 by 21 member states (the remainder signed in 2005 with the exceptions of Estonia and Slovenia), its standards entered their national legal frameworks much later. For 11 member states this was effected in the period from 2008 to 2014 but the most notable delays were registered by Germany (2014), Czechia (2013) and Ireland (2011).

⁶⁰ The EU joined the *UN Convention against Corruption* as a separate entity. This membership is separate from the individual membership of the member states and binds EU institutions to an adherence to and implementation of the anticorruption provisions of *UNCAC*.

2008b), thus making its stipulations obligatory for all public servants and institutions of the EU. The adoption of *UNCAC* on behalf of the European Union requires all EU institutions to follow the same anticorruption obligations that are applicable to the EU member states, provided that they have also ratified *UNCAC*. This was not the case, however, for 1/5 of the member states, which by the time *UNCAC* had entered into force for the EU institutions, had failed to ratify the convention.⁶¹

Another straightforward example of the ‘do as I say, not as I do’ principle involves the anticorruption requirements imposed on candidate members during their accession. While the ratification and transposition of *CoE Civil and Criminal Law Conventions on Corruption* was among the major positive factors in the consideration of a candidate country for EU membership, such compliance was not expected from the member states that were already part of the large EU family (Szarek-Mason 2006). And while one can justifiably argue that the eastern European candidates were/are much more corrupt than the western EU members (thus prompting the double-standard requirement), a brief look at corruption levels in countries such as Greece, Italy and Portugal may easily shake that argument.

It goes without saying that the ratification of international conventions cannot be considered a panacea. The sole fact of adoption certainly cannot affect the intended outcomes without vigorous implementation. The repeatedly low corruption rankings⁶² of some member states⁶³ in the TI Corruption Perception Index and the World Bank control of corruption indexes vividly exemplify this. Yet, notwithstanding that some scholars

⁶¹ These countries are: Czechia, Estonia, Germany, Italy, Ireland and Cyprus.

⁶² Higher place in the ranking means better anticorruption performance.

⁶³ Greece, Bulgaria and Romania, for example, which have ratified the *CoE Civil and Criminal Law Conventions on Corruption* and *UNCAC*.

(Kubiciel 2012 and Bryane 2010 quoted in Anagnostou et al. 2014: 10) may question the effectiveness of anticorruption legal regulations and the adoption of international anticorruption conventions, ‘few would deny that a legal frame against corruption is a necessary, even if not sufficient condition, in the process of seeking to mitigate it’, as Anagnostou et al. explain (2014:10).

Given the free movement of people, capital, goods and services throughout the EU, nothing can be more valid than this argument. The adoption of legally binding tools and a synchronisation of anticorruption approaches between the member states is the main enabler for the effective prevention, prosecution and investigation of national and cross-border corruption crimes. A lack of legal uniformity in corruption-related matters risks the creation of jurisdictional ‘pockets’ that may favour organised criminality and hinder the establishment of equal standards of integrity across the member states. Sherrer et al. (2009) add to this argument, asserting that the weak legal anticorruption framework increases the EU’s vulnerability to transnational crimes and exposes EU citizens to additional economic and security risks, both of which might be diminished if the EU would revise its legislative approach to fighting corruption.

The adoption and adherence to internationally recognised anticorruption standards is also one of the indicators of a strong political will to fight corruption. It sends a strong message to all national and international stakeholders about the country’s commitment vigorously to counteract all forms of corrupt activities. It also shows continuous commitment to fighting corruption and readiness to enforce and sanction any violations (Brinkerhoff 2000). All these elements proved to be somehow missing in the member states’ behaviour towards the adoption and enforcement of a unified international

anticorruption legal framework. The prolonged national ratification procedures created a wide gap at EU member state level between the de jure and de facto expressed political will regarding the harmonisation of national anticorruption standards. It clearly signalled the commitment (or rather the lack of it) to tackle corruption in a unified manner. The reasons behind the lack of commitment may vary; they may be dependent on a set of environmental factors ranging from the state's social, economic and political stability, the extent of corruption and/or the existence of vested interests, the strength of civil society and the private sector, the type of governance regimes and donor-government relations (Brinkerhoff 2000). Yet, whatever are the underlying reasons for the lack of commitment, it is evident that the EU cannot rely on the currently established international conventions: because of the delayed (or non-existent) ratification and sanctioning mechanisms, it has not been possible to establish a unified and level anticorruption playing field throughout the entire EU.

3.2.2 The national anticorruption legislative motivations of member states: the case of Germany

Despite the fact that current corruption challenges exceed the capabilities of even the largest and strongest states (Mosconi and Padoa-Schippa 2009), the EU member states have so far avoided adopting a common legal anticorruption framework. Instead they have clearly expressed their preference for those international anticorruption conventions and EU policy documents that allow them to harmonise their approaches, and commit to joint anticorruption actions, without binding them actually to do so. In this process it is the anticipation of how international law and institutions will affect the national political environment, and the political actors' behaviour, that determines the legislative drive or

resistance (Abbott and Snidal 2000). Having in mind that corruption is a highly sensitive issue, which strongly influences national elections (Monar and Danmani 2007), the choice of anticorruption regulatory framework may have a major impact on national politics and political elites. Such consequences are largely avoided by the chosen policy approach, which does not oblige member states to give account to the EU and suffers sanctions if their anticorruption efforts have failed to prevent the spread of corruption at national and EU level.

The still-pending national ratifications of the *CoE Civil Law Convention on Corruption* and the delayed ratification of the *CoE Criminal Law Convention on Corruption* are clear examples of the political flexibility of the intergovernmental coordination approach, allowing member states to commit to (by signing) standards that they find potentially risky without ever implementing them (by ratifying).

The specific reasons that drive the ratification resistance of each individual member state are hard to estimate. With a few notable exceptions, academic research on this particular topic is largely missing. Yet, the researches of Wolf (2013), Jakobi (2013b) and (Humborg 2014) into Germany's *UNCAC* ratification provide some glimpses of national motivations.

The case of Germany presents an explicitly interesting example for three main reasons: the country's image is one with a high anticorruption profile;⁶⁴ it is among the EU nations considered to have highly democratic governance;⁶⁵ and yet it is the only EU

⁶⁴ Germany has been ranked among the 10 least corrupt countries in the world by the Transparency International Corruption Perception index for 2015.

⁶⁵ Germany is ranked among the top 19 democratic countries in the world by the Economist Intelligence Unit's Democracy Index 2016.

member state not to have ratified the *CoE Criminal and Civil Law Conventions on Corruption*.⁶⁶ The case with *UNCAC* is also very similar: Germany signed the Convention immediately after its adoption in 2003, but only ratified it eleven years after its signature, in 2014. And while the reasons behind such legislative resistance may vary, Humborg (2014), Jakobi (2013b) and Wolf (2013), argue that in the case of the *UNCAC* ratification, it was primarily politically and personally driven.

Looking at the changes that the provisions of *UNCAC* require in the German criminal legal framework, Wolf (2013) argues that the main sticking point in the ratification of *UNCAC* was the reluctance of Member of Parliament to criminalise their potentially corrupt behaviour. In particular, *UNCAC* requires the criminalisation of active and passive bribery of members of Parliament, a behaviour that was not considered a crime in Germany before 2014. The ratification of *UNCAC* would therefore have brought potential personal losses much greater than the political gains brought by supporting the implementation of international anticorruption standards. The same hypothesis is expressed by Humborg (2014: 1),⁶⁷ who states that ‘many parliamentarians feared that the wide definition of corruption in the convention might lead to more investigations, destroying their reputations and even ending careers – even if investigations never make it to the courts.’ Thus, the adoption of the robust anticorruption norms brought the ‘inherent dilemma: the very actors which must adopt and implement policies to curb corruption are those which may face weak, or even negative, incentives to do so.’ (Fritzen 2006:80).

⁶⁶ Germany signed the two conventions in 1999, but never ratified them. CoE signatory lists, 5 February 2017.

⁶⁷ Christian Humborg is Managing Director of Transparency International Germany.

Jakobi (2013b) joins this discussion by adding a different perspective, arguing that the main obstacle to ratification was the national parliamentarians' fear of being restricted in their actions by the international anticorruption norms. Jakobi's thesis implies that the international anticorruption commitments are seen as a direct breach of the principle of national sovereignty and are rejected on these grounds. And while such explanation has potential foundation, the enactment of this scenario should be carefully considered because the 'sovereignty card' is often used as automatic excuse for legislative reluctance, driven by self-, rather than national, interest (Humborg 2014, Wolf 2013).

Notwithstanding the reasons for Germany's late adoption of *UNCAC* were her fear of restriction of national policies or calculations that the personal costs of the national parliamentarians might be greater than their potential political benefits, the cumbersomeness of the national ratification processes and/or the lack of adoption of international legal commitments (as in the case of CoE Conventions) is indicative of the sensitivity of the anticorruption issue. It also demonstrates the level of national political commitment, even in countries considered to be highly corruption-clean.

The sharp contrast, demonstrated by this section, between the member states' internationally expressed anticorruption commitments and the sluggishness of national ratification procedures, clearly exhibits that the policy makers' rational cost-benefit analysis does not always favour the creation of equal anticorruption standards among all members. This latter hinders the establishment of a unified approach for tackling corruption at the level of the EU's member states.

3.3 EU anticorruption legal framework: potential reasons behind the lack of legally binding commitments

Based on the overview of the corruption literature (chapter 2), the discussions and evidence presented in this chapter, an explanation for the non-existence of a common anticorruption legal framework can be sought in four main directions.

The lack of common legal framework may be related to the low priority given to anticorruption measures by the EU member states. This would imply, however, that corruption is not a problem in the EU and therefore does not need to be jointly addressed.

The next explanation relates to an understanding that there is no need for binding legal commitments and sanctioning procedures because the EU member states are willingly following and correctly applying all internationally agreed standards.

These two explanations can be easily overruled, however. Given the widely acknowledged negative effects of corruption on economic and socio-political development (discussed in chapter 2), there is little room for arguing that corruption is not a topic that should be robustly addressed by the EU and its member states. The slow national ratification of the international anticorruption Conventions, on the other hand, combined with the uneven implementation and constant spread of corruption throughout EU member states, have come to question the results yielded from the current non-binding regulatory framework. The non-effectiveness of the latter has been already acknowledged by policy-makers (European Commission 2011a) and those in the world of academic research (e.g. Mosconi and Padoa-Schippa 2009, Sherrer et al. 2009).

As previously discussed, the reasons behind the member states' reluctance to conclude legally binding commitments are hard to determine and depend on a complex web of motivational factors that have to do with public values, and political and personal

cost-benefit analysis. It is therefore reasonable to suggest that the lack of a European common anticorruption framework reflects these national motivational factors. Yet, given that the EU decision-making process comprises a complex mix of supranational and intergovernmental interests, it is also reasonable to suggest that if there is no political will nor a strong institutional driving force behind the adoption of an EU common anticorruption framework, the latter will not become a reality. Considering the above, the rest of the thesis investigates two possible hypotheses:

- Hypothesis 1: the absence of a robust EU common anticorruption framework reflects the legalisation reluctance of the Council to conclude legally binding anticorruption agreements;
- Hypothesis 2: strong anticorruption framework has not been adopted due to lack of institutional leadership by the EU supranational institutions.

The two hypotheses are built on the premise that EU policies and legal framework are results of a complex mix of political and technocratic interests, expressed by the Commission, the Parliament and the Council. The adoption of any binding framework at EU level is ultimately a product of political will, EU supranational leadership and the member states' drive to implement the proposed regime. If either of these elements is missing, no legal act can be adopted.

Hypothesis 1 reflects the behaviour exhibited by some member states in the process of adoption of the CoE and UN anticorruption conventions and links the member states' overall position on how anticorruption should be regulated in the European Union to the national ratification resistance. It suggests that member states favour the adoption of non-binding anticorruption commitments that allow them to manoeuvre and accommodate

divergent political and personal interests. Such behaviour will attest the theory of Abbott and Snidal (2000) that the legalisation process comprises intertwined connections between law, politics, interests and values.

To test the viability of this hypothesis, the thesis applies the theories of Helstroffer and Obidzinski (2014) and Costello and Thomson (2013) on the institutional behaviour of the main EU policy makers when new standards are to be introduced at EU level. These theories predict that, in such cases: the Commission will propose such standards, trying to anticipate the positions of the Parliament and the Council; the Parliament will reinforce the proposed standards; and if these standards are problematic for the Council, the standards will be lowered to accommodate the preferences of the Council or the latter will block their adoption. The Council therefore has the prevailing bargaining power in the final policy outcome.

If the legalisation theories of Abbott and Snidal (2000) and the institutional behaviour models of Helstroffer and Obidzinski (2014) and Costello and Thomson (2013) are fully applicable to the anticorruption domain, one might expect the Council (expressing the opinion of the member states) to oppose the adoption of legally binding anticorruption initiatives. The reasons behind such opposition do not suggest either that all the member states are corrupt or that they do not want to fight corruption. It suggests, rather, the existence of a variety of political, personal and economic motivational factors that are hard to distinguish. At one end of this spectrum are the personal/political interests of the political and business elites; on the other are the technocratic arguments and sovereignty concerns.

Among the obvious disadvantages of a binding international anticorruption framework is that compliance with the latter may expose corrupt or shady practices that have previously been hidden. This may have a severe negative impact on national politics and business elites and is, therefore, highly undesirable. The adoption of a strong legislative mechanism will also introduce monitoring and sanctioning procedures that may further expose the inability of an individual country to fight corruption. Technocratic reasons may also be behind the reluctance of the member states to create anticorruption mechanisms, which would put additional burden on already overburdened administrations.

The most common reason for the insufficient use of joint legal instruments in the area of justice and home affairs (including anticorruption), however, is that the adoption of common hard law touches upon the concept of national sovereignty and comes at a significant cost: constraints in policy-making, losses due to regulation or a more fundamental intrusion into the relationship of the state and its citizens (Abbott and Snidal 2000). The plausibility of this argument should always be carefully considered, however, because the ‘resistance to legalisation seems at times to represent an assessment of sovereignty costs rooted in ideological or normative resistance to external oversight or constraint.’(Kahel 2000:664) This is even more true in sensitive areas like anticorruption, where the political environment is inhabited by a variety of interests and considerations.

If hypothesis 1, suggesting that Council is reluctant to adopt legally binding anticorruption standards, proves to be true, it does not follow that all member states oppose the adoption of a common anticorruption framework. Rather, it will indicate that some member states are still not ready to make the leap and protect the European public good even if, in the long run, such behaviour may potentially harm the interests of their own

citizens. If hypothesis 1 is not correct, and the member states are, in fact, willing to conclude legally binding anticorruption agreements, the reason for the current weak EU anticorruption approach may be hidden in the lack of institution(s) which is/are willing to pursue the common EU anticorruption agenda.

Hypothesis 2 therefore suggests that absence of counter-corruption standards is due to a lack of leadership by EU institutions. This suggestion reflects the theories of Klitgaard (1998) and Brinkerhoff (2000) that the successful anticorruption reforms require political will and sufficient resources. If they are not present, no effective anticorruption framework can be set in place. The success of anticorruption interventions is therefore reliant on the existence of institution(s) which have the competences and the capacities to initiate, pursue, implement and uphold coherent anticorruption policies. If such institutional driver(s) do not exist, the adoption of common anticorruption approach is hardly possible

In building hypothesis 2, the thesis deploys the theory of Brinkerhoff (2000) and investigates the presence of suprainstitutional political will to vigorously combat corruption. This is done by examining the locus of initiative, continuity of efforts and the degree to which the main EU institutions perform in-depth analysis of the problem in order to establish adequate and feasible reform programmes. The logic behind this approach reflects also the theories that the successful anticorruption reforms require political will, institutional leadership, normative deterrents and sufficient resources (Klitgaard 1998, Mungiu-Pipiddi 2013, Persson, Rothstein and Teorell 2013). If they are not present, no effective anticorruption framework can be set in place. The establishment of robust anticorruption standards and strong monitoring mechanisms is therefore inevitably linked to the existence of an EU institution that is capable and willing to drive the reform agenda

and unify the divergent practices and opinions of the member states. At the EU level, three institutions, each with a very distinctive set of competences and characteristics, could play such a role: the European Commission, the European Parliament and the Council. These institutions, depending on their policy preferences can either foster or create obstacles for the establishment of a stronger anticorruption framework. Their competences and policy stances on key anticorruption and good governance issues are examined in the following chapters.

3.4 Concluding remarks: zooming in on the EU's regulatory efforts

By presenting a comparative overview of the EU, UN and CoE anticorruption policy and legal framework developments, along with an analysis of the member states' compliance with their international legal commitments in the anticorruption area, this chapter has established the background for further empirical analysis. The chapter presented evidence that the current EU approach, reliant on the willingness of the member states to follow (or not) the commonly agreed anticorruption standards, is not sufficient to ensure a common level of corruption deterrence within the EU. Such behaviour indicated the lack of sufficient political will on behalf of some member states to vigorously pursue and implement a robust anticorruption agenda (Brinkerhoff 2000). The chapter then constructed two hypotheses to suggest why the EU has not adopted a common legal anticorruption framework. The first suggested that the reluctance of the Council to conclude legally binding anticorruption agreements explained the lack of a robust anticorruption framework at EU level, while the second proposed that it could be attributed to a lack of leadership among the main institutional EU decision makers.

The remainder of the thesis explores these two hypotheses. The method of process tracing is used to identify the links between the policy positions of the European Commission, European Parliament and the Council, and the lack of a common EU anticorruption framework. Given that it is hard to establish the motivational factors behind the policy preferences of 28 member states and 2 supranational institutions in one research project, the present thesis provides evidence on the policy stances adopted by the Commission, the Parliament and the Council regarding the creation of a more robust EU anticorruption policy and legal framework. By doing so, the thesis identifies the institutional anticorruption enablers and inhibitors, thus drawing the framework within which the EU anticorruption policy operates. The detection of possible supporters for stronger anticorruption regimes will give further grounds for the research on their motivations. It will also enable practitioners and civil society groups better to focus their advocacy campaigns and to apply peer pressure for the establishment of unified anticorruption standards, applicable to all member states.

4. European Union Institutions and Anticorruption Policy-Making

Hix and Høyland (2011) point out that in order to comprehend how the EU works, one must consider the interests of all the actors involved, their strategic relationship vis-à-vis each other, their institutional constraints, optimal policy strategies and the institutional reforms that they would be willing to pursue in order to achieve their objectives. Similarly, when anticorruption policy is examined, the answers to these same questions provide an insight into why there is no common EU anticorruption framework, and which are its institutional enablers/inhibitors.

While the previous chapter described the international and EU anticorruption regulatory approaches, the present chapter looks at how the main policy actors have the most significant say in the EU anticorruption framework's adoption process. This latter requires a complex interaction between the main institutional players, each of them acting within their Treaty competences, and having distinct preferences that derive from their institutional composition and power influences.

By examining the role of the European Commission, the European Parliament and the Council, this chapter provides insights into the general roles, competences and limitations of the three most powerful EU agenda-setters. In its search to identify why the EU has not adopted a robust common anticorruption approach the chapter focuses further on the specific roles of the three institutions in the legislative and anticorruption domains. The chapter argues that there are no legal barriers to prevent the adoption of a common anticorruption legal framework. Indeed, it demonstrates that in the area of criminalisation, the treaties have specifically empowered the Parliament and the Council to adopt legally

binding standards. These competences have not as yet been utilised, however, a fact suggesting that the underlying reasons for the current non-binding policy approach in anticorruption area are not so much related to a lack of institutional and legal competences, as they are a result of some institutional preferences. The chapter further discusses the bargaining power theories of Costello and Thomson (2013) and Helstroffer and Obidzinski (2014),) who argue that in cases where the position of the Council is closer to the status quo than the ones of the Parliament and the Commission, the Council has a bargaining advantage and is generally determining the policy results. This outcome is dependent on the anticipations of the political actors on how the proposed legalisation efforts will influence their national political environment, as argued by Abbott and Snidal (2000; 2002) and Kahler (2000). Acknowledging the role that interests play in defining the legalisation agenda, the chapter further explores whether the regulatory bias is dependent on a particular topic (anticorruption) or whether it has a more global character. To do so, the chapter investigates the institutional choices in another area that is equally sensitive and has equal significance for the development of the EU and its member states: European competition policy. Acknowledging that EU competition policy is among the most successful of the EU's policies, the chapter deliberates on the reasons for this success, particularly as it is among the most densely regulated of EU policies. It reveals that in the competition portfolio, the member states have given powers to the Commission, that have transformed it into the most powerful competition authority in the world, a function that the Commission is successfully implementing. The chapter therefore argues that the presence of political will (as described by Brinkerhoff 2000) to transfer powers to the EU supranational institutions, together with the willingness of the institutions to enforce these

powers, are among the main preconditions to ensure regulatory efficiency in areas of sensitivity. These prerequisites reinforce the two hypotheses elaborated in chapter 3. The non-existence of a robust EU anticorruption framework can be attributed either to the reluctance of the Council to conclude legally binding anticorruption commitments (hypothesis 1), or to a lack of leadership of the supranational European policy-making institutions (hypothesis 2). By applying the legalisation theories of Abbott and Snidal (2000; 2002) and the policy bargaining dynamics theories of Costello and Thomson (2013) and Helstroffer and Obidzinski (2014), the thesis further tests these hypotheses in the empirical chapters and reveals the viability of the above theories in the anticorruption policy domain.

The rest of the chapter is divided into four sections. The first describes the institutional positioning of the European Commission, Parliament and the Council in the European decision-making process and deliberates on their particular roles in the procedures relating to the adoption of legislation. Leading on from this, the second section analyses the legal framework that empowers/constrains the EU institutions as regards taking regulatory actions in the anticorruption domain. It argues that the European supranational and intergovernmental institutions can act and adopt hard anticorruption regulatory instruments within the framework of their current competences (as provided by the treaties) and explores how these competences are utilised. The third section focuses on the regulatory regime, adopted in competition policy, an area as sensitive as corruption. The section examines the development of one of the most successful regulatory models in EU history and argues that, if there is a political will and institutional capacity, the establishment of a similar model in the anticorruption domain is also feasible. Next,

section 4 deliberates on theories that explain the delegation of power and seeks to establish the driving factors behind the enablement/disablement of supranational power in the anticorruption domain. Finally, the chapter summarises and concludes the arguments presented.

4.1 The EU institutional triangle: the Council, the Commission and the European Parliament

Originally created as a Coal and Steel Community, and then as an economic union that aimed to bring stability to post-war Europe, the European Union has gradually transformed itself into a complicated governance structure, representing the interests of 28 member states and more than 500 million citizens.

The complexity of managing and regulating the EU's open market and borderless economy, and the interactions within it, has prompted the creation of a network of shared competences between the member states and the EU supranational institutions (the Commission and the Parliament). Within this network, both the member states and supranational institutions have exclusive decisive powers, determined both by the area of regulation and the powers allocated by the treaties. The distribution of these exclusive powers is dependent on both national and supranational European interests and on the attainment of institutional balance, granting fair and equal representation of all interested stakeholders in shaping the European future.

4.1.1 Institutional composition and policy-shaping powers

The Council of the European Union, European Parliament and European Commission are the three major players with utmost importance for establishing, enabling and enforcing the

fight against corruption in EU. The following subsections present therefore an overview of their general competences, focusing on those related to the adoption of legal acts.

4.1.1.1 The Council of the European Union

The Council of the European Union⁶⁸ is an intergovernmental institution that sets the long-term EU policy agenda. It is the body responsible for the coordination of the member states' policies, the development of Common Foreign and Security Policy, the conclusion of international agreements and the adoption of the European Union's budget (jointly with the Parliament). The Council also has a decisive role in the EU legislative process (Hix and Høyland 2011): depending on the type of legislative procedure, the Council either has the final say on whether a legislative act is to be adopted or not or makes the decision jointly with the Parliament. This means that no legislative initiative or major policy can be moved forwards without the Council's approval. Although it usually legislates based on draft proposals prepared by the Commission, the Council also has the right to ask the Commission to submit any proposals it may deem necessary. This way, the Council exercises substantial power in the dynamics of EU decision-making.

Given the significance of these competences, the Council comprises ministerial-level representatives of national member states.⁶⁹ And although the Council is a single

⁶⁸ The Council should be distinguished from another EU body with a very similar name: the European Council. The latter is a high-level summit attended by the heads of the member states, the President of the Council and the President of the Commission. The summit meets at least twice each year to discuss the strategic framework of the Union's policies. Its role is to identify the EU's overall political directions and priorities. The details of the EU's priorities, along with the operational framework for their implementation, is further agreed in the Council, the Parliament and the Commission.

⁶⁹ Thus, for example the Justice and Home Affairs council comprises the justice and home affairs ministers of all member states. The JHA Council deals with judicial cooperation, fundamental rights, migration, border management, police cooperation and civil protection.

entity, it operates in 10 different configurations (composition of ministers)⁷⁰ depending on the issue at stake (Thomson and Hosly 2006a).

Considering the variety of topics being deliberated upon and the recognition of the need to take into account specialised expertise and specific national positions, all issues discussed at ministerial level are subject to preliminary exchange of national views in one of the Council's preparatory bodies: either the Committee of Permanent Representatives (COREPER) or one of more than 150 national working parties and committees.⁷¹ The work of these bodies (along with the work of the Council) is supported by a General Secretariat, which coordinates the discussions and provides technical support and expert advice. Key to this supportive function is the role played by the Council's legal service: it provides opinions to the Council and its committees, to ensure that the acts of Council are lawful, well drafted and in compliance with the treaties.

National experts from each sector, representing the views of their respective national administrations, make up the national working parties. These are the starting point of negotiations on any given topic and represent the first 'filter' in the Council's decision-making process. If these national working parties reach agreement, the topic is discussed no further but voted 'en bloc' by the Council. If agreement cannot be reached at expert

⁷⁰ These are: Agriculture and Fisheries; Competitiveness; Economic and Financial affairs; Justice and Home Affairs; Education, Youth, Culture and Sport; Employment, Social Policy, Health and Consumer Affairs; Environment; Foreign Affairs; General Affairs; Transport, Telecommunication and Energy.

⁷¹ A variety of working groups may be attached to each ministerial council, e.g. in 2016 the following working parties were attached to the Justice and Home Affairs Council: Strategic Committee on Immigration, Frontiers and Asylum; Working Party on Integration, Migration and Expulsion; Visa Working Party; Asylum Working Party; Working Party on Frontiers; Working Party on Civil Law Matters; Working Party on Terrorism; Customs Cooperation Working Party; Working Party on Cooperation in Criminal Matters; Working Party on Substantive Criminal Law; Working Party on Civil Protection; Working Party on Fundamental Rights, Citizens' Rights and Free Movement of Persons; Working Party on Information Exchange and Data Protection; RELEX Working Party; CATS; Law Enforcement Working Party; Working Party for Schengen Matters; Working Party on General Matters including Evaluation.

level, the Working party highlights any points of divergence and sends the topic to COREPER, which forms the middle tier of the Council's decision-making apparatus.

Ambassadors to the EU acting as representatives of member states make up COREPER, which plays a key role in setting the Council's overall policy direction.⁷² It serves both as a forum for political debates and as a supervisory body, guiding the work of the national working parties. COREPER scrutinises proposals and drafts the acts, which are tabled for a decision by the Council. If it does not reach an agreement at its own level, COREPER sends the debate to the ministerial level, providing opinions, suggestions or guidelines for the attention of the respective Council.

In practice, if the Council's preparatory bodies reach full agreement (positive or negative) on a specific topic of discussion, the latter not discussed at ministerial level. Thus, 'often, the minister will not even be aware that the Commission has introduced a proposal. The default process works the other way around: bureaucrats start discussing the dossier and it is up to them to decide whether or not to involve ministers.' (Häge 2011: 25) This upside-down arrangement has some important implications for the openness of the Council's work. Given that only ministerial meetings (and not even all of them)⁷³ are open to the public, the work of the Council remains 'shrouded in a good deal of secrecy, in spite of attempts over recent years to increase its "transparency"' (Wallace 2002: 326). The deliberations of the preparatory bodies that take place behind closed doors prevent public scrutiny and blur the lines of accountability, forcing the general public and political

⁷² COREPER is divided in two parts: COREPER 1 comprises deputy ambassadors and deals with questions of a more technical nature while COREPER 2 involves the ambassadors and deals with political and economic questions horizontal in nature.

⁷³ The meetings of the Council are open when the debate concerns legislation or is of a general nature. In all other cases, however, the exchange of national viewpoints takes place *in camera*.

scholars alike to ‘make assumptions about how the Council works from scattered and unsystematic evidence’ (Wallace 2002: 326).

The decision-making structure of the Council vividly illustrates that the Council clearly represents the governments of the member states and their country-specific preferences, which are often kept hidden from the general public (Häge 2011, Wallace 2002). Therefore, when further examining the policy positions of the Council, the thesis regards it as an intergovernmental body speaking collectively on behalf of the member states, and expressing their particular views on anticorruption policy and good governance.

4.1.1.2 The European Parliament

The European Parliament is the only EU directly elected institution, representing the interests of the European citizens. There are 751 members of the European Parliament,⁷⁴ clustered in 8 party-political groups,⁷⁵ 26 standing and special committees and 28 national delegations. Yet, for many years, the Parliament was considered a mere ‘multilingual talking shop’, because most of its initial functional competences went no further than consultation (Hix, Scully and Farrell, 2011).⁷⁶ This perception began to change in the mid-1980s, when the treaties gradually vested legislative and executive oversight powers in the Parliament. The process of full empowerment of the Parliament culminated in the provisions of the *Lisbon Treaty*, which granted to the Parliament legislative powers equal

⁷⁴ The number may vary. In the previous parliament (2009-2014) for example, the number of members was 766.

⁷⁵ These include: Group of the European People’s Party (Christian Democrats), Group of the Progressive Alliance of Socialists and Democrats, European Conservatives and Reformists Group, Group of the Alliance of Liberals and Democrats for Europe, Confederal Group of the European United Left–Nordic Green Left, Group of the Greens–European Free Alliance, Europe of Freedom and Direct Democracy group, Europe of Nations and Freedoms, and non-attached members.

⁷⁶ The European Parliament has also had certain budgetary functions since 1970.

to those of the Council in the majority of policy areas. Parallel to its role of approving the annual budget and examining the annual programme of the European Commission, the Parliament also gained the right to ask the Commission to present legislative proposals to the Council. These institutional changes transformed the Parliament into one of the most powerful legislatures in the world (Hix, Scully and Farrell, 2011) and increased its potential impact on the reduction of corruption levels in the EU.

Nowadays, as the only directly elected supranational body in the world (Hix and Høyland 2013), the European Parliament exhibits the characteristics of a unique governance structure, comprising national and European party-political groups, numerous permanent and ad hoc committees, delegations, sub-committees and national delegations. This complex structure of internal decision-making provides a broad platform for debate and accommodates a wide variety of national and pan-European views and interests. These latter often express positions that may not comply with those, declared by the national administrations in the Council. Given that the work of the Parliament is organised along the lines of transnational political groups, Hix and Høyland (2013: 181) found evidence that ‘national parties and MEPs whose policy positions are not completely congruent with the median position of the political group to which they belong are usually willing to face the costs of sometimes following group instructions against their own policy preferences in the knowledge that other MEPs and national parties in their group will do the same.’ Mühlböck (2013) adds to these findings, arguing that national affiliation plays a weaker role than transnational party affiliation. This suggests that, depending on the issue at stake, some members of the European Parliament (MEPs) may have different voting preferences from their national ministers sitting in the Council. The results from this study indicate that

the European Parliament, as a collective body, may express positions that diverge widely from those expressed by the member states in the Council.

Acknowledging the amount of literature devoted to the European Parliament's legislative influence (Crombez, Steunenberg and Corbett 2000, Kreppel 2002, Maurer 2003, Thomson and Hosli 2006a), the role of the committees and the impact of rapporteurs on EU agenda setting (Benedetto 2005, Costello and Thomson 2010, Mamadouh and Raunio 2003, McElroy 2006), the voting behaviour of MEPs and national and party preferences (Hix, Noury and Roland 2005), the present thesis does not examine in depth the internal institutional dynamics to reveal how parliamentary consensus is achieved. Instead it focuses on the outcomes of the Parliament's work, as these are crucial for identifying the reasons behind the lack of a common EU anticorruption legal framework.

4.1.1.3 The European Commission

The main executive body of EU, the European Commission is led by a President and a College of 28 Commissioners. It is supported by approximately 30,000 staff members, working in 44 Directorates-General and other departments.⁷⁷

The Commission has a role in virtually all the EU policy-making spheres, ranging from legislative proposals and agenda setting, through the monitoring and enforcement of primary and secondary legislation, to the implementation of policies adopted by the Council (Beneyto 2008, Warleigh-Lack and Drachenberg 2009). It represents a unique supranational bureaucratic structure, exercising control over both the timing and the policy

⁷⁷European Parliament (2016) European Commission: Facts and Figures, Briefing. Available at: [http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/559482/EPRS_BRI\(2016\)559482_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/559482/EPRS_BRI(2016)559482_EN.pdf). Assessed on 29 November 2016.

substance of the proposals that it submits to the Council and the Parliament. The key role of the Commission in the overall European institutional structure is also preconditioned by its responsibilities relating to the preparation and execution of the European budget. Last but not least, the European Commission has been given a crucial role as ‘guardian of the Treaties’ (Pollack 2003).

All these functions presuppose the Commission’s overall obligation to promote the general interest of the Union, remaining independent from any single member state’s national interests (Article 17, *TEU*). As Pollack (2003) rightly argues, being independent from the diversity of national interests is one of the main features of the Commission’s work. The delegation of agenda-setting power to the Commission was initially driven by the member states’ desire to reaffirm their European commitments by empowering a supranationalist agenda-setter which was uniquely aware of – and sensitive to – the interests of all member states. The Commission’s independence is one of the distinctive characteristics that provides legitimacy for its being able to impose credible commitments, monitoring the compliance of the member states with the commonly agreed rules and standards.

As a supranational body, the Commission is entrusted with enforcing reforms that promote a common European, rather than local national, interest. In this task, the Commission’s authority ‘varies depending on the decision-making procedures governing the respective policy field. It is, for instance, quite independent in enforcing the single market, whereas it only plays an auxiliary role in the coordination procedures that are to guide national reforms.’ (Bauer and Becker 2014: 216) These restrictions define the boundaries within the Commission’s competences and precondition its strength/weakness by ensuring the application of common European standards.

4.1.2 Evolution of the EU legislative process: the co-decision procedure

In the early years of the EU's existence, when the mode of EU governance was clearly state-centred, the Council was undoubtedly the most powerful institution in the EU. The *Treaty of Rome* (1958) made provision for most of the European legislation to be adopted under the so-called consultation procedure whereby it was the Commission's role to propose draft legislation, the Parliament was entitled to be consulted, but the final decision was taken only by the Council. This institutional arrangement was changed by the *Single European Act* (1987), which introduced the co-operation procedure,⁷⁸ and subsequently by the *Treaty of Maastricht* (1992), which introduced the co-decision procedure (also currently called the ordinary legislative procedure).

The co-decision procedure introduced a system of parity, whereby neither the Parliament nor the Council could adopt a legislative act without the other's consent. Yet, the *Maastricht Treaty* prescribed that if the Council and Parliament could not agree after two readings and a conciliation procedure, the Council would still have control over the final decision (Hix 2002).

The *Treaty of Amsterdam* (1999) modified the co-decision procedure, creating equality between Parliament and the Council. The *Treaty of Lisbon* (2009)⁷⁹ further extended the areas of co-decision to include fields previously covered by the co-operation or consultation procedures, thus making the co-decision legislative procedure the new norm in EU decision-making. Following the Lisbon amendments, Parliament legislates

⁷⁸ Under this procedure, even if the Parliament rejects a proposal, the Council can overrule the rejection by adopting the proposal with unanimity.

⁷⁹ The *Treaty of Lisbon* was adopted in 2007 and entered into force 2009.

jointly with the Council in no fewer than 83 areas, including that of freedom, security and justice.

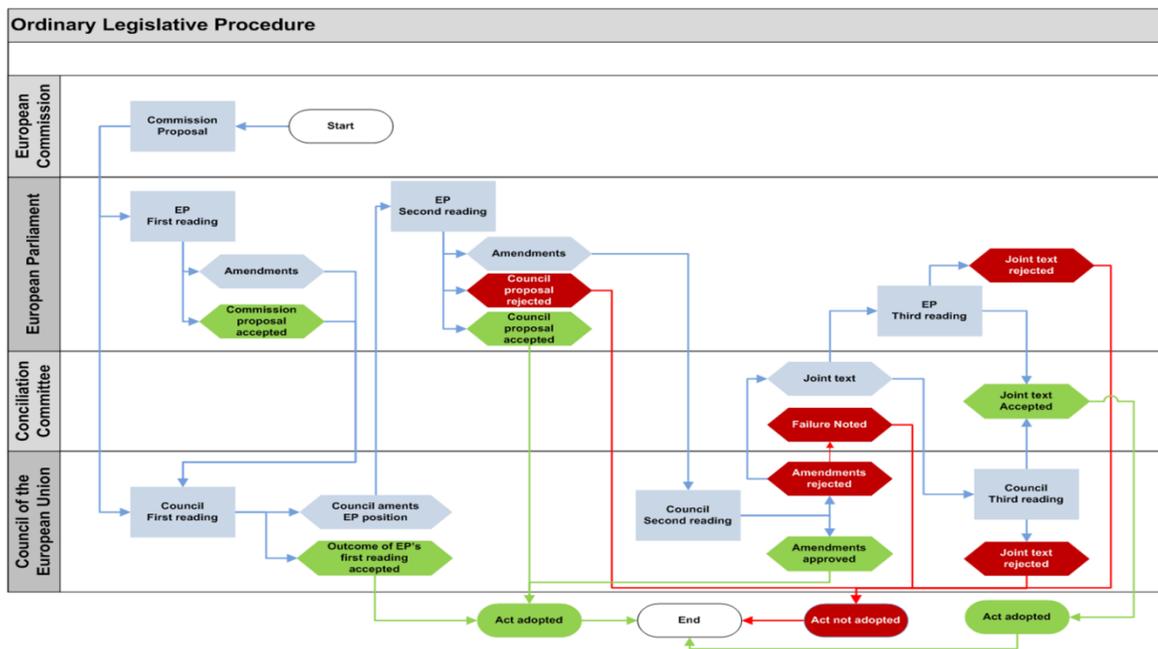
Nowadays, as a result of treaty developments, the ordinary EU legislative process comprises two distinct phases: the Commission has the exclusive role in putting forward legislative initiatives⁸⁰ and framing them in legal proposals, while the European Parliament and the Council debate, reshape or amend the proposed initiatives (see Figure 4.1). In carrying out their respective tasks, the three institutions have agreed to ‘cooperate in good faith throughout the procedure with a view to reconciling their positions as far as possible and thereby clearing the way, where appropriate, for the adoption of the act concerned at an early stage of the procedure.’ (European Parliament, Council and Commission 2007: 1) Such cooperation is crucial, given the complexity of the co-decision procedures, a brief summary of which follows.

Once the Commission’s proposal enters the Parliament and the Council, it can either be adopted/ rejected during the first reading, or debated again for a further, second and third time. Adoption at the first reading entails both institutions working in parallel, cooperating extensively, exchanging information and negotiating with each other. If these negotiations are successful, the Parliament adopts the legislative text and it is later approved by the Council. When the Parliament and the Council cannot reach consensus, the Council produces its own version of the draft and sends it for a second reading in the Parliament. The Parliament can approve the revised draft or reject it (and the act is thereby

⁸⁰ Although the right to legal initiative generally belongs to the Commission, the Council (by a simple majority of its members) , the Parliament (by a majority of its component members) or 1 million EU citizens, coming from at least 7 member states (citizen initiative) may request the Commission to carry out studies and submit any appropriate legislative proposals. In certain cases, prescribed by the *TFEU*, a quarter of the member states, the European Central Bank and the Court of Justice can also initiate specific legislation in certain areas.

rejected), or further amend it, thus triggering the procedure for a second reading in the Council. If the Council does not accept the amendments made by the Parliament during the second reading, a conciliation procedure is initiated, aimed at finding consensus on a joint text.⁸¹ This is followed by the third reading, in both the Parliament and the Council, and if the revised draft act is adopted by both institutions, it is sent for publication (Hix and Høyland 2013). In this legislative process the Commission plays a crucial role in facilitating the debate between the Council and the Parliament and has the power to alter or withdraw its proposal, given that the Council has not acted yet.

Figure 4.1 Basic diagram of the Ordinary Legislative Procedure



Source: Author's elaboration

⁸¹ The Council and the Parliament have equal representation in the Conciliation Committee. The Council is represented by 28 members (one from each member state usually at ministerial level – or his/her representative), while the Parliament's quota consists of 28 Members of the European Parliament, appointed by the political groups. The Commission is represented by the Commissioner, responsible for the file, who also has the task to facilitate the discussion.

Given the many variables that should be factored in this complex legislative procedure, the outcomes and the power of influence of each institution towards the other are hard to estimate (Hix and Høyland 2013). Yet, by analysing the policy outcomes and relative influence of the Parliament and the Council, Helstroffer and Obidzinski (2014) assert that, when a policy reform aims to change the status quo and the institutions' policy preferences differ, there is a significant likelihood that one of the institutions will block the procedure. Thus, the adoption of legal acts only succeeds, if the Commission, the Parliament and the Council all agree with the change. Even when agreement is reached, the need for consensus often leads to results that are systematically below the desired levels because the 'outcome is biased towards the ideal point of the institution that is closest to the status quo ... in threatening to block the co-decision process altogether and to maintain the status quo, the Council has considerable bargaining power. This is recognized by the Commission and the European Parliament who agree to far-reaching concessions in order to raise the standard at all' (Helstroffer and Obidzinski 2014: 43). Costello and Thomson (2013) come to similar conclusions, arguing that the Council has substantive bargaining powers over the Parliament when its position is closer to the status quo than it is to that of the EP. By analysing the co-decision procedure and the bargaining success of the Parliament, the Council and the Commission in 274 specific controversial issues raised by 112 legislative proposals, Costello and Thomson (2013) attest that when it comes to shaping legislative outcomes, the powers of the Parliament and the Commission may be smaller than the formal procedure suggests. Helstroffer and Obidzinski (2014) came to the same conclusions by building a theoretical model which encompasses the features of the general co-decision framework and includes competences, optimal standards of the institutions and

timing. The model was tested in four areas where the Commission aimed to increase the existing standard: asylum policy, gender equality, maternity leave and fishing. By looking at institutional behaviour, Helstroffer and Obidzinski (2014:8) argue that if new standards are introduced, then ‘1. The Commission tries to anticipate the co-decision procedure outcome in its initial proposition; 2. The European Parliament agrees to raise the bar but makes amendments to increase it further; 3. The Council sees problems in raising the standard. It does not agree to the proposition, thus threatening with a failure of the negotiation process; 4. Either the initial proposal is amended to accommodate the Council position or negotiation stalls’. This model can be applied to the anticorruption domain, as the lack of a common anticorruption framework suggests that either none of the institutions is willing to initiate reforms, or one of them is acting as an institutional inhibitor. If the theories of Helstroffer and Obidzinski (2014) and Costello and Thomson (2013) are applicable to the anticorruption policy area, it can be expected that the Commission should be the institution which will introduce new anticorruption policies, the Parliament will raise the proposed standards and the Council will block the initiative until the proposed reform is agreeable to the member states. The empirical chapters of the thesis test the viability of this model in the EU anticorruption policy domain and demonstrate to what extent the three institutions act in the manner, predicted by Helstroffer and Obidzinski (2014) and Costello and Thomson (2013).

By describing the core functions of the European Commission, European Parliament and the Council, this section also outlined their powers to shape the European legislative processes. It identified that, in some cases, given the supranational and national interests represented by the three institutions, they may have divergent preferences. This is

particularly important for the establishment of the legal foundations of EU anticorruption policy, because this latter requires a change in the status quo that can only be achieved if all three institutions reach consensus.

4.2 Who is responsible for the fight against corruption in the EU: the Council, the Commission or the Parliament?

While the previous section outlined the main policy competences of the EU's major decision-making bodies, this section outlines the horizons of the EU's institutional involvement in defining the EU common anticorruption policy. It examines the general division of powers between the EU and its member states; deliberates on the competences of each institution in the anticorruption domain; and analyses how these powers are applied in practice. This is done to provide a better understanding of the mechanisms that may lead to the adoption/rejection of a common legal anticorruption framework.

4.2.1 Division of powers between the EU and its member states: focus on anticorruption

The limits and competences of the European Union pertaining to its actions in all policy areas are strictly prescribed by the *Treaty on European Union (TEU)* and the *Treaty on the Functioning of the European Union (TFEU)*. The *Treaty on European Union* states explicitly that the scope and use of the EU's competences is governed by the principles of conferral, subsidiarity and proportionality (art. 5). Translated into practice, the principles of conferral and proportionality bind the EU institutions to act only within the boundaries set by the treaties without exceeding the limits necessary for achieving the Union's objectives. The subsidiarity principle prescribes that the EU may only act, in areas which do not fall within its exclusive competences, 'if and in so far 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' (art. 5 (3) *TEU*).

Currently, the overall competences of the EU institutions and the member states are divided into three main areas:

- Areas of exclusive European Union competence: These are areas where the EU legislates and adopts legally-binding acts, while the member states are enabled to do so only if empowered by the EU. The exclusive competences of the EU lie in the areas of: Customs Union; establishment of competition rules necessary for the functioning of the internal market; monetary policy for the member states in the Eurozone; and the conservation of marine biological resources under the common fisheries policy and common commercial policy.
- Areas of shared competence: These are the areas where both the EU and the member states may legislate and adopt legally binding acts. Member states can only exercise their competences, however, in cases where the EU has not used its powers to legislate or has explicitly ceased to do so.
- Areas of supplementary competence of EU: In these areas, the EU can only support, coordinate and supplement the actions of the member states.

Having a horizontal effect right across the EU policy board, anticorruption has remained outside the scope of the EU's exclusive competences. These latter are predominantly 'booked' for economic portfolio activities. The role of the EU in any drafting of a common European anticorruption agenda is therefore limited to the shared or supplementary competences.

Before the Lisbon amendments, anticorruption law enforcement activities were embraced by the third pillar, which encompassed almost all matters relating to justice, home affairs, policing and criminal law (Peers 2009). Under the new division of powers, they can be easily clustered in the area of freedom, security and justice (AFSJ). Such clustering is sanctioned by the *TFEU*'s proclamation of corruption as a particularly serious crime with a cross-border dimension. The *Stockholm Programme*⁸² and the *Internal Security Strategy for the European Union: "Towards a European Security Model*, adopted by the Council in 2010, express the same notion, the latter listing corruption among the main security perils that threaten the foundations of democracy and the rule of law in the EU (European Council 2010a, 2010b). Along with areas such as internal market, social policies and energy, AFSJ is one of the areas where the EU has the primary right to legislate and provide a common policy framework.

Reflecting on the gravity of corruption's impacts on the security and welfare of European citizens, the Lisbon amendments explicitly granted powers to the Parliament and the Council to adopt directives establishing minimal rules concerning the definition of corruption criminal offences and sanctions (art. 83 *TEU*). This empowerment enabled the EU institutions to harmonise the national criminal frameworks as regards corruption offences and strengthened the potential of the EU to counteract corruption (Arnone and Borlini 2014). In addition, the Parliament and the Council were given the right to adopt any measures necessary to ensure the effective protection of EU funds in the member states.

⁸² 'The Stockholm Programme - An open and secure Europe serving and protecting citizens' provides a road map of the EU actions in the area of justice, freedom and security for the period 2010–2014.

While the role of the main institutional players is pretty straightforward in relation to the criminalisation of corrupt activities, their competences and responsibilities in the areas of anticorruption, corruption prevention and education are unclear. Depending on the interpretation, these areas may either be clustered under AFSJ as shared competences or left aside under the supplementary portfolio, where the EU has no powers to intervene. Thus, while the treaties remain silent on who exactly should take charge of the fight against corruption, and how, the EU institutions and member states are left with something that is open to interpretation, creating both opportunities and challenges as regards achieving the desired integrity standards within the EU.

Even if both corruption criminalisation and corruption prevention are clustered under the AFSJ portfolio, the lack of clarity about how to address the matter of anticorruption interventions is only magnified by some political dimensions that make anticorruption regulation problematic. The process of legal integration, culminating in the creation of the area of freedom, security and justice, has been notable for its cautious approach to the transfer of powers to EU institutions (Murphy and Arcarazo 2014): some of topics covered by the AFSJ are perceived to relate to core sovereign state functions, and are therefore treated with special care by national politicians (Coutts 2011). This attitude is particularly visible in the anticorruption domain, where the member states do not wish to give up their control over sensitive issues (such as immunities of public officials and transparency in public administration) and prefer to rely on intergovernmental bodies such as CoE (Szarek-Mason 2011). Such an approach reflects the peculiarity of the AFSJ issues and signals the member states' preference for wider autonomy of the national legal systems (Peers 2011, Monar 2006).

4.2.2 *How are the European Union anticorruption competences applied in practice?*

To date, notwithstanding that corruption law enforcement activities fall under the area of shared competences, where the EU has the right to propose legally-binding texts, the member states have preferred to adopt non-binding, target-setting texts such as programmes, action plans, guidelines and good practice manuals (Monar 2006). The right of the EU to legislate in the anticorruption law-enforcement area is constrained by the prerogative of the European Council to define the strategic guidelines for legislative and operational planning within the area of freedom, security and justice (art. 68 of the *Treaty on the Functioning of the European Union*) In practice this means that despite the empowerment of the Parliament and the Council jointly to adopt directives establishing minimal rules on the definition of corruption crimes and their sanctions, the latter can happen only if the European Council wishes it, and so far no such wish has been expressed.

This approach contradicts the competences already given to the Commission. As a ‘guardian of the treaties’, the Commission is expected to ensure the proper functioning of the area of freedom, security and justice. This is a task that may become particularly difficult because of the non-existence of even general enforceable anticorruption standards, which would allow the Commission to demand compliance and impose sanctions. The non-binding character of the anticorruption instruments, combined with the lack of any sanctioning mechanisms like those of the infringement procedure,⁸³ makes it virtually impossible for the Commission to demand the implementation of anticorruption measures

⁸³ If the Commission detects a member state’s failure to comply with Community law, the Commission may initiate the procedure against the member state and enforce the proper execution of the Community law.

by individual member states.⁸⁴ This raises two main problems. The first is that the EU is applying double standards, enforcing anticorruption requirements in the EU candidate countries, but not in its member states. The second problem emerges when the country joins the Union and the EU has no leverage over the application of anticorruption standards: once a country gets its EU membership ‘ticket’ it can easily neglect the commitments made to the EC because the latter has no powers for ensuring compliance (Mungiu-Pippidi 2008).

Thus, the Commission is expected to safeguard the treaties and prevent the significant risks that corruption poses to the main EU economic and security pillars without having any enforcement tools to do so. In this situation, the only thing that the EC could do would be to propose to the Council that it ‘adopt measures laying down the arrangements whereby Member States, in collaboration with the Commission, conduct objective and impartial evaluation of the implementation of the Union policies’ (art.70 *TFEU*). Such an evaluation, however, would enable the Commission to put soft pressure on non-compliant member states, but nothing more.

The first *EU Anticorruption Report*, published in 2014, proved the helplessness of the Commission in this regard. It identified a wide range of corruption-related problems at member state level that had not been properly addressed: weak political integrity, the politicisation of recruitment, vote-buying and other forms of electorate fraud, weak and uncoordinated internal controls, widespread conflicts of interest, the improper allocation of

⁸⁴ The fruits born by the lack of specific guidelines and EU acquis were particularly visible in the 2007 enlargement. While both Romania and Bulgaria had high compliance rates in the implementation of European law (Trauner 2009), the non-existence of clear stipulations relating to the transparency and accountability of institutions led to significant anticorruption failures that posed questions on their right to EU membership.

public funds and public procurement, among others. Despite the gravity of the problems encountered, the Commission could do nothing but express its hope ‘to see a wide debate about anti-corruption measures with active participation of the Member States, the European Parliament, national parliaments, the private sector and civil society’ (European Commission, 2014b: 5).

The challenges faced by the Commission in relation to implementing anticorruption compliance without any legal tools are multiplied by the defensiveness of the member states when it comes to corruption. Any attempt to request particular actions or ‘naming and shaming’ a specific country is a legally questionable and politically sensitive endeavour. The first *EU Anticorruption Report* exemplifies these constraints very well. Instead of naming the countries that failed to address their anticorruption challenges, the executive summary of the report contains 75 incidents of phrases such as ‘in some Member States’, ‘most Member States’, ‘in a number of Member States’, ‘many of the Member States’, ‘a few Member States’ in 41 pages, indicating that the corruption problem still persists but is not properly addressed (European Commission 2014b).

The first *EU Anticorruption Report* contained a much more important and straightforward message, however. It makes it clear that corruption is becoming a serious reality in many EU countries and that the EU approach in tackling corruption has to date been insufficient. The Commission noted that, among the main reasons for this failing, is the ‘lack of firm political commitment on the part of leaders and decision-makers to combat corruption in all its forms – political corruption, corrupt activities committed by and with organised crime groups, private-to-private corruption and so-called petty corruption. There is thus an evident need to stimulate political will to fight corruption and

improve the coherence of anti-corruption policies and actions taken by Member States.’
(European Commission 2011a: 4)

This section illustrated that the political sensitivity of anticorruption as a topic, combined with the lack of any tools to ensure the vigorous counteraction of corruption, has created a situation in which no country is accountable for its performance vis-à-vis anticorruption. This is so despite the treaties’ provisions allowing for the adoption of a common anticorruption framework and specifically empowering the Parliament and the Council to adopt minimal legal standards for the criminalisation of corruption.

4.3 Regulating sensitive domains: EU competition policy

Corruption is more likely to prevail in areas where the personal, political and economic costs of adopting (or not adopting) robust regulations can be significant. Such costs may have different forms such as election or political influence losses (in cases where corruption of political elite is exposed and prosecuted); hypothetical financial losses (as anticorruption regulations impose barriers and restrain unethical business practices⁸⁵) or even imprisonment (in case of corruption convictions). All these reasons may explain the reluctance of some member states to conclude legally binding anticorruption commitments. While one might expect that similar cost/benefit calculations may determine the regulatory approaches in other sensitive EU governance topics, this seems not always to be the case.

The aim of this section is to demonstrate how the EU has addressed the need for a common regulatory approach in another policy area that is as highly sensitive as corruption

⁸⁵ The case of Siemens, which pleaded guilty to corruption and agreed to pay \$1.36 billion, is a very good example. Siemens faced accusations of bribery and other corporate malpractices in 16 countries. (More information can be found on <https://www.propublica.org/article/the-world-wide-web-of-siemens-corruption>. Source last retrieved on 16 March 2017).

and has similar effects on the national economic and political environment. Taking the EU competition policy as an example of one of the most successful EU regulatory policies, this section presents the factors and circumstances that have led to the success of the present EU competition approach. The comparison between the regulatory approaches adopted in the two policy domains is interesting for two main reasons: anticorruption policies are excluded from the EU regulatory portfolio and are evaluated as highly unsuccessful (Ballegooij and Zandstra 2016, Hough 2013), while the competition policy is the domain where the European Commission has the most considerable influence over economic actors and national states (Warlouzet 2016) and is highly effective.

The thesis acknowledges that anticorruption and competition domains are characterised by very distinct and specific features. Competition policy, at its core, is created to prevent restraints to trade, posed by private companies through mechanisms such as mergers, cartels, abuse of dominant position, and trade conspiracy. It has become since the dominant regulatory mechanism within the market system that ensures fair allocation of resources, thus contributing to the well-being of EU citizens. Anticorruption policy, on the other hand, is established to ensure public welfare by prevent abuse of power and undue influence of private interests in public governance. Competition and anticorruption policies thus play important roles in two distinct branches of governance: economic and political. Despite the variances in the ‘substance’ of the regulated domains, the similarities between the two policies can offer some interesting comparative perspectives. An overview of the gradual creation of EU regulatory approach towards competition might provide some suggestions as to the hurdles that had to be overcome and the factors that contributed to this policy success. It might also indicate the processes and

the underlying reasons that prompted the member states to delegate vast regulatory competences to the European Commission, thus bringing useful insights for the reasons behind the lack of a common European anticorruption framework

The section starts with a brief overview of the characteristics that make competition and anticorruption policies a suitable ground for a comparison of regulatory approaches. It then presents the main elements and the major steps in the evolution of EU competition policy and deliberates on the reasons for the regulatory success and the factors that might have a similar impact in the anticorruption domain.

Despite their different policy domains, anticorruption and competition policies exhibit a variety of similar characteristics (see table 4.1), which may affect the regulatory choices of the member states. These similarities refer to their general objectives, the sensitivity of the policy areas, their cross-border dimension and the presence of conflicting member states' interests.

Competition and anticorruption policies are among the main pillars supporting the overall aim of the EU to promote peace and the well-being of its people (art 3.*TEU*). While the anticorruption policy contributes to upholding the existence of the area of freedom, security and justice, and supports the proper functioning of the internal market, the EU competition policy supports the attainment of the EU's general objectives by upholding the existence and functioning of the internal market and the proper execution of the free movement of people, services, goods and capital. In upholding these objectives, the two policies are closely interlinked, as the presence of corruption impacts significantly and negatively on the level of competition within the internal market competitiveness (as discussed in chapter 2). At the level of the EU, the existence of corrupt businesses and

corruptible public administrations distorts the proper functioning of the internal market and creates negative externalities for the parties bound by principles of fair play. Corruption thus fosters an anticompetitive environment and prejudices the fair competition principle that is at the heart of the EU single market. These negative externalities are multiplied by the huge cross-border dimension of both policies, whose impact is multiplied by the freedom of movement of people, goods, services and capital in the free, borderless economies of the EU.

The high political sensitivity of the regulated domains and the presence of conflicting member states' interests are another common feature that characterise the two policies. Competition policy, as Doern and Wilks (1996:254) argue, can easily 'become subordinated to industrial, regional, and employment interests or be neutralized by extreme national pressure'. Like anticorruption policy, it touches upon highly politically vulnerable areas, which have a significant effect on both national politics and election results. While the adoption of a robust EU anticorruption framework may lead to the exposure, investigation and prosecution of high-level political corruption, thus directly affecting national election results, the adoption of a strong EU competition framework may be seen as weakening national competitiveness and slowing economic growth, thus changing the social-political environment. The choice of regulatory instruments in both policy domains has therefore an important impact on the national economic and political processes and is therefore handled with extreme care.

The two policies are also highly influenced by the principles of transparency and accountability. These principles play a significant role in the competition domain 'because without transparency it is very difficult to establish credibility, legitimacy, and the ultimate

goal of all regulatory agencies - willing compliance' (Doern and Wilks 1996:255). In the area of anticorruption, the two principles are among the major safeguards ensuring that public policies are adopted and executed in the interests of the people (as discussed in chapter 2).

Table 4.1 Competition and anticorruption policy: similarities and: differences

Similarities	
Competition Policy	Anticorruption Policy
Supports the attainment of the EU's general objectives by upholding the existence of the internal market and the proper execution of the free movement of people, services, goods and capital.	Supports the attainment of the EU's general objectives by upholding the existence of the area of freedom, security and justice, and supports the proper functioning of the internal market.
Conflicting member states' interests because of protective policies relating to national economic growth and national business development.	Conflicting member states' interests because of protective policies regarding personal, political and economic interests.
Highly sensitive area in political and economic terms, which might potentially affect national elections.	Highly sensitive area in political and economic terms, which might potentially affect national elections.
Substantial cross-border dimension.	Substantial cross-border dimension.
Differences in EU regulatory approaches	
Competition Policy	Anticorruption Policy
Exclusive competence of EU.	Shared or supplementary competences.
Competition rules and standards are established under EU law.	Anticorruption compliance is subject only to non-obligatory policy guidelines and policies.
The European Commission has a leading regulatory role.	Lack of clear division of competences. The EU member states decide on what kind of anticorruption policies/measures to adopt.

Source: Author's elaboration

All these similarities, which would normally have led to similar policy developments, have led, somewhat surprisingly, to two totally different regulatory approaches. Unlike anticorruption policy, the EU's competition policy falls under the exclusive competence of the EU. Its main framework is established under the EU acquis, through which the member states have transferred huge regulatory powers to the European

Commission, thus establishing powerful supranational competences for enforcing common rules and regulations across the EU.

Nowadays, EU competition policy is ‘one of the oldest, most central, far-reaching and supranational policies of the European Union’ (Karagiannis 2010: 600) and represents one of the biggest success stories in the history of the delegated powers in the EU (Aydin and Thomas 2012, Roller 2011). It embraces the areas of antitrust, mergers, cartels, international cooperation, state aid and liberalisation. Aimed at protecting fair competition in the EU market, it deals with price-fixing, distribution agreements, mergers, market sharing cartels and monopolistic practices.

The establishment of a robust European competition regime was the response of the founding EU members to the opening-up of national markets and the increased threat from the distortion of trade. The EU’s competition rules were therefore created to serve as guardians of the freedom of movement of services, capital, goods and people, thus supporting the efficient functioning of the internal market. The economic interdependence of the member states and an increasing potential opportunity for cross-border anti-competitive activities additionally fuelled the unification of the competition rules (Aydin and Thomas 2012). The origins of European competition policy can be traced back to the *Schuman Declaration* of 1950 and the creation of the European Coal and Steel Community. The *Treaty of Rome* in 1957 positioned competition among the very few common EU policy areas. The underlying reason for this was a desire to establish peace and economic prosperity in post-war Europe via the creation of a Customs Union and internal market. The Treaty’s provision opened the door for common European actions that

were further framed by the adoption of *Regulation 17/62 on cartels*⁸⁶ and the *Merger Regulation 4064/89*.⁸⁷ The years that followed were marked by a mixture of successes and failures, accompanied by heated debates between the Commission, the Parliament and the Council about the limits of the regulations and the competences of the EU.

Aydin and Thomas (2012) cluster the EU competition policy development in three main phases. The first phase lasted between the late 1950s and early 1960s and marked the establishment of the joint EU competition approach and the delegation of enforcement powers to the Commission. During the second phase, the Commission was given the competences to investigate mergers and gradually positioned itself as a key player in protecting the single market principles. This phase was also marked by the gradual harmonisation between national competition rules and EU ones and by 'the end of the 1990s a puissant and prestigious supranational competition regime was exerting its force and power on both business undertakings and member state governments.' (Aydin and Thomas 2012:535). The shift of powers from the member states to the Commission was however not an easy outcome, and came as a surprise, given the preferences of the larger member states for a more 'relaxed' European competition framework (Warlouzet 2016). By looking at the historical institutional dynamics in the adoption of *Regulation 17/62 on cartels* and the 'mechanics' that influenced the transfer of powers to the EU, Warlouzet (2016) argues that the final legislative outcome reflected none of the preferences of the main national decision makers. While Germany agreed on the final Commission's proposal, its preferences were towards the establishment of an independent cartel authority,

⁸⁶ Regulation 17/62 of 6 February 1962: First Regulation implementing Articles 85 and 86 [now 81 and 82] of the Treaty.

⁸⁷ Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings

acting as a politically neutral technocrat body. France, Belgium and Italy also opposed the centralisation of power towards the Commission and preferred the creation of an independent authority instead. Given the discretionary power of the Council at that time, the vast powers given to the Commission by *Regulation 17/62 on cartels* came as a surprise. Deliberating on the somehow astonishing legislative outcome, Warlouzet (2016) suggests that the latter is a result of the skills of the then EC Competition Commissioner, intergovernmental bargaining between France and Germany, and various contingent reasons such as the change of government in Belgium and the French overestimation of their leeway over EU decision-making. The complex mix of those factors led to a huge transfer of powers towards the EU, a regulatory choice that was not preferred by any of the influential member states. Although lobbying for it, the Commission was largely unprepared for such a policy development as the sheer amount of competences that it was empowered with led to years of backlogs. Constrained by its limited resources and huge amount of cases to deal with, the Commission acted reactively, rather than proactively, for years, a fact that put into question its administrative efficiency and capacity to properly handle the competition portfolio. Interestingly, the administrative deficiencies demonstrated during the decades of major administrative backlogs, created by *Regulation 17/62*, did not decrease the EC's powers in the domain. On the contrary, the *Merger Regulation 4064/89* granted additional exclusive competences to the European Commission, giving it powers to control and monitor the proper implementation of the EU's competition laws, despite the conflicting interests of the member states and some highly-politicised power struggles. Warlouzet (2016) argues, that in this particular case, the administrative deficiencies demonstrated by the Commission helped it gain more powers,

as the member states felt less threatened from a potential tightening of the competition regime by the supranational institution. The years that followed were marked by increased political leadership and administrative efficiency on behalf of the European Commission, which gradually established itself as a ‘credible, autonomous, quasi-judicial and policy-making institution that wields substantial power over both private business and member states’ governments’ (Cini and McGowan 2009: 203). The current success of the EU competition approach has been therefore ‘based on a complex conjunction of factors but was grounded in quite exceptional legal powers’ (Doern and Wilks 1996:245). These findings are especially interesting for the anticorruption policy adoption, as they suggest that the process of adoption of one of the most successful EU regulatory frameworks was hardly rational, and was dependent on a variety of unexpected factors and consequences, determined by national political and economic interests that evolved over time. These can benefit greater EU centralisation even when the member states are not in favour of such an outcome.

Looking at the variety of factors, that laid the foundations of the success of the EU regulatory approach in EU competition policy, Warlouzet (2010; 2016) argues that they may be categorised in three main groups: 1) the ability of the proponents of the EU hard regulatory approach to provide sufficiently coherent political and institutional proposals to convince the member states to transfer part of their regulatory powers to a EU supranational institution; 2) the lack of institutional constraints; and 3) the technical ability of the Commission smoothly to assume its regulatory role. These can be complimented with the changing political preferences and interests of the member states (Warlouzet 2016). All these factors suggest that the regulatory outcomes in highly dynamic regulatory

processes are determined by a variety of economic, social and political variables which change over time.

Given the identified similarities between the anticorruption and competition policies, the success factors described by Warlouzet (2010) may be presumed to play a prominent role in determining the main reasons for the existence/non-existence of a robust EU anticorruption approach. If this is so, they validate the two hypotheses, described in chapter 3, and suggesting that 1) either the Council is reluctant to conclude legally binding commitments and transfer regulatory powers in the anticorruption domain to the EU, or 2) none of the supranational institutions has shown any commitment or leadership with regard to anticorruption policy or 3) the provisions of the Treaty do not provide for such an option. The latter has been proven by the previous section not to be the case.

This section analysed the regulatory choice of the member states in the case of the establishment of EU competition regulatory framework and argued that competition and anticorruption have many common characteristics. Both policies have a strong cross-border dimension and uphold the existence of the internal market and the area of freedom, security and justice. In addition, their regulatory domains encompass highly sensitive areas, which have an impact on the economic and political development of the national member states. Hence, the choice of regulatory approaches may be influenced by a complex set of political and economic considerations. Yet despite these similarities, the member states have chosen two completely different regulatory approaches to deal with the two policies. The next section explores the factors that prompt the member states to transfer powers to EU and conclude legally binding commitments, thus testing whether the factors, determining the success of the adoption of EU competition policy, as described by

Warlouzet (2016) and Doern and Wilks (1996) may also influence the policy adoption in other fields.

4.4 What are the factors that may determine the regulatory power transfer from the Member States to the EU supranational institutions?

Given the wide discrepancies between the regulatory approaches undertaken in domains of a similar importance for the European Union and its member states, this section explores the motivations of the member states for outsourcing competences to the EU supranational institutions. An understanding of the drivers/constraints behind the member states' choices is crucial for discerning the reasons that shaped the existing regulatory preferences in the anticorruption domain.

The logic behind the decision to keep or outsource competences to the EU supranational institutions is comprehensively explored by Pollack (2003). He uses rational choice theory to explain the motivations behind power transfers. Deliberating on the principal–agent delegation of powers and the methods for exercising control over the agent's behaviour, Pollack (2003) argues that the member states usually outsource functions in four main areas. These relate to: 1) monitoring compliance of agreements among the principals; 2) solving problems of incomplete contracting; 3) adopting credible expert regulation of economic activities in areas where the principals will be ill-informed or biased; 4) setting the parliamentary agenda when the principals themselves are the agenda setters, in order to avoid endless 'cycling' of policy alternatives.

According to Pollack (2003), the member states are more willing to transfer competences to supranational institutions when they want to enjoy the benefits of mutual cooperation but are unsure whether their partners will properly implement the mutually

agreed commitments. The role of the EU supranational institution in such cases is to monitor compliance, inform all stake-holders about the extent of that compliance or lack of it, and apply sanctions if necessary.

Powers can also be transferred to an EU institution when the member states want to solve the problem with incomplete contracting. Given the wide array of bilateral and multilateral cooperation in the internal market area and the difficulties for predicting future changes, it is virtually impossible precisely to describe all the detailed obligations and processes required of each party. In such cases, the member states create a framework agreement (e.g. Treaty), which is further interpreted by an independent institution (such as the European Court of Justice) to ensure precision and solve disputes.

The member states also tend to ‘outsource’ their regulatory functions to an independent supranational body when the area of regulation is too technical and too complicated to be dealt with in multiple, multilateral diplomatic negotiations. In this case an independent agency is empowered to monitor and impose the agreed regulations, thus relieving the member states of the burden to implement ‘unpopular’, but needed, reforms.

Lastly, the member states may choose to delegate the setting of legislation to a supranational institution. This might happen when they believe that the option provided by the national majoritarian systems, in which every legislator can initiate a new legislative proposal whenever he/she is unhappy with the results of the previous vote, could create an endless backlog of proposals, leading to constant changes in policy direction.

The degree of power allocated to the agent also depends on the uncertainty in the issue area (which prompts the principal to delegate in order to acquire information), the difficulties in establishing credible commitments, and the degree of the policy conflict

(Pollack 2003). Difficulties arise in establishing credible commitments when the member states, due to various national and political constraints, cannot guarantee that the policies to which they commit will be supported in the future. These difficulties relate also to the degree of policy conflict, where national interests may contradict the common European interests,⁸⁸ or when the common interest may contradict the personal interest of political elites. The decision to delegate is usually made when the degree of policy conflict is low, both between the principals themselves and between the principals and their agents.

If Pollack's rational choice motivation theory is applicable to anticorruption, the member states should be willing to transfer powers to an independent supranational body in order to ensure the credibility of their anticorruption commitment and their compliance with that. Given that fighting corruption diminishes economic losses, upholds fair competition and ensures security in Europe, the establishment of a strong anticorruption regulatory base would be of benefit to all member states – both at national and at European level. The member states, therefore, have an interest in establishing an independent monitoring supranational body, capable of 'painting scarlet letters on transgressors' (Pollack 2003: 22) and imposing sanctions in cases of non-compliance. And yet, given the high degree of policy conflict in setting uniform anticorruption rules that may restrict unethical foreign economic activities and expose corruption among ruling political elites, setting a common anticorruption legal framework and transferring monitoring powers to a supranational EU institution is highly problematic. The problem is aggravated by the fact that the creation of an EU legal anticorruption framework and its respective monitoring

⁸⁸ The environmental protection rules, that may restrict national economic activities polluting the environment of neighbouring countries, is a classic case for such conflict.

body might have legal and political domestic implications for the member states, resulting in the empowerment of some actors over others (Kahler 2000).

Given these ‘complications’ and contradictory driving forces, the motivations of the member states for choosing different regulatory approaches in similar domains can be better explained by the motivation theories for legalisation developed by Abbott and Snidal (2000). According to them, ‘legalization provides actors with a means to instantiate normative values’ (422) and is seen as ‘one of the principal methods by which states can increase the credibility of their commitments’ (426). Abbott and Snidal (2000) attribute to legalisation particular characteristics of rules and procedures, defined along three major lines: obligation, precision and delegation.

Obligation refers to legally binding rules or sets of rules that are subject to international and/or national scrutiny. Precision refers to the unambiguity and clarity of the rules. Delegation means that certain parties are authorised to interpret and implement the rules and possibly adopt new rules (Abbott and Snidal 2000). The varying intensity of the features of obligation, precision and delegation shapes the normative substance of the area of regulation and preconditions the applicable tools for compliance assurance.

Given that the process of legalisation is an arena where law and politics meet, the agreed dimensions of obligation, precision and delegation explicitly exhibit the level of political commitment and the sensitivity of the regulated domain. Varying levels of political commitment lead to the adoption of harder or softer legalisation approaches (Abbott and Snidal 2000). Each of these has its particular advantages and disadvantages, predetermined by the political context, area of regulation, motivations and the rational choices available to the actors involved.

The hard law approach includes the adoption of legally binding commitments, which describe precisely the rights and obligations of the parties involved and establish the authority that can monitor/interpret the implementation of those commitments. Given the presence of a variety of actors and diverse interests at international level, the hard law approach 'reduces the transactions costs, strengthens the credibility of their commitments, expands their available political strategies and resolves the problems of incomplete contracting' (Abbott and Snidal 2000: 422). Once established, it guarantees a level playing field, ensures conformity with the agreed rules and provides for sanctions in cases of non-compliance. The price to be paid is in the restriction of national regulatory interventions and sometimes in restrictions of sovereignty, because 'legalisation provides a means of commitment through hardened constraints on policy choice.' (Kahler 2000: 665)

The soft law approach, on the other hand, has either a non-binding or non-sanctioning character, and can be vague, allowing for room for interpretation and variation. As such it does not impose constraints on national policy choices; yet it may reduce the transaction cost and bring benefits on its own, such as easing the bargaining process and creating opportunities for compromise (Abbott and Snidal 2000). The soft law concept provides the member states with a chance to create some uniformity in their regulatory approaches, without obliging them to follow them. In practice, the soft law concept provides the modality for concluding governance arrangements that operate alongside, or in place of, EU law. Such arrangements may look similar to hard law, but in terms of enforceability, it is the exact opposite: they have a voluntary character, are not enforceable and, in cases of non-compliance, are not subject to any sanctioning mechanisms (Trubek, Cottrell and Nance 2005). This is so because the soft law concept is built on the premise

that all parties will voluntarily and unconditionally fulfil their commitments, which is why it possesses no robust compliance mechanisms and has no sanctioning powers.

The soft and hard law approaches coexist in parallel with each other in the EU arena. Although, in terms of regulation, the EU is ‘perhaps the most “legalised” international institution in existence’ (Alter 2000: 490), that level is not equal across all sectors of governance. While the area of competition (for example) is highly regulated, the issues falling under the home and justice portfolios are, by contrast, very loosely regulated.

Among the most prominent reasons for such a disparity in approach is the reflexive process that links the forms of legalisation with its consequences. Because the choice of international hard or soft policy tools may have a direct, restrictive effect on national regulations and policy adoption, the ‘domestic politics propels or inhibits legalisation, and legalisation, in turn, shapes domestic political institutions and empowers domestic actors.’ (Kahler 2000: 662) The choice of regulatory approach is therefore linked to rational assessments of the costs and benefits for the actors involved. When the political actors agree to bind themselves legally to previously agreed rules, they have calculated that the benefits of such a commitment will exceed the inconveniences caused by the restrictions of their national policy-making. And vice versa, so that when the actors want to act in an unrestricted manner, deciding on their own ways of dealing with particular issues, they will refrain from committing to any legally binding agreements. This notion reflects the findings of Johnston (1997) who argues that the reforms in the anticorruption area are dependent on the lack or presence of incentives to vigorously pursue them. The motivation behind these choices may be different and may be linked to a wide spectrum of considerations from national election results, party political positions, geopolitical or

economic interests, or even personal considerations (as demonstrated in chapter 3). In such cases, when the national actors are uncertain if they will suffer damages or enjoy benefits by transposing the international legal provisions into the national legal framework, they prefer either to delay the national ratification (as in the cases of *UNCAC* and CoE conventions) or to conclude non-binding commitments. The same principle can be applied to the regulatory power transfer from the member states to the EU supranational institutions: when the national governments are not convinced that they will benefit directly from transferring anticorruption regulatory and monitoring powers to the EU supranational institutions, they will be less likely to do so.

4.5 Concluding remarks: regulating the EU anticorruption domain – is the mission possible?

The EU governance represents a process and an outcome, determined by the influence of the member states and the EU institutions, whose decisions both form and reinforce the EU and national policy development. Based on this notion, this chapter presented an overview of the main competences of the EU institutions vis-à-vis the member states. The analysis of the various treaties' stipulations demonstrated an ambiguity in the provisions: where anticorruption activities should be clustered was shown to be somewhat open to interpretation. The ambivalence concerns only prevention measures, as the area of criminalisation of corruption is clearly positioned under the shared competences portfolio, where the EU has the primary power to legislate. This clustering indicates that corruption, identified as one of the particular serious crimes with cross-border dimensions, can be regulated by the EU within the current treaty system. The Parliament and the Council have been granted the right to adopt directives, establishing minimal rules concerning the

sanctions and the definition of corruption as a criminal offence, along with necessary measures for protection of EU funds. Yet, despite this empowerment, this chapter reasserted the findings of chapter 3, that the member states are generally reluctant to conclude legally binding anticorruption commitments and become subjects to monitoring and sanctioning mechanisms. Looking at the legislative bargaining processes under the co-decision procedure, the chapter then suggested that the lack of a coherent EU anticorruption framework may result from the powers of the Council to assert its preferences over the ones of the Commission and the Parliament. The chapter presented the theories Helstroffer and Obidzinski (2014) and Costello and Thomson (2013), who argue that when its position is closer to the status quo, the Council can determine the final outcome of the policy process, either by stalling the reform proposal or by lowering its standards to the levels that are agreeable to the member states. The applicability of these theories in the anticorruption domain is further tested in the empirical chapters.

The development of competition policy was presented as a comparative perspective, with an investigation of the similarities in the policy impacts and the differences in the regulatory choices. The reasons behind the success of the EU competition approach were discussed and the chapter deliberated that this success is a result of institutional leadership demonstrated by the Commission and power allocation agreement (among the member states) that is influenced by a mixture of politically unpredictable factors, circumstances and preferences that change over time.

Given the similarities in the political objectives and some common characteristics between the EU competition and anticorruption policies, it is reasonable to expect that the same reasons would play a crucial role in the process of adoption of a hard anticorruption

regulatory regime. These findings correspond to the two hypotheses developed in chapter 3, suggesting that the lack of robust EU anticorruption framework is: either a result of the reluctance of the Council to adopt legally binding commitments in the anticorruption area (hypothesis 1) or is an outcome of lack of institutional leadership of the EU supranational institutions (hypothesis 2). These hypotheses are further explored in the following chapters which examine the policy positions of the Council, the European Parliament and the Commission in promoting transparent and accountable procedures.

The case studies illustrate the attempts to unify the governance arrangements in the establishment and management of the European decentralised agencies, the attempts to better protect EU money, and the strive for ensuring transparency and accountability in the work of EU interest representatives. They have been taken as examples that can exhibit the political preferences and levels of commitment of the major EU institutional actors towards the implementation of the principles of accountability and transparency in areas of crucial anticorruption importance. The case studies will be examined through the prism of the legalisation motivation theories of Abbott and Snidal (2000), which link the legalisation preferences of the institutional actors to a complex set of cost-benefit calculations, as well as personal and political motivations that might influence the overall legislative outcomes.

5. Creating a Good Governance Framework for the EU's Decentralised Agencies: a Smooth Operation or a Bumpy Ride?

The European decentralised agencies (DAs) represent the majority of the agencies and similar bodies established under the EU law (36 out of 48 agencies in total). They are independent entities that support the execution of the Commission's regulatory tasks and provide a platform for the national authorities' cooperation. The responsibilities of the DAs encompass a wide spectrum of activities, ranging from the provision of technical and scientific advice to the adoption of binding rules and networking (Table 5.1). With a yearly budget of more than €1 billion,⁸⁹ DAs form the second layer of EU governance and have broad powers over the ways in which EU policies are executed. These characteristics increase the DAs' corruption vulnerabilities: their high budget allocations, combined with their significant executive and advisory powers, make them attractive targets for corruption abuses and/or infiltration of private interests in the execution of public policy. The corruption 'attractiveness' of the DAs is further increased by the fact that, unlike most of the EU's institutional endeavours, their management frameworks are set on a case by case basis, so that there is a huge variety in their operational and accountability arrangements. Bearing in mind that such an approach may prompt an institutional layer where the EU principles of good governance are systematically disregarded, this chapter investigates what steps the Council, the Parliament and the Commission have taken in the establishment of such an alarming governance trend. The chapter focuses particularly on the application of the principles of transparency and accountability, as these are the major

⁸⁹ The figure reflects the budget request for 2016 made by the European Commission in the *Draft General Budget of the European Union for the financial year 2016*. The overall approved EU budget for 2016 is approximately € 155 billion.

determinants for the political accountability arrangements in the operational framework of the DAs. As discussed in chapter 2, accountability and transparency are the two main characteristics that distinguish good from bad governance. They prevent corruption by empowering people with information and allowing them to hold the national and supranational governing bodies to account for their actions (Kosack and Fung 2014). Thus, the reactions of the main institutional players at moments when transparency and accountability in the EU governance structures are at stake, can be used to indicate the readiness/resistance of the EU institutions to pursue a robust EU anticorruption agenda.

By investigating the policy stances of the Commission, the Parliament and the Council, this chapter tests the two hypotheses developed in chapter 3, concluding that the lack of a robust anticorruption framework in the EU is likely to be caused by a reluctance of the Council to conclude legally binding commitments (hypothesis 1) rather than by the lack of institutional leadership (hypothesis 2). The chapter argues that while the Parliament and the Commission have demonstrated political will (as described by Brinkerhoff 2000) and have been strongly committed to the establishment of transparent rules and procedures, the Council has generally been reluctant to follow their call and ensure that the EU principles of good governance are properly applied. These policy positions were explicitly visible in the process of the inter-institutional agreement on the operational framework of the EU decentralised agencies: the Commission and the Parliament tried over a period of 10 years to create binding accountability and transparency norms but all attempts failed to conclude more than a non-binding political statement, endorsed by the Council. In determining the level of political will, the chapter applies the theory of Brinkerhoff (2000) and demonstrates, that the EU supranational institutions exhibited locus of initiative (by

initiating the conclusion of IIA), they possessed in-depth understanding on the issue at stake (by commissioning number of studies); suggested better accountability mechanisms and continuously pushed for the adoption of framework agreement on the establishment and work of the EU decentralised agencies. None of those elements was present in the political stance of the Council, which showed visible reluctance to support any binding agreement. The presented policy developments also back the notions of Helstroffer and Obidzinski (2014) and Costello and Thomson (2013) that the Council has stronger bargaining powers than the supranational institutions when its position is closer to the status quo. The long and unsuccessful struggle to establish a binding accountability framework for the work of the decentralised agencies corroborates the predictive behaviour model suggested by Helstroffer and Obidzinski (2014). This outcome also affirms Abbott and Sundial's theory (2000) that the legalisation motivation of the Council is dependent on a complex set of cost–benefit calculations. It also shows that the need for enforcing better accountability and transparency in the management of the EU's second layer of governance can be overhauled by other specific national interests.

The chapter comprises four remaining sections. Firstly, section 5.1 explains the importance of the decentralised agencies and their place in the European governance system. Section 5.2 provides an overview of attempts of the Commission and Parliament to create a unified framework for the operational activities of the DAs and notes the Council's repudiation in this regard. Section 5.3 discusses the need to establish a coherent operational framework for the work of the DAs and investigates the differences between the initial proposal offered by the Parliament and Commission and the final *Joint Statement on the decentralised agencies* (hereafter referred to as *Joint Statement*) endorsed by the Council.

Finally, section 5.4 summarises the chapter's findings and links them to notions elaborated in chapters 3 and 4.

By forefronting the failure to establish a unified operational framework for the EU decentralised agencies, the chapter offers insights into the reasons behind the non-existence of a unified European anticorruption legal framework. The chapter exhibits the strong commitments of the Commission and the Parliament to introduce more robust transparency into the EU governance process, a commitment that is not shared by the Council. In so doing, the chapter argues that the non-compliance with European good governance standards results not from the lack of supra-institutional leadership (to propose better regulations) but rather reflects the Council's legislative reluctance to limit the manoeuvring opportunities of the member states to accommodate their own divergent political and personal interests. The findings of the chapter thus support the rationale that the lack of an anticorruption framework is primarily a result of the disinclination of the member states to invest more powers in the EU supranational institutions and to commit bindingly to common regulations that can be monitored and enforced.

5.1. The EU decentralised agencies: key features and institutional arrangements

This section summarises the key structural and operational features of the EU's decentralised agencies. It presents their role in the EU governance framework and the competences of the Commission, the Parliament and the Council vis-à-vis the DAs.

5.1.1 European decentralised agencies: key features

The European decentralised agencies⁹⁰ have many names; they are also known, for example, as ‘traditional agencies’, or ‘satellite agencies’ (Jones 2006). They supply the European Commission with technical and scientific expertise, forming the foundation of the decision-making and policy implementation arrangements in a number of EU areas of intervention. Depending on the area of delegated competences, European decentralised agencies can be clustered in four main types: 1) agencies adopting individual decisions which are legally binding for third parties;⁹¹ 2) agencies providing technical or scientific advice and/or inspection reports as a direct assistance to the Commission and member states;⁹² 3) agencies conducting operational activities;⁹³ and 4) agencies which gather and systematise objective, reliable and easy-to-understand information/networking.⁹⁴

Often seen as the extended arms of the Commission, the European decentralised agencies were created as support structures to strengthen the Commission's capacity in the execution of its increased regulatory function. The creation of the DAs was based ‘on the quantitative expansion of the Commission’s jurisdiction and might be seen at the same time as a qualitative change within the Commission policy-making through both horizontal and vertical co-ordination and co-operation’ (Kreher 1997: 241). These characteristics are reflected in the organisational and managerial structure of the DAs.

⁹⁰ Initially DAs were called ‘regulatory agencies’. Recognising that the term can be misleading because not all regulatory agencies have regulatory functions, the Commission switched to the more neutral term decentralised agencies. Hence, in the EU interinstitutional communications the same agencies may be referred to as ‘regulatory agencies’ (up to 2010) and as decentralised agencies (from 2010 onwards). This thesis uses the term decentralised agencies throughout the entire thesis to avoid confusion.

⁹¹The Office for Harmonization in the Internal Market is a typical example.

⁹² The European Maritime Safety Authority is a typical example.

⁹³ The European Border and Coast Guard Agency is a typical example.

⁹⁴ The European Union Agency for Network and Information Security is a typical example.

Unlike the Commission's Directorates-General, DAs have a separate legal personality, and relative operational and financial autonomy. The agencies operate under EU law and are established under secondary legal acts (such as decisions and joint actions, and regulations). Most of the established agencies are directly funded by the EU budget and some have the explicit powers to undertake legally binding decisions related to third parties. Except for the three agencies that are fully funded by intergovernmental sources and the Office for the Harmonisation in the Internal Market and the Community Plant Variety Office (fully self-funded), the EU decentralised agencies' budgetary expenditure and staffing is controlled by the European Parliament and the Council. The overall operational management of the DAs is executed by a Director, an appointment made in most cases by the Management Board, based on a list of candidates proposed by the Commission. In some limited cases, the Director might be appointed by the Council and the Commission and may be subject to a Parliament hearing before the formal appointment is made. Choice of the agency's headquarters (seat allocation) is, however, reserved for the decision of the member states. As there are no official criteria on how a seat should be chosen, this is either agreed by the heads of state or government at the level of the European Council or is determined by the Council.

Since 1975, when the first two agencies were established, the DAs have grown significantly in numbers (36 in 2016), as well as in function and geographical spread, thus contributing to one of the most significant developments of the EU institutional landscape (Scholten 2014). The rapid growth of DAs is explained by Dehousse (1997) by the conflict arising from the functional need among the member states for greater unification in the application of community law and the member states' preference to retain their

decentralised national systems of regulation, which better protect their national priorities. These conflicting interests led to the establishment of a wide network of decentralised agencies, serving as structures for network coordination and non-legal harmonisation (Dehousse 1997). The need for central coordination grew out of ‘the coexistence of distinct regulatory authorities, each with their own objectives and priorities, each endowed with different means of action and inspired by contrasting visions of the boundary between the public and the private sphere or by different administrative traditions, [which] can give rise to a variety of obstacles to trade’ (Dehousse 1997: 248). By establishing the concept of the European DA as an EU management tool, the member states answered the need for policy coordination without depriving themselves of significant regulatory functions. In practice, by establishing the DAs, the member states created a layer of independent agencies, which are called independent because they are partly independent from the Commission, not because they are independent from intergovernmental politics and national interests (Shapiro 1997). The dominant number of member state representatives in the DAs’ management structures and the ways that decisions are taken about the establishment and administration of DAs are clear manifestations of this fact. On average, the management boards of the agencies comprise approx. 30 (and more) members, appointed for a mandate of between 3 and 5 years.⁹⁵The management arrangements of each DA vary and can include representatives from the European Commission, European Parliament, all the EU

⁹⁵ The work of the Management Boards is supported in some cases by Executive Boards, Scientific Committees and Advisory Committees/Boards. The Executive Boards, comprising a limited number of Management Board members, are tasked with the monitoring of the implementation of the Management Boards’ decisions. The Advisory Boards (where established) are made up of interested parties. They are set to consult the Management Board before taking decisions related to the working programme of the agency, its managerial arrangement and budget. The Scientific committees, on their behalf, support the Management Board and the Director by providing technical and scientific advice in the areas of agency’s competence.

member states, EU candidate countries, non-EU countries, other agencies and/or institutions, as well as individuals. In such a composition, with representation of the Commission and the Parliament varying between 1 and 6 (in some cases where the supranational institutions have only advisory but not voting rights),⁹⁶ the member states' representatives⁹⁷ comprise the majority of the board membership. This very distinctively designed management structure ensures that the DAs operate under intergovernmental control and do not threaten the existing practices of the national administrations (Kelemen 2002).

⁹⁶ The Commission does not have voting rights in the management board of the Community Plant Variety Office, Office for Harmonisation in the Internal Market, European Union Institute for Security Studies, and European Union Satellite Centre. The Parliament has no voting rights in the European Training Foundation.

⁹⁷ The member states' representatives are usually appointed by their respective national authorities and, in rare cases, by the Council.

Table 5.1 Decentralised agencies in the EU

Regulatory (decentralised) agency	Year of creation	Current location (2016)	Funded by	EU funding in € million⁹⁸
Agency for the Cooperation of Energy Regulators	2009	Ljubljana, Slovenia	EU	11,266
Body of European Regulators for Electronic Communications	2009	Riga, Latvia	EU	4,017
Community Plant Variety Office	1994	Angers, France	Self-funded	0
European Agency for Safety and Health at Work	1994	Bilbao, Spain	EU	14,679
European Agency for the Management of Operational Cooperation at the External Borders	2004	Warsaw, Poland	EU	116,644
European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice	2011	Tallinn, Estonia	EU	76,953
European Asylum Support Office	2010	Valletta, Malta	EU	15,945
European Aviation Safety Agency	2002	Cologne, Germany	EU and self-funded	36,370
European Banking Authority	2010	London, UK	EU and national authorities	12,606
European Centre for Disease Prevention and Control	2004	Stockholm, Sweden	EU	58,388
European Centre for the Development of Vocational Training	2000	Thessaloniki, Greece	EU	17,434

⁹⁸Annual budget (2015).

Regulatory (decentralised) agency	Year of creation	Current location (2016)	Funded by	EU funding in € million
European Chemicals Agency	2012	Helsinki, Finland	EU and self-funded	16,771
European Environment Agency	1990	Copenhagen, Denmark	EU	42,362
European Fisheries Control Agency	2005	Vigo, Spain	EU	9,217
European Food Safety Authority	2002	Parma, Italy	EU	79,148
European Foundation for the Improvement of Living and Working Conditions	1995	Dublin, Ireland	EU	20,371
European Global Navigation Satellite Systems Agency	2004	Prague, Czechia	EU	26,840
European Institute for Gender Equality	2006	Vilnius, Lithuania	EU	7,628
European Insurance and Occupational Pensions Authority	2010	Frankfurt, Germany	EU and national authorities	7,979
European Maritime Safety Agency	2002	Lisbon, Portugal	EU	52,656
European Medicines Agency	1993	London, UK	EU and self-funded	302,117
European Monitoring Centre for Drugs and Drug Addiction	1993	Lisbon, Portugal	EU	15,684
European Union Agency for Network and Information Security	2004	Heraklion, Greece	EU	9,156
European Police College	2005	Budapest, Hungary	EU	8,471
European Police Office	1995	The Hague Netherlands	EU	95,036

Regulatory (decentralised) agency	Year of creation	Current location (2016)	Funded by	EU funding in € million
European Railway Agency	2004	Valenciennes/ Lille, France	EU	25,613
European Securities and Markets Authority	2010	Paris, France	EU and national authorities	9,703
European Training Foundation	1990	Turin, Italy	EU	20,546
European Union Agency for Fundamental Rights	1997	Vienna, Austria	EU	21,299
European Union Intellectual Property Office (formally Office for Harmonisation in Internal Market)	1993	Alicante, Spain	Self-funded	0
Single Resolution Board	2015	Brussels, Belgium	Self-funded	0
The European Union's Judicial Cooperation Unit	2002	The Hague, Netherlands	EU	32,994
Translation Centre for the Bodies of the European Union	1994	Luxembourg	Self-funded	0

Source: Author's elaboration

5.1.2 The role of the main EU institutional players vis-à-vis the DAs

The European Commission, the European Parliament and the Council together define the competences and the operational frameworks of the DAs. The three institutions form a multi-principal model (Dehousse 2008) or a composite principal formation: 'multiple actors whose collective makeup changes periodically through, for example, elections – may not possess stable, coherent preferences over time. Instead, they may be competitive with one another over some or many issues, as when member state governments in the EU

disagree on matters of policy that fall within the agents' mandate.' (Thatcher and Sweet 2002: 6) In this model, some of the functions that would normally belong to one principal may be parcelled out to multiple actors. Such an approach dilutes the capacity of the principals to control the agents' performance and hold them to account for their actions (Thatcher and Sweet 2002). These observations are particularly relevant for those EU decentralised agencies whose operational borders are jointly managed and scrutinised by the three main institutional players (see table 5.2).

The EU treaties clearly defined the role of the Council as the (co-)legislative and budgetary authority. Depending on the area of regulation, the Council has the power to request, and decide on, the creation/closure of DAs – either by itself or in conjunction with the Parliament. Again, either alone or jointly with the Parliament, it can revise the founding statutes, work programmes and financial regulations of DAs. The Council may appoint representatives of the member states as board members; has the exclusive competence in deciding the allocation of the agency's seats;⁹⁹ and can request political accountability from the agency's director. Further, on the basis of the Commission's proposal, the Council can (alone or jointly with the Parliament, depending on the procedure) revise an agency's founding regulation, mandate, functions and objectives. The Council's budgetary authority role means that it (again jointly with the Parliament) authorises appropriations for the DAs, monitors their budget reports, and submits proposals to the Parliament with regard to the agencies' budget discharge.

The European Parliament, on its own behalf, plays the role of co-legislator and has the powers to influence the provisions of the founding acts. It plays, jointly with the

⁹⁹ This may sometimes also be done by the European Council.

Council, a decisive role in creating (or not) new agencies and in gearing the scope of their tasks, competences, activities, objectives, structure and accountability mechanisms. In some cases, the Parliament may be involved in the procedures to appoint directors for agencies (Parliament's hearing) and may have representatives on the management boards. Jointly with the Council, the Parliament receives the annual work programmes, activity and audit reports. The Parliament's main role, however, is as a budgetary authority, approving the budget jointly with the Council and, following the Council's recommendation, deciding on the budget discharge.

The Commission has a dual role: assisting and supervising the operational activities of the DAs. It has the right to initiate the establishment of decentralised agencies, nominates the director of an agency, and is represented on their management boards. Depending on the portfolio, the Commission is either consulted on the adoption of the agencies' annual work programmes or has the powers to decide them. In some cases, it may be involved in the drafting of an agency's budget.

Considering the significant role played by the DAs in the EU's policy elaboration and policy implementation, the Commission must also ensure that good governance standards are applied in the agencies' work. The Commission can, therefore, request external evaluation of the agencies' work and propose revisions of their founding acts. The EC's internal auditors have the same powers over the agencies as the Commission's departments and can conduct audits, similar to the Commission's internal ones.

The intertwined competences of the three EU institutions vis-à-vis the DAs create a complicated governance arrangement, in which the Commission has the powers to initiate – but only initiate – the establishment of an agency. Its powers stop there, because the

process depends mostly on the Council (and its ability to reach common agreement with the Parliament). When it comes to defining operational priorities and the execution of day-to-day tasks, this three-institution decision-making system is additionally complicated by the dominance of the member states' representation on the agencies' management boards, where the Commission and the Parliament have minor tools for interaction.

Table 5.2 Competences of the EU institutions vis-à-vis DAs

Competences	European Commission	European Parliament	Council of the EU
Establishment/Closure	Proposes the creation	Decides jointly with the Council in some cases	Decisive role (in some cases jointly with Parliament).
Revision of founding statutes, work programmes and financial regulation	Proposes revisions	Decides jointly with the Council (but not in all areas)	Decides alone or jointly with the Parliament
Location of headquarters (seat)	-	-	Decisive role. In some cases, such a decision may be also taken by the European Council
Budget approval and discharge	In some cases, may be involved in drafting of the agencies' budgets/agency's budget.	Approves the budget jointly with the Council. Receives budget reports and decides to discharge, or not, the agencies' budgets.	Approves the budget jointly with the Parliament. Monitors budget reports and submits proposal for budget discharge to the Parliament.
Appointment of Director and Board Members	Proposes candidates for DAs directors and may have representatives on the management boards.	May conduct hearing of the candidates for DAs directors and may have representatives on the management boards.	Appoints the DAs directors and the representatives of the member states as board members.
General supervision of the agencies' work	May audit or request external auditing.	-	-

Source: Author's elaboration

This section provided a brief overview of the main features of the decentralised agencies, the motivations behind their creation, and the roles that the Council, the Commission and the Parliament play in their establishment and operations.

5.2 Unifying the divergent approaches: reality or chimera?

This section looks at the attempts for introducing a unified approach in the establishment and operational framework of the DAs. It analyses how the Commission and the Parliament have striven to frame the latter in a legally binding, transparent agreement and deliberates on the Council's resistance in this regard. The section presents the evolution of the inter-institutional struggle, by tracing the attempts made to establish a binding inter-institutional agreement and the eventual emergence in conclusion of a non-binding joint statement.

5.2.1 Phase 1 (2002–2007): the struggle to establish inter-institutional agreement

As discussed in chapter 4, the European governance system represents a complex multi-level network, based on the principles of subsidiarity, proportionality and partnership, in the execution of the EU's coordinated actions. The synergy created by attaining the EU policy objectives is, therefore, heavily dependent on the existence of a transparent, open and inclusive decision-making and policy implementation process (Committee of Regions 2014). In the case of the European decentralised agencies, this latter can be achieved by building unified procedures for the ways that the agencies are established, operated and managed. Such procedures were first discussed in the *White Paper on European Governance* (European Commission 2001a), which highlighted the need, as a part of a

broader European governance reform agenda for increasing transparency and accountability in EU decision-making, for the establishment of coherent DA arrangements.

It was in another document, however, that the particular ideas on how to ensure the DAs' better accountability vis-à-vis Europe's citizens whilst safeguarding the unity and integrity of the executive function at EU level were framed: *Communication on the operating framework of the European regulatory agencies* (European Commission 2002a). This was the first document to systematise the Commission's views on the ways that DAs should be established, managed, monitored and supervised. These views were related to the need to close the accountability loopholes that existed at the time in order to create a transparent operational environment. With this in mind, the Commission proposed to the Parliament and the Council the adoption of a common institutional approach, guaranteeing that the DAs' operations were 'not prejudiced by tactical considerations connected with particular sectors or interests' (European Commission 2002a: 5). The latter was considered of great importance, given the significant role played by the DAs in delivering technical expertise, credibility and a continuity of public actions in highly specialised areas of EU governance. The Commission was emphatic in noting that the main prerequisite for delivering objective and independent advice was to provide the DAs with genuine autonomy, allowing them to base their decisions on purely technical evaluations uninfluenced by political or contingent considerations. The Commission underlined, however, that such an autonomy should not be unconditional but should be bound to clear standards, ensuring the accountability and transparency of the DAs' operations.

The Commission's proposal got the full support of the Parliament and the Council. The plan to unify the divergent practices regarding the establishment of the DAs and their

operations met with the almost unanimous support of the respective parliamentary committees and was smoothly voted through in the Plenary session on 13 January 2004 (European Parliament 2004a).¹⁰⁰ The Parliament noted that ‘it is essential to rationalise and standardise the structure of the present and future agencies in the interests of clarity, transparency and legal security, and in the light of a prospective Union with 25 Member States or more.’ (European Parliament 2004a: 2) The Parliament called on the Commission to prepare an inter-institutional agreement and provided guidelines on how the unified operational framework should look.

The Commission’s communication also received positive feedback from the Council. In its conclusions from 28 June 2004, the Council asserted the need for ensuring coherence, transparency, accountability and legitimacy in the work of the DAs (Council of the European Union 2004). The Council noted the tasks and competences of the DAs to be constantly evolving, a fact calling for their creation, operation, supervision, structure and composition of their management boards to be closely examined.

Following these positive feedback, the Commission submitted its draft proposal for an *Inter-Institutional Agreement (IIA) on the operating framework for the European regulatory agencies* in 2005. The inter-institutional agreement is a legal tool that creates binding commitments for the Council, the Commission and the Parliament. Its main advantage is that its utilization requires no amendments of the existing treaties. Moreover it gives to the three institutions the flexibility to conclude binding arrangements in certain areas of EU governance. In relation to the decentralised agencies, the signing of such an

¹⁰⁰The response of the Parliament on the Commission’s communication was prepared by the Constitutional Affairs Committee (AFCO). AFCO’s report met with the almost unanimous support of the Committee on Budgets and the Committee on Legal Affairs and Internal Market and was smoothly approved in the Plenary (voted as a whole) on 13 January 2004.

agreement entailed the adoption of a common legal approach in the establishment of the DAs and agreement on the unification of their operational framework. The proposed *IIA* aimed to create a legal certainty and embed the principles of good governance in the management and operation of the DAs. The proposed *IIA* suggested a coherent institutional approach in the creation of new agencies, based on: a clear definition of tasks and executive responsibilities; structure and management; location; control and accountability. The proposed draft was based on the notion that

‘without a common framework, the proliferation of designations, tasks, structures and control arrangements for these agencies has resulted in a situation which is rather untransparent, difficult to understand and detrimental to legal certainty. Greater transparency and coherence are therefore needed in order to prevent the legislative authority from setting up agencies which are increasingly diverse, thereby undermining the unity of the executive function.’ (European Commission 2005:9).

While the proposed agreement summarised and framed already existing practices, it also introduced new elements for optimising the effectiveness of the DAs and improving their accountability. Notwithstanding their good intentions, however, these newly proposed elements had a negative impact on the member states’ control of the work of the DAs. In particular, they aimed to: decrease the excessive number of national member state representatives on the management boards; create institutional parity by providing equal representation of the Commission (6 members) and the Council (6 members); and strengthen the oversight powers of the Parliament. Given these oversight powers and as a means of retaining the independence of the external scrutiny, the Parliament’s representatives were not included on the management boards. The proposed changes were based on the notion that the ‘principles of accountability and coherence demands that the composition of the [management boards] reflects the agency's position with regard to the

distribution of powers between the executives at Community and national levels’ (European Commission 2005: 7).

The proposed *IIA* was not welcomed by the Council. Despite the latter’s positive feedback on the Commission’s *Communication on the operating framework of the European regulatory agencies* (2002), it rebuffed the actual draft *IIA* on legal grounds. The Council’s discussions evolved around the opinion of the Council’s legal service that the conclusion of *IIA* on the establishment of the DAs is not legally grounded in the treaties because it goes beyond the establishment of cooperation between the institutions. The Council’s legal service considered that the proposed *IIA* created ‘supra-legislative’ rules, that would have binding effects on the legislature and could not therefore be regulated by the conclusion of *IIA*. The legal service’s standpoint was that a horizontal approach in creating a standard framework for decentralised agencies would not be a viable option and that ‘the only legally correct option is for rules on the statute of regulatory agencies to be established case by case, on the basis of the Community Regulation that creates each individual agency.’ (Council of the European Union, 2005a: 4) The Council’s legal service has, therefore, ruled out any opportunity to conclude binding agreement on a unified framework. Although such an opinion contradicted those expressed by the Commission and the Parliament, it gave ‘solid’ legal grounds for the rejection of the conclusions of the inter-institutional agreement. The delegations of UK, Czechia, Poland and Slovenia did that, explicitly referring to the opinion of the Council’s legal service as a reason for ruling out the possibility of concluding a legally binding agreement with the Commission and the Parliament. The matter was further discussed in the Council’s Working Party on General Affairs where the conclusions of *IIA* were supported by only 2 national delegations

(Hungary and Slovakia) while 11 firmly opposed.¹⁰¹ An alternative solution, proposing the conclusion of a legally binding commitment – in the form of a framework regulation, as provided by art. 308 of the *EC Treaty* – was backed by 8 national delegations.¹⁰² Such a framework would have entitled the Council to adopt the rules for the operational frameworks of the DAs anonymously, based on the proposal from the Commission and after consultation with the Parliament. Despite the decisive powers of the Council in the procedures enacted under art. 308 *EC Treaty*, the proposal for the conclusion of framework regulation was also rejected. The majority of national delegations¹⁰³ were in agreement about the conclusion of some kind of framework, but one which should be less detailed and more flexible. Following this discussion, the Council's President referred the question back to the Commission and to the Secretariat-General of the Council for further discussions (Council of the European Union 2005b).

Considering that the Council had acknowledged the intention of the Commission to establish a legally binding regulation for the operational framework of the decentralised agencies in 2004, such a negative reaction to the Council's legal service casts some doubts on whether the reasons for the rejection of *IIA* were purely legal or whether there was also some political dimension. Although it is hard to estimate the policy dynamics behind such a policy turn, Chamon (2016: 63) argues that 'the true reasons for the Council's objections should be searched for in the political sphere, since the agreement would have limited the flexibility left to the legislator.' Dehousse (2008) reaches a similar conclusion, suggesting

¹⁰¹ These were the Maltese, Estonian, Latvian, Greek, Lithuanian, Polish, Czech, French, Portuguese, German and Luxembourg delegations.

¹⁰² These were the Netherlands, Greek, Hungarian, Spanish, Slovenian, Portuguese, German and Finnish delegations.

¹⁰³ These include: Italian, Lithuanian, Irish, Cypriot, Danish, Hungarian, Belgian, Spanish, Swedish, Slovenian, Finnish, Austrian and United Kingdom delegations.

that the content of the *IIA* and the ways that it was interpreted by the member states prompted the Council's legal service to challenge its legality. Dehousse (2008) further suggests that the member states' resistance to the *IIA* was fuelled mainly by the changes that it proposed to the structure of the agencies' management boards. According to the draft *IIA*, the member states would have lost their right to nominate representatives on the management boards of all agencies, and their representation would have been reduced as the number of representatives of the Commission on the boards increased by the same number for parity. The limitation of the seats (and hence the limitation of influence) was seen by some member states as an EU supranational bid to modify the power balance within the European regulatory system. and 'an attempt to limit the national governments' room for manoeuvre both during the creation of an agency and in its day-to-day operations' (Dehousse 2008: 802). These theories support the legalisation theory of Abbott and Snidal (2002), who argue that the adoption of legally binding norms is the result of a complex set of political considerations, including the estimation of sovereignty costs, national constraints and the expected uncertainty rather than being anything to do with the benefits it might bring.

The reluctance of the Council to sign *IIA* on the operational framework of the decentralised agencies was met with the severe criticism of the Parliament. The issue was discussed at the November 2005 session of the Parliament in Strasbourg,¹⁰⁴ at which the Parliament demanded the establishment of more tangible and clear accountability

¹⁰⁴ Debates during 15 November 2005 Session in Strasbourg, Oral question with debate O-0093/05 pursuant to Rule 108 of the Rules of Procedure by Jo Leinen, on behalf of AFCE, Janusz Lewandowski, on behalf of the Committee on Budgets to the Council. Available at: <http://www.europarl.europa.eu/sides/getDoc.do?type=CRE&reference=20051115&secondRef=ITEM-026&language=EN>. Source last retrieved on 18 March 2017.

mechanisms for the formation and operational procedures of the agencies. The EP's standpoint was based on the argument that the then-current agency system did not ensure the DAs' democratic legitimacy and economic efficiency, and hence was not compliant with the basic principles of the EU's concept of good governance. In the Parliament's resolution on the draft *IIA*,¹⁰⁵ it was pointed out that the principles of financial and operational accountability should have a decisive role in the agencies' set up. The Parliament expressed its regret that the Council was not prepared to begin negotiations for concluding *IIA* based on the Commission's proposal and stressed the Parliament's concerns that the expansion itself and the costs of a strongly fragmented network of bodies operating in an intergovernmental manner, would threaten the proper execution of the Commission's tasks. The Parliament pushed to progress the adoption of *IIA*¹⁰⁶ by asking the Council if it intended to start negotiations on the conclusion of *IIA* and if such negotiations were to be concluded before the end of multiannual financial framework 2000–2006.

In its response, the Council expressed its readiness to examine the content of the *IIA*, as proposed by the Commission, but based on the legal grounds that conformed to the EU treaties (Council of the European Union 2005c). The Presidency of the Council submitted to the national delegations a non-paper concerning the establishment of a horizontal framework for the DAs (Council of the European Union 2007b). It advocated that *IIA* should not be signed, because its legal nature did not allow for the creation of supra-legislative rules (on how agencies should be established). Further on, it argued that

¹⁰⁵ Adopted with simple majority.

¹⁰⁶ Oral question with debate pursuant to Rule 108 of the Rules of Procedure by Jo Leinen, on behalf of the Committee on Constitutional Affairs, and Janusz Lewandowski, on behalf of the Committee on Budgets to the Council, 12 October 2005.

the conclusion of *IIA* would require the three institutions to enter the proceedings on an equal footing, a proposition that would change the institutional balance as provided by the treaties. To overcome these weaknesses, the Presidency of the Council supported the idea (expressed already by some of the national delegations) and proposed the conclusion of a formal act on the basis of Article 308 of the *EC Treaty*, which prescribes that ‘if action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community, and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament, take the appropriate measures.’ In such a framework the Council has the ultimate powers to decide on the DAs’ future; while the Parliament is consulted, it has no role as a co-legislator (Council of the European Union 2006).

In an echo to the discussions held in 2005, once again the member states in the Council did not manage to reach a common agreement. While the ‘large majority of delegations could broadly agree on a set of principles that should guide the setting up and the operation of regulatory agencies, namely good governance, better regulation, transparency, accountability, cost efficiency, evaluation of agencies based on cost-benefit analysis and impact assessment’ (Council of the European Union 2007a: 2), the national delegations could not agree on the form of the legal instrument to be adopted. Moreover, many of them expressed concern that a legally binding agreement would decrease the established national flexibility. These concerns having been expressed, most of the delegations were ready to explore endorsing a non-binding political statement on the operational frameworks of DAs.

The two years of internal negotiations among the member states in the Council resulted in an outcome, clearly supporting the arguments of Dehousse (2008) and Chamon (2016) that the decision on the draft *IIA* was a political rather than a legal matter. This became even more apparent, when the legal obstacles, that had initially been pointed out as the main reason for the rejection of the *IIA*, were overcome. The political outcome of the *IIA* discussion also came to reaffirm Abbott and Snidal's (2000) observation that law and politics are deeply intertwined. The rejection of the *IIA* and the readiness to conclude a non-binding inter-institutional joint statement clearly indicated the member states' preferences to keep their flexibility for political bargaining on a case-by-case basis during the establishment of new agencies, even if the cost of the latter would compromise the principles of good governance.

5.2.2 Phase two (2008–2012): from a mandatory framework to non-committal political agreement

In 2008, based on the indicated willingness of the Council to consider the conclusion of a non-binding policy agreement, the Commission published a new communication: *The European agencies. The way forward* (European Commission 2008a). The communication noted that in the period 2002–2008, the number of decentralised agencies increased by almost 50 per cent and reiterated the need to establish a unified *modus operandi* in the work of the DAs. The Commission underlined that the process of rapid agentification required the establishment of stronger accountability standards, allowing for closer scrutiny of the agencies' performance and financial management. The Commission therefore suggested that the Parliament's supervisory competences should be expanded, and that the Parliament should be involved in the nomination of management boards and

agencies' directors. The Commission also proposed a horizontal evaluation of the existing agencies, aimed at fine-tuning current operational practices and improving the procedures for creating new agencies. Given the prolonged inter-institutional debates on the draft *IIA*, on this occasion the Commission proposed the establishment of an inter-institutional working group, aimed at 'bridging' the institutional positions and initiating inter-institutional dialogue.

The Commission's proposal for inter-institutional dialogue coincided with the release of the European Court of Auditors' special report on the decentralised agencies' sound financial management (European Court of Auditors 2008). After analysing the financial and management procedures of eight DAs with a budget of €556 million in 2007,¹⁰⁷ the European Court of Auditors (2008: 29) reported the 'widespread lack of any activity-based budgeting, which is one of the basic instruments needed for management transparency, combined with monitoring tools that do not provide the transparency needed for permanent supervision of performance'. These findings added additional 'fuel' to the struggle by the Commission and the Parliament to impose more clarity in the DAs' operations.

Although the Parliament welcomed the establishment of the Joint working group, it expressed reservations about whether this approach could lead to the creation of a clear and coherent framework, ensuring the requisite accountability in the agencies' operations (European Parliament 2008a). The Parliament joined forces with the Commission and the Council, however, and after 9 meetings at technical level and 7 meetings at political level, the triumvirate of institutions reached an agreement. Thus in 2012, ten years after the

¹⁰⁷ Budget for the year 2007.

release of the Commission's first communication on decentralised agencies, the Commission, the Parliament and the Council eventually issued a *Joint Statement on the decentralised agencies* (European Commission, European Parliament and the Council of European Union 2012).

Similar to the initially proposed *IIA*, the statement aimed at establishing a common approach for the creation and operational framework of the DAs. Yet, in contrast to the proposed *IIA*, it had no legally binding powers in relation to the EU institutions. The document followed the principles embedded in the *White Paper on European Governance* (European Commission 2001a) but did not touch the status quo of the management boards, preserving the right of the Council to appoint one representative from each Member State to the management boards of the DAs. By doing so, the Council protected the inter-institutional control of the member states and ensured their influence in the agencies' decision-making bodies.

The revealed institutional stances demonstrated the strong desire of the Council to preserve the status quo, when that would safeguard national political interests, even if the status quo might prove detrimental to the common interests of European citizens and the EU as a whole. In the light of the theories of Helstroffer and Obidzinski (2014) and Costello and Thomson (2013), which suggest that if the three institutions are not on the same opinion, they will either block the proposal or finally agree on a text that is well below the expected and desired governance standards, this type of behaviour can be used as an indicator of the anticorruption institutional enablers and inhibitors. The case described above, with the *IIA* and the DAs, shows how, if the Council is not willing to change the status quo, it has sufficient powers to rebuff the proposal until it becomes

obsolete. Given that the adoption of a robust anticorruption framework will inevitably reshuffle the established status quo, and will alter the established institutional balances, the Council is likely to be the institutional inhibitor, blocking the anticorruption change, because a change in institutional balance may have a significant negative impact on national and political interests (Abbott and Snidal 2000).

This section presented the prolonged struggle of the European Commission and the European Parliament to unify the rules governing the management and operational framework of the decentralised agencies. It showed that, while the two institutions have taken a firm stand about installing more transparent and accountable systems, the member states (represented by the Council) have strongly resisted this urge and refused to commit bindingly to any proposal that might limit their discretionary powers in the process of establishing and managing the DAs.

5.3 The operational framework of the EU regulatory agencies: a matter of good governance or something else?

This section examines the need to establish a unified operational framework for the European decentralised agencies and investigates the differences between the approaches proposed by the Commission (and supported by the Parliament) and the Council. In so doing, it shows that the Commission and the Parliament have been actively promoting the enforcement of a transparency and accountability arrangement of the EU's second governance layer, while the Council have remained reluctant to do so.

5.3.1 EU regulatory agencies: what is wrong with the current framework?

The need to reform the operational framework of the work of the European DAs derived from the very nature of the DAs' structure and operational arrangements. Among the main idiosyncrasies of the decentralised agencies is that they operate outside the organisational structure of the Commission and the Council, and yet they are not specifically mentioned as entities in the EU treaties. This peculiarity gave to the member states the flexibility to decide individually on the operational and management modus operandi of each new agency, and the use of this prerogative resulted in remarkable institutional creativity. Out of 15 agencies established under the EU law during the period 1975–2003, 12 had different types of structures, with management bodies composed in 10 different ways, and with the directors appointed in several ways (European Parliament 2003a). This wide variation of institutional design threatened to create an 'administrative zoo' (Jann et al. 2008), where neither the principles of transparency and accountability, nor those of effectiveness and efficiency, are properly implemented and/or scrutinised. The lack any credible justification for why agencies with similar functions, established in the same time period, should have different accountability obligations widened 'the existing gap in the delegation-accountability chain between individual EU agencies and the EU representative institutions, and hence also the 'ultimate principals - the citizens' (Scholten 2014:5). The existence of such a gap was reasserted by a number of empirical studies (Eureval 2008, Rambol, Eureval, Matrix 2009a, Tobias et al. 2009) which indicated that the lack of accountability and transparency in the ways that the agencies are created, operated and scrutinised poses significant risks for the impartiality and credibility of the DAs' operations. The reports revealed that the rationale for the creation of the agencies was

often, but not always, justified (Rambol, Eureval and Matrix 2009a); alternative options were usually not explored in depth (Eureval 2008); and agencies were established on a non-transparent case-by-case basis, as a result of political pressure by the member states or from the Commission (Rambol, Eureval and Matrix 2009a). An absence of results-based indicators has created additional flaws in the monitoring system and prevented the objective assessment of the agencies' performances (Rambol, Eureval and Matrix 2009a, European Court of Auditors 2008). Performance reports have been almost non-existent, thus limiting the budget discharge procedure¹⁰⁸ to regularity, leaving aside any questions of efficiency and the effectiveness of operations. The same observations apply in any investigation of the directors' accountability. Thus, although the majority of the agencies have been meeting the formal requirements regarding oversight, their actual execution of the latter has been done in a way that does not ensure actual accountability, either in terms of costs, or in terms of performance (Rambol, Eureval and Matrix 2009b).

The lack of accountability for performance has also been rooted in the institutional design of the DAs' boards of management. These boards represent the first tier of the DAs' accountability structure, and their efficiency, inclusiveness and competency guarantees the legitimacy and financial viability of the DAs. Notwithstanding these requirements, the composition of the management boards in the majority of the cases do not reflect the target groups whose needs the agency addresses (Rambol, Eureval, Matrix 2009a). Rather they reflect the political setting of their creation. Rambol, Eureval and Matrix (2009a)

¹⁰⁸ The budget discharge procedures 'release' the European Commission from responsibility for managing the budget for the given year. The procedure marks the end of the budget implementation cycle. The discharge is given by the Parliament on the recommendation of the Council (see more on: http://ec.europa.eu/budget/explained/reports_control/discharge/disch_en.cfm).

highlighted the overall tendency to include representatives of all the member states in the management boards and stressed that creating such large committees is not only costly¹⁰⁹ but may also create counterproductive or self-blocking management systems that would hinder the work of the agencies. To these findings, Busuioc (2012) adds striking examples of cases in which the board members outnumbered an agency's actual staff.¹¹⁰

This disproportionate selection regarding the boards of management is further complimented by a lack of coherent regulations relating to conflict of interest. A report of the European Court of Auditors (2012) revealed that the DAs that are highly exposed to corruption risks¹¹¹ do not have adequate systems for addressing and managing conflict of interest situations. This, the lack of relevant regulations ensuring objectivity in the operational activities of the DAs, combined with a lack of clear accountability and transparency in their work, created a favourable environment for corruption and a waste of public resources.

5.3.2 Why it took so long? Similarities and differences between the 2005 draft IIA and the 2012 Joint Statement

Given the gravity of the identified weaknesses and the obvious non-compliance with EU good governance principles, the question about why the operational framework of the DAs has not been unified gains additional importance.

¹⁰⁹ Rambol, Eureval, Matrix (2009a) estimated the travel and time costs alone of the national member state representatives for attending management board meetings as approx. 2.5 million EUR per year.

¹¹⁰ In 2009, for example, the European Police College had 21 staff and at least 27 representatives of the member states on the board, while the European Agency for Health and Safety at Work, with 64 staff members, had 84 members of its management board.

¹¹¹ The report covered the procedures established in the European Aviation Safety Agency, European Chemicals Agency, European Food Safety Agency and the European Medicines Agency.

A careful examination of the provisions of the draft *IIA* (2005) and the *Joint Statement* (2012) shows that content-wise they are largely similar (table 5.3). Both documents envisioned that the DAs would be operationally accountable both to their management boards and to the Parliament and the Council via the annual budget discharge procedure. By empowering the Commission to conduct internal audits of their work and by putting the agencies under the scrutiny of the European Court of Auditors and the European Anti-Fraud Office, the DAs' financial accountability has been further ensured. While the draft *IIA* envisioned that the director of a DA would be selected by its management board following a proposal made by the Commission, the 2012 *Joint Statement* described a slightly modified procedure. It prescribed that the management board should select the director from a shortlist presented by the Commission, in an open and transparent selection procedure. The 2012 *Joint Statement* expanded the draft framework of the *IIA* by giving the Commission the right to trigger alerts when DAs were not compliant with EU law, acted against the EU policy objectives or overstepped their mandate.

Table 5.3 Comparative overview of key transparency and accountability aspects of the work of the decentralised agencies

Core anticorruption elements	<i>Draft IIA (2005)</i>	<i>Joint Statement (2012)</i>
Management structure	Small administrative board. Equal and limited number of representatives of the Commission and the Council. Representatives of interested parties may sit on the board without voting rights.	Management board (30): <ul style="list-style-type: none"> • 1 representative of each member state; • 2 representatives of the Commission; Where appropriate: • 1 representative of the Parliament; • representatives of the stakeholders
Appointment of the director	Appointed by the Management Board, on the basis of the Commission’s proposal. Hearing in front of the Parliament may be conducted.	By the management board, following the Commission’s shortlist, drawn on the basis of an open and transparent selection procedure
Accountability	The Parliament and the Council execute control over the EU’s public spending via the annual discharge procedure. The DAs’ annual reports are submitted to the management board, the Parliament, the Commission and the Court of Auditors. The Parliament and the Council may request hearing of the director on a subject relating to the agency’s activities.	The Director of the DA is first and foremost accountable to the management board. The DAs are also accountable for the use of EU money, through the annual discharge procedure, to the Parliament and the Council. The DAs’ annual reports are submitted to the management board, the Parliament, the Commission and the Court of Auditors.
Internal audit	The internal auditor of the Commission has the right to conduct internal audits.	The Commission’s Internal Audit Service can conduct internal audits. Their results are presented to the DA’s Director and the management board.
Alert/warning	-	The Commission can trigger an alert when it feels the management board is taking decisions which are not compliant with EU law, or contradict the EU policy objectives, or in those cases where the DA oversteps its mandate.
Prevention of corruption	OLAF’s competences of investigation should be vested over all agencies.	OLAF’s role should be formalised and made more visible.

Source: the 2005 draft IIA and the 2012 *Joint Statement on the European decentralised agencies*

Despite these large similarities, the two documents differ significantly in two areas: the composition of the management boards and the binding commitment of the three institutions.

One of the major differences between the text of the *IIA* and that of the *Joint Statement* adopted in 2012 is the legal force of the jointly adopted document. While the *IIA*, proposed by the Commission and supported by the Parliament, aimed to create legally binding institutional commitments, the 2012 *Joint Statement* is merely a declaration of intent. Like the intergovernmental anticorruption tools discussed in chapter 3, the *Joint Statement* does not create legal certainty or predictability. Instead, it allows for unlimited wriggle/manoeuvring room and political bargaining on a case-by-case basis.

The second major weakness of the 2012 *Joint Statement* is the potential exposure of the DAs' work to national vested interests. The 2012 *Joint Statement* proposed to continue to create bloated management boards, regardless of the agency's size and tasks – hardly to be justified by any but political reasons. The huge budget losses and the lapses in efficiency that such management structures have demonstrated in the past (Busuioc 2012, Rambol, Eureval and Matrix 2009a), proved to be less important than the need to maintain political control over the agencies' operations (Busuioc 2012; Dehousse 2008; Keleman and Tarrent 2011). The exercise of such control has been demonstrated to be of a greater importance than the efficiency of operational activities and financial costs borne by the DAs.

The financial ineffectiveness and inappropriateness of the management board structures are, however, only two of the elements that feed a much bigger concern related to the independence of the agencies from national interests. Based on the research of the

practices of the existing EU agencies, Rambol, Eureval and Matrix (2009b) voiced their disquiet about the underrepresentation of EU representatives on the management boards potentially creating an imbalance in which European interests contradict those of some member states. In such cases, ‘if the EU interest is voiced in a contradictory or conflicting way, it might therefore be considerably weakened and the whole governance system might become unbalanced.’ (Rambol, Eureval, Matrix 2009b: 16). Jann et al. (2008) comes to similar conclusions suggesting that decisions on such boards are political rather than managerial, and tend to protect the national political attitudes in the specific field. The same notion is also confirmed by Busuioc (2012) who argues that, in cases of conflict between European and national interests, the latter take precedence. Busuioc (2012) asserts, too, that in many cases, the board members are not even interested in the work of the agency, unless it concerns their national vested interests. Such board representatives become ‘active’ only when the DA’s operations should be steered in a way to provide benefits for, or avoid negative impacts on, their specific national interests. Busuioc (2012: 733) further notes that the ‘pervasive gaps identified in board supervision are clearly not strictly owing to individual failures but are a product of agencies’ design and the considerations that have driven it.’ These findings support Kelemen’s (2002) and Delhousse’s (2008) theories about the structure of the decentralised agencies being tailored to ensure that the agencies’ operations do not threaten the status quo established by the national administrations.

The 2012 *Joint Statement* preserved the status quo, demonstrating that the design of the second layer of EU governance is not a matter of good governance, but rather an assessment of how DA structures are likely to influence national policy outcomes

(Kelemen and Tarrant 2011). This latter is a typical example of the institutional design problems which Majone (1997: 5) describes as the struggle to find the ‘particular governance structure which maximises the net benefits to the principal(s), subject to various constraints’. The design of every DA can therefore be seen as ‘a product of strategic interaction between the Member States, the Parliament and the Commission, each of them pursuing their preferences within a framework structured by the EU’s decision-making procedures and the legal strictures imposed by the European Court of Justice’ (Kelemen and Tarrant 2011: 924). In this configuration the presence of multiple principals creates a peculiar framework whereby each principal plays a special role and displays different preferences for how to control the activities of the agent (the DA) and how to prevent the ‘agency losses’ in a form of behaviour that contradicts the principal’s preferences (Thatcher 2005). While, in the classical principal–agent theory, the agency losses are mostly associated with the possibilities of the agent pursuing an agenda that differs from that of the principals, Dehousse (2008) argues that in the case of DAs the main fear is that one of the principals may capture the ‘leadership contest’. The essence of the latter is the competition between the national and supranational preferences of the three institutions.

The role and preferences of the Commission and the Parliament are relatively straightforward. Albeit for different reasons, they favour greater European integration and supranational control regarding the monitoring and coordination of EU policies. The two supranational institutions exhibited strong political will for transparency reforms, as defined by Brinkerhoff (2000). They did so by initiating the policy change, demonstrating in-depth understanding of the inefficiency of the current agency system; and by

continuously supporting the policy reform push. On the side of the Council, such commitment was clearly missing. The conclusion of any binding agreement with the Commission and the Parliament would mean that the member states would in effect limit their own flexibility regarding the way in which the agencies operate and are accountable (Dehousse 2008). If the Council had agreed on the draft institutional agreement presented in 2005, the member states would have lost a substantial amount of their influence at that stage and would have been put in a position where they could not ‘anticipate all possible consequences of a legalized arrangement ‘(Abbott and Snidal 2000: 441). The political stances of the Commission and the Parliament on one side and the Council on the other reflect also the legalisation theory of Abbott and Snidal (2000) regarding the use of hard legalisation tools as a means of ensuring credible commitments and the enforcement of agreed standards. The behaviour of the Commission and the Parliament is typical of actors who believe that the scope for opportunism and its costs are significant and that non-compliance is hard to detect. The Council’s resistance, on the other hand, is typical of actors who see the adoption of legally binding commitments as a tool for circumscribing their autonomy (Abbott and Snidal 2000). The unsuccessful attempt of the Commission and the Parliament to enforce transparency and accountability in the management of the European DAs corroborated the predictive model of Helstroffer and Obidzinski(2014) who suggest that if new standards are proposed, the Commission will try to predict the position of the Parliament and the Council and align its proposal; the Parliament will bring new suggestions for further improvements and the Council will disagree with the proposal by either blocking it or forcing the Commission and the Parliament to lower the standard. By concluding a joint statement of non-obligatory character, rather than an inter-institutional

binding agreement, the Council safeguarded the opportunity for national political manoeuvring and ensured that a framework be adopted ‘within which states can adapt their arrangement as circumstances change and can pursue “harder” gains through further negotiation’ (Abbott and Snidal 2000: 44). The structure of the management boards of the DAs explicitly demonstrates the Council’s preference for keeping control and minimising the flexibility of the supranational institution (Keleman 2002).

These regulatory preferences echo the behaviour of the member states analysed in chapter 3 and demonstrated the absence of all elements that Brinkerhoff (2000) considers vital for demonstration of actual political will. Although the reasons behind the disinclination of the member states to ratify the international anticorruption conventions varied from concerns regarding national sovereignty (limiting the national regulatory powers) to a possible negative personal and political impact on the political elite (if corrupt practices were to be exposed), the essence of the reasons motivating the member states to reject the conclusion of legally-binding commitments are pretty similar. In both cases their national influence over the particular decision-making process would have been minimised at the expense of the increased influence of the supranational institutions. The Commission's proposal for introducing a new standard on the ways that the DAs are created, substantially deviated from the status quo, triggering institutional dynamics, predicted by Costello and Thomson (2013) and Helstroffer and Obidzinski (2014) and described by the dominance of the Council over the outcome of the policy proposal. The Council’s explicit position in relation to the adoption of the joint non-binding statement on the work of the DAs, exhibits the link between the choice of regulatory approach and the rational assessments of the costs and benefits for the actors involved (Abbott and Snidal

2000, Kahler 2000). In the case of *IIA* on the DAs, for example, the restrictions for the member states on national policy-making seem to exceed the benefits that might appear alongside the DAs' new transparent and accountable framework.

Given the active role of the Commission and the Parliament in the promotion of more transparency and accountability in the DAs' work, and the Council's resistance in this regard, the findings of the chapter suggest that the lack of a common European anticorruption framework does not result from a lack of supranational institutional leadership, but rather is an outcome of the Council's constraints. The latter reflects Abbott and Snidal's theory (2000) that the adoption of a mandatory legal framework is a consequence of international politics and reflects the calculations made by the national states regarding costs to their sovereignty and the level of uncertainty they may face. When 'both uncertainty and sovereignty costs are high, legalization will focus on the statement of flexible or hortatory obligations that are neither precise nor highly institutionalized.' (Abbott and Snidal 2000: 44)

5.4. Concluding remarks: political preferences versus good governance needs

This chapter presented the quest to adopt unified standards in the establishment and management of the European decentralised agencies. It demonstrated the Commission's and Parliament's prolonged struggle to ensure the proper application of the EU's good governance standards and described the continuous resistance of the Council in this regard. The chapter showed that such resistance was not based on an opposition to good governance per se, but rather on politically based considerations, reflecting specific national interests. The case study illustrated considerable divergence between the widely

acknowledged and loudly proclaimed desire to implement the principles of good governance and their actual implementation. It clearly signalled that none of the three accountability facets – for finances, fairness and performance (Behn 2001) – have been properly reflected in the operational framework of the European decentralised agencies. The chapter also demonstrated that the process of the establishment of DAs has not enforced the obligation of the EU institutions and member states to explain and justify their conduct (Bovens 2010, 2007). Such an outcome supports the findings, that in some areas of policy-making, national interests take precedence over the EU's common interests, thus overruling the general responsibility of all public stakeholders to give account of their actions. Such precedents weaken the foundations of the European governance and set favourable conditions for corruption to flourish.

Further evidence was provided of the Parliament's and the Commission's commitment to safeguard EU citizens' interests and ensure that policy-making procedures be open, transparent and objective. The policy attitudes of the supranational players exhibited by their locus of initiative, deep understanding of the problem at hand, continuity of the efforts, willingness to enforce constraints and ability to mobilise support demonstrated the presence of clear political will, as measured by Brinkerhoff (2000). By presenting these two institutions' strong commitment to a strengthening of the accountability arrangements in the second layer of EU governance, the chapter indicated that they have a strong potential for becoming flagships of anticorruption.

The chapter went on to investigate the resistance of the member states in the Council to endorse the conclusion of intergovernmental agreement on the operational framework of the decentralised agencies, arguing that it reflects a typical intergovernmental preference

for the retention of a broad control over the EU governance process. By utilising the findings of Busuioc (2012), Dehousse (2001, 2008) and Keleman (2002, 2008) the chapter showed that the adoption of clear and transparent standards for the establishment of the DAs is strongly correlated to the intergovernmental preferences of the member states to keep control of areas they consider important for their national interests. These findings confirmed Abbott and Snidal's (2000; 2002) and Johnston (1997) notions that the process leading to the choice of regulatory approach is highly politicised and coloured by a complex set of considerations.

The policy dynamics, exhibited in the attempts for creating a more transparent and accountable second layer of EU governance, asserted the applicability of the institutional predictive models, described by Costello and Thomson (2013) and Helstroffer and Obidzinski (2014), in the anticorruption domain. The resistance of the Council to conclude *IIA*, as has been demonstrated by the present chapter, had nothing to do with the widely recognised need to ensure better governance in the EU. Instead, it was related to the question of 'who gets what and how' from the European regulatory state. These findings support hypothesis 1 developed in chapter 3 – that the lack of a robust EU anticorruption framework is a result of the Council's reluctance to conclude legally binding commitments. The case study clearly indicated that the Council is not willing either to restrain the member states' manoeuvring or potentially to 'harm' the member states' interests, even if the price for such behaviour are the European good governance principles. Given that the desire and need to enhance the accountability and transparency in EU governance arrangements is demonstrable, it is reasonable to expect that the Council will react in a

similar manner in the realm of anticorruption, which is far more sensitive and which has, and will have, a significant impact on the national political environment.

The following chapter provides another similar example by analysing the Parliament's and the Commission's attempts to introduce criminal law protection for EU funds and guarantee that EU taxpayers' money is spent in accordance with the objectives and priorities of the EU.

6. Protection of EU Financial Interests – Another Struggle?

Corruption is most commonly defined as the ‘misuse of entrusted power for private gain’ (Transparency International 2009a). And although the definitions of corruption may vary (as discussed in chapter 2), the elements that inevitably exist in the corruption formula are the misuse of entrusted power and (usually public) resources. Safeguarding public money and the ways it is spent should, therefore, be one of the cornerstones of every successful anticorruption policy. Ensuring fair distribution is also of key importance for preventing market distortion and unfair competition practices. The attainment of these objectives is obviously linked to the presence of clear rules governing financial accountability processes, alongside strong anti-fraud mechanisms that are capable of identifying and deterring any possible irregularities or fraudulent activities targeted at the misappropriation of public funds. The credibility of the European Union regarding its ability to manage its own huge resources depends of the effectiveness of such mechanisms. Their presence indicates the readiness of the EU institutions and member states to give account for their actions (Bovens 2010, 2007) and manifests the adherence of both institutions and member states to the general obligation for financial accountability (Behn 2001).

Given that the EU’s budget comprises approximately €145 billion, a figure that represents 1 per cent of the wealth generated in the member states,¹¹² and considering that 94 per cent of this money is distributed to beneficiaries through a variety of spending programmes,¹¹³ one might expect robust systems of checks and sanctions to be set in place

¹¹² This figure represents the budget for 2015. Although the figure varies from year to year, the percentage correlation remains the same. Source last retrieved on 13 June 2016 at http://europa.eu/pol/financ/index_en.htm.

¹¹³ The remaining 6 per cent covers the EU’s administrative needs. Source last retrieved on 13 June 2016 at: http://ec.europa.eu/budget/mff/introduction/index_en.cfm.

to deter fraud and the mismanagement of those public funds. This chapter investigates whether this is so.

The chapter focuses on the development of a EU legal regime for harmonising the national criminal law frameworks regarding fraud committed against the EU's financial interests. The case study has been chosen because antifraud policy is an indispensable part of every anticorruption policy and is detrimental for the proper functioning of the overall governance system. As with the EU anticorruption policy, the success of which is dependent on the harmonised anticorruption efforts of each member state, so, too, with anti-fraud policy: the efficient investigation and prosecution of the crimes committed against the EU budget is contingent on the presence of harmonised legal systems in 28 member states (Quirke 2009). Investigating the process of harmonisation of the EU anti-fraud, criminal legal approach can therefore outline the features that predetermine the adoption or non-adoption of a common EU legal anticorruption framework.

With this aim in mind, the chapter looks at the main EU and national competences in the anti-fraud arena and deliberates on the seemingly endless attempts (21 years to date) to achieve harmonisation in anti-fraud criminal law. The chapter seeks both to outline the validity of hypothesis 1 that the absence of robust EU anticorruption framework is a consequence of the Council's reluctance to adopt legally binding anticorruption agreements, and of hypothesis 2, that the non-existence of such a framework is an outcome of a lack of political leadership on behalf of the EU supranational institutions. The chapter further seeks to confirm or refute the findings of chapter 5, explaining the legislative reluctance of the member states as the result of a series of complex political calculations made by them on the costs incurred and benefits that they will receive (Abbott and Snidal

2000). By tracing the prolonged attempts to adopt an EU anti-fraud criminal law directive, the chapter also examines the applicability of the institutional dynamics bargaining theories proposed by Helstroffer and Obidzinski (2014) and Costello and Thomson (2013). It corroborates the institutional behaviour predicted by their model by demonstrating the policy preferences expressed by the Council, the Commission and the Parliament in the process of the adoption of the EU's criminal antifraud directive. The chapter demonstrates that the first attempt of the Commission and the Parliament to establish a strong common EU antifraud deterrent mechanism was blocked by the Council, while the second attempt of the supranational institutions proved to be successful, only after painfully long negotiations. The latter resulted in significantly lowering the initially proposed standards so that at least some common antifraud framework is established. In this prolonged struggle for ensuring better protection of EU taxpayers' money, the EU supranational institutions, demonstrated firm political will, as described by Brinkerhoff (2000) while the Council exhibited clear disinterest and lack of determination for policy change.

The chapter is divided into four sections. The first section provides the contextual background of the chapter. It explains what fraud is, how it is linked to corruption, and what are the roles of the supranational institutions and the member states in the elaboration and implementation of the EU's anti-fraud policy. The second section follows the developments in the EU's criminal anti-fraud policy and presents the different stances of the Commission, the Parliament and the Council on the adoption of an EU directive on crimes affecting EU public money. The third section seeks to address the reasons behind the 20-year-old anti-fraud stalemate, looking at the motivations of the intergovernmental and supranational institutions for enacting EU criminal legislation. In so doing the section

argues that the existing EU approach cannot render the anticipated results, based as it is on divergent national systems of detection and investigation of fraud against EU money. The fourth and final section summarises the chapter's findings and asserts that, as was the case with the European DAs (discussed in the previous chapter), the decision to enact EU criminal anti-fraud legislation was influenced by a variety of political and economic considerations that have little to do with the topic in question rather than by the specific need for the better protection of EU taxpayers' money.

By presenting the case study on the criminal law protection of the EU's financial interests, the chapter reconfirms the rationale that the Council is generally reluctant to conclude legally binding agreements that will deprive the member states of their regulatory function in the arena of justice and home affairs. Such reluctance predetermines the lack of a unified legal anticorruption approach in the EU.

6.1. Fraud against EU financial interests: key characteristics and responsible institutions

This section sets the contextual background of the chapter. It explains the main characteristics of fraud in reference to the EU's financial interests and provides an overview of the main policy actors responsible for preventing fraud against EU money.

6.1.1 What is EU fraud and how much does it cost?

Fraud, corruption and irregularities form the 'holy trinity' of culprits responsible for the biggest losses of EU budget funds. Irregularities are considered to be the most innocent of

the triad; they are unintentional omissions/mistakes and are therefore not subject to criminal proceedings.¹¹⁴

The situation with fraud and corruption is completely different. Corrupt activities, such as bribery, extortion and the abuse of function¹¹⁵ are criminalised by the *CoE Criminal Law Convention on Corruption* and the *UN Convention against Corruption*. As such, they are part of the criminal law systems of the member states, albeit with different degrees of scope and applicability. At EU level, passive and active corruption was first criminalised by the protocol drawn up on the basis of *Article K.3 of the Treaty on European Union to the Convention on the protection of the European Communities' financial interests (PIF Convention)*. This protocol criminalised any deliberate action or solicitation, that resulted in the promising, offering, giving, or acceptance, directly or indirectly, of an undue advantage for the public official himself/herself or another person or entity, in order to act or refrain from acting in the exercise of his/her official duties in any way that damages, or is likely to damage, the financial interests of the European Community.

¹¹⁴Irregularity is 'any breach of Union law or of national law relating to its application, resulting from an act or omission by an economic operator involved in the implementation of the Fund, which has, or would have, the effect of prejudicing the budget of the Union by charging an unjustified item of expenditure to the budget of the Union', art.2(16) Regulation (EU) No 223/2014 of the European Parliament and of the Council of 11 March 2014 on the Fund for European Aid to the Most Deprived. The statistical evaluation of irregularities done by the European Commission (2011) indicates that the bulk of the irregularities are of an administrative nature and can be detected in the course of routine administrative checks.

¹¹⁵*CoE Criminal Law Convention on Corruption* and *UNCAC* criminalise the following activities: active and passive bribery of domestic and foreign public officials, active and passive trading in influence, embezzlement and misappropriation or other deviation of property, abuse of functions, money laundering, concealment (facilitating or furthering of other corruption offences), obstruction of justice of corruption-related crimes, aiding or abetting the commission of any of the criminal offences established in accordance with the Conventions. In addition to those acts, the Criminal Law Convention includes in the scope of criminal offences the account offences. The EU Convention on the fight against corruption criminalises only active and passive bribery of domestic and foreign public officials.

The main objective of any corruption offence is the attainment of undue benefit; public-sector corruption is directly damaging to public money and/or the public good. Fraudulent activities have similar objectives linked to ‘receiving money from or avoiding payment of money to the state based on certain legal obligations’ (Sieber 1998: 4). The pivotal element that initiates the fraudulent behaviour and shapes the criminal activities is the undue profit, as it is in corruption crimes. Such criminal activity can be manifested by any act, omission or misrepresentation of facts or documents that intentionally misleads, or attempts to mislead, a third party with the aim of either obtaining a benefit or avoiding an obligation, including the payment of tax. In the case of fraud against EU money, the offender seeks to mislead the EU, or a national institution, in order to extract unearned financial advantage.

The overlapping objectives of corruption and fraud make them common ‘companions’, sometimes united in complicated composite crimes which are difficult both to detect and prevent. The EU’s significant vulnerability and corruption exposure, combined with the secretive nature of such crime, makes detection and prevention even more difficult. As discussed in chapter 2, the internal market and the EU borderless economy creates valuable economic opportunities, but also therefore exposes the EU to higher cross-border corruption risks. Tupman (2010) argues, in a similar fashion, that the EU is highly exposed to fraudulent risks, because the higher prices of some goods and commodities on the EU market (as opposed to their lower value outside the EU), together with the EU systems of subventions, subsidies and quotas, may create a favourable environment for fraudulent crimes to flourish and for EU money to be misappropriated. In the same vein, Quirke (1999: 173) argues that the ‘European Community budget attracts

both the organised fraudster who may be an intrinsic part of, or closely connected to, organised criminality, or entrepreneurs who resort to fraud as a means of supporting a failing enterprise or helping a company or organisation in financial difficulties.’

Acknowledging the corruption risks associated with fraudulent activities, the EU’s first steps in the regulation of the anticorruption field were actually related to the adoption of an anti-fraud legal framework. The legal definition of fraud against EU financial interests is provided in the *Convention, drawn up on the basis of Article K.3 of the Treaty on European Union on the protection of the European Communities' financial interests (PIF Convention)*. Article 1 of the *Convention* states that fraud constitutes:

‘(a) in respect of expenditure, any intentional act or omission relating to: the use or presentation of false, incorrect or incomplete statements or documents, which has as its effect the misappropriation or wrongful retention of funds from the general budget of the European Communities or budgets managed by, or on behalf of, the European Communities, non-disclosure of information in violation of a specific obligation, with the same effect, the misapplication of such funds for purposes other than those for which they were originally granted;

(b) in respect of revenue, any intentional act or omission relating to: the use or presentation of false, incorrect or incomplete statements or documents, which has as its effect the illegal diminution of the resources of the general budget of the European Communities or budgets managed by, or on behalf of, the European Communities, non-disclosure of information in violation of a specific obligation, with the same effect, misapplication of a legally obtained benefit, with the same effect.’

In essence, any intentional act or omission that aims to gain undue benefit from the EU budget is considered fraud. Yet to be officially categorised as such, this intentional act/omission should be confirmed as fraudulent by a court ruling. In the absence of such a ruling,¹¹⁶ all fraudulent activities fall under the category of fraudulent irregularity or suspected fraud. These are describes as irregularities that give: ‘ rise to the initiation of

¹¹⁶ Given the highly secretive nature of the fraudulent activities and the difficulties that the law-enforcement agencies may encounter in collecting evidence, the pre-trial and trial phases may last for a long while.

administrative or judicial proceedings at national level in order to establish the presence of intentional behaviour, in particular fraud, as referred to in Article 1(1)(a) of the Convention drawn up on the basis of Article K.3 of the Treaty on European Union, on the protection of the European Communities' financial interests' (Commission delegated Regulation 2015c, art. 2a). For any irregularity to be identified as fraud, it should be proven to be a deliberate act of deception (with malevolent intent) and not a genuine error.

The use of the term suspected fraud/fraudulent irregularity rather than fraud allows the Commission to request reports from the member states on any identified irregularities that are not obvious administrative omissions, and which can be reasonably expected to have possible intent. It also allows for some type of analysis on the fraudulent risks and the amounts associated with them, because 'EU fraud, like any type of fraud ... belongs to the category of known unknowns. There is fraud which is committed but not detected, fraud which is committed and detected, and fraud which is committed, detected and reported. In the nature of things, it is only the third category which can appear in official figures.' (Williams 2013:230).

The problem regarding the detection and reporting of fraud affecting EU financial interests has many dimensions, the most prominent among them referring to constraints imposed by divergent legal systems and those emerging from a political reluctance to admit any wrongdoing.

From a legal perspective, the actual negative ramifications of fraud affecting the EU can be only estimated once the respective court rulings have entered into force. The collection of up-to-date and accurate data on all fraudulent activities against the EU budget requires synchronisation of the work of tens of thousands of courts, operating in 28 legal

systems. While not impossible, this can be extremely difficult because there is a lack of reliable statistics regarding EU fraud, mainly due to the lack of sufficient reporting incentives. Ruimschotel (1994) argues that if properly detected, reported and quantified, the actual size of fraud against EU money will indicate either an unfair distribution of financial resources or an inadequate capacity of the national law enforcement systems to prosecute EU fraud. Given the above, the official statistics on fraud committed against EU money can only rely on the numbers of suspected fraudulent irregularities detected and reported by the member states. The actual amount of fraud affecting the EU budget is therefore often referred as the 'dark number' (Ruimschotel 1994: 320). Quirke (2009: 532) adds to this argument, noting that 'if figures revealed by "dark number" research are higher than the existing figures, it could look that there has been a boom in fraud, also, there is a bigger "target" figure to claw back for the taxpayer. This could show how efficient or otherwise a legal system is in terms of recovering defrauded funds.' In all these cases, the abilities of the national governments to manage huge financial flows and implement the principles of good governance will be questioned.

For 2015, the officially reported suspicious irregularities amounted at € 637.6 million and represented around 15-17 per cent of all detected irregularities. The actual loss for the EU budget has, however, remained a 'dark number'.

6.1.2 Who is responsible for preventing fraud against EU financial interests?

The EU treaties and the *Financial Regulation of 2012 applicable to the general budget of the Union* clearly stipulate the obligation of all the stakeholders in relation to the protection of EU money. The opening paragraph of *TFEU*, in its chapter specially devoted to

combating fraud, spells out the duty of all the EU institutions and member states to counter ‘fraud and any other illegal activities affecting the financial interests of the Union’ (art.325(1) *TFEU*). It also obliges the member states to deter fraud against EU funds in the same way that they deter fraud against national funds. These provisions reiterated the obligations of previous treaties and reconfirmed the leading role of the EU institutions and the member states in counteracting crimes against the EU’s financial interests.

The *TFEU* assigns to the Parliament, the Commission, the Council¹¹⁷ the classical competences of policy-shaping authorities and supervisory authorities (as discussed in chapter 4). It endows them with responsibilities for establishing the EU’s anti-fraud policy and building a safety net to prevent any possible misappropriation of EU money. The Council’s primary responsibility (jointly with the Parliament) is to shape the policy agenda. The European Parliament, via the EU general budget discharge procedure,¹¹⁸ has a say on the effectiveness of fraud prevention in the EU. These two institutions are also the main gatekeepers, responsible for the adoption of mechanisms that will prevent and counteract fraud against EU financial interests. The Commission meanwhile has the ultimate political responsibility for ensuring that EU money is spent properly.

The member states play a much bigger, more prominent role that goes beyond shaping policy stances in the Council. They have a crucial say in their own right, as they are tasked with the investigation and prosecution of fraud related to the EU’s financial

¹¹⁷The work of the three institutions is supported by the European Anti-fraud Office (OLAF) and the European Court of Auditors. Yet, the roles of OLAF and the European Court of Auditors are not subject to analysis in the current chapter, as they don’t have legislative competences.

¹¹⁸ Through the budget discharge procedure, the Parliament ‘releases’ the Commission from its responsibility for manage the budget for ta particular year. This marks the end of budget execution. The budget discharge is granted by the Parliament on a recommendation from the Council.

interests, and are responsible for managing around 76 per cent of the EU's funds.¹¹⁹ This is so, because although the Commission is ultimately responsible for the EU budget, the majority of EU funds are managed at national level under the so-called 'shared management' mechanism, established by the *TFEU* (art. 317) and regulated by the *Financial Regulation*.

Shared management requires the member states to: 1) take all legislative, regulatory, administrative or other measures necessary to protect the EU's financial interests; 2) set up efficient and effective internal control systems; and 3) submit annual reports on the management of the EU funds (art. 59, *Financial Regulation on the financial rules applicable to the general budget of the Union, 2012*). The allocation of these competences means that although the Commission is responsible for the overall implementation of the EU budget, it is actually the member states who are actually in charge of managing expenditure on behalf of the European Commission. The provisions of the *TFEU* and the *Financial Regulation* limit the Commission's role as a guardian of the EU treaties – in the main to coordination and assistance. Thus, the Commission is obliged to submit annual reports to the Parliament and the Council describing the measures undertaken and the problems encountered in the process of protecting the EU's financial interests, and the support provided to the national administration in this regard. The Commission is allowed to monitor and observe but does not have a significant enforcement role in preventing and counteracting fraud against EU money at the national level. The

¹¹⁹These funds are disbursed mainly via 5 programmes: the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund. Source last retrieved on 1 March 2017 at http://europa.eu/european-union/about-eu/funding-grants_en.

European Anti-fraud Office has also limited competences in this regard. As a specialised, independent anti-fraud entity within the Commission's structure, it has a mandate to conduct preliminary administrative investigations of any fraud, corruption or other crime-related activities committed against the financial interests of the Union by members of European institutions and national beneficiaries in the member states. Yet, OLAF cannot prosecute the detected fraud cases and is required to pass all the gathered data to the national authorities, and it is these latter who have the power to decide whether criminal prosecution should be enacted or not.

This section described the roles and responsibilities of the EU institutions and the member states with regard to the protection of the EU's financial interests. It revealed the complex structure of the EU's shared responsibilities, with the member states taking the main part in the safeguarding of EU money, while the three EU institutions have been vested with policy-making and supervisory functions.

6.2. The evolution of the EU criminal approach in protecting the EU's financial interests

This section analyses the EU efforts to introduce the *acquis communautaire* in the area of the mismanagement of EU funds. It examines the prolonged struggle for the adoption of the EU criminal law directive on the protection of EU financial interests. The case study indicates the willingness of the EU institutions and EU member states vigorously to prevent and protect EU money. The section focuses on how the European Parliament, the Commission and the Council have responded to the need for protection of the EU's financial interests.

6.2.1 Phase 1 (1995–2012): The attempted adoption of a Directive on the criminal law protection of the financial interests of the European Union

The EU's initial efforts to counteract fraud against its budget date back to the 1960s when the member states tried (unsuccessfully) to agree on common protective measures (Peers 2011). The first major EU attempt to build strong enforcement mechanisms to prevent EU fraud came much later, in 1995, when the *Convention on the protection of the European Communities' financial interests* (hereafter referred to as the *PIF Convention*) was adopted.

The *PIF Convention* was a major breakthrough in the overall development of an EU anticorruption policy, because it represented the first common EU attempt to manage corruption and fraud affecting EU money. Its main objectives were to harmonise member states' laws in relation to fraudulent activities affecting the EU's financial interests and to ensure that these activities were subject to criminal penalty. The *Convention* itself was supplemented by two protocols.

The *First Protocol* (also called the '*Corruption Protocol*')¹²⁰ primarily targets acts of corruption (active and passive bribery) that have an impact on the European Community's financial interests and involve national and EU officials. The *Corruption Protocol* (adopted in 1996) was the first major EU legal document to outline corruption as a serious phenomenon that the EU needed to tackle. However, it only dealt with corruption as an offence when it affected the financial interests of the European Union.

¹²⁰ First Protocol of 27 September 1996 to the Convention on the protection of the European Communities' financial interests, 23 October 1996, Official Journal C 313.

The *Second Protocol* (adopted in 1997) fosters cooperation between the member states and the Commission and a coordination of their activities. It introduces specific measures concerning the liability of legal persons, confiscation and money laundering.

The adoption of the *PIF Convention* and its protocols required the unanimous approval of the member states and it was thus considered to mark a major promise for improved cooperation. But like the other conventional mechanisms discussed in chapter 3, the *PIF Convention* did not have a self-executing character and its implementation first required ratification by the national parliaments and then to be transposed into the national legal frameworks. Unlike the EU directives, which are instruments of EU law and set out mandatory rules that should be transferred into the national law of each country, the *PIF Convention* is an instrument of public international law and has no mandatory powers. Compliance with its provisions cannot be monitored and sanctioned, as would be the case with an EU directive, which empowers the Commission to take action against a non-compliant member state.¹²¹ This means that no specific system exists that can guarantee any uniformity in the interpretation and application of the *PIF Convention* and its protocols. As a result, there is no general or systematic system of courts that can penalise a member state that fails to comply with its obligations under an international convention. Yet, considering the numerous political statements on the need for a coherent and unified approach in building criminal legal protection against the mismanagement of EU funds, hopes that these statements would be transformed into effective actions were pretty high.

¹²¹The EU directives prescribe a timeline within which each country should implement the rules of the Directive in their national legislation. In case this does not happen, the Commission may undertake actions against the non-compliant Member State and the Court of Justice can then declare that there is an infringement of the community law and can impose sanctions.

And these hopes were additionally boosted by the *Treaty of Amsterdam, the Vienna Action Plan*¹²² (European Council 1998) and the *Prevention and control of organised crime – a European Union strategy for the beginning of the new millennium* (Council of the European Union 2000).

The *Treaty of Amsterdam* explicitly underlined the will of the member states to develop common actions for ‘preventing and combating crime, organised or otherwise, in particular ... corruption and fraud’ (art. K1). The latter was expected to take place through closer judicial and police cooperation and, where necessary, legal approximation of rules in criminal matters.

The same notion was reconfirmed in the *Vienna Action Plan* (European Council 1998), where the heads of state acknowledged the need to establish at least minimum common rules with regard to the punishment of crimes with a particularly serious cross-border dimension: corruption, fraud and money laundering, for example. The feeling was reinforced at the European Council meeting in Tampere (1999). The conclusions of the Council’s Presidency emphasised that ‘efforts to agree on common definitions, incriminations and sanctions should be focused in the first instance on a limited number of sectors of particular relevance, such as financial crime.’ (art. 48, European Council 1999) The mechanisms for doing so were spelled out by the *Millennium Strategy on the Prevention and Control of Organised Crime* (Council of the European Union 2000), which requested immediate ratification and implementation of the *PIF Convention*, the *CoE Criminal Law Convention on Corruption* and the *Convention on the fight against corruption involving officials of the European Communities or officials of Member States*

¹²² Action Plan of the Council and the Commission on How Best to Implement the Provisions of the Treaty of Amsterdam on an Area of Freedom, Security and Justice.

of the European Union. All member states which did not ratify the above conventions were required to report to the Council in writing every six months until the ratification entered into force (recommendation 27) giving their reasons for the delay.

All these loudly expressed commitments, however, seem to have been left on the negotiating table with no intention for real implementation. After a laborious period of ratification, the *PIF Convention* eventually entered into force (along with its first protocol) some 7 years after its initial adoption. It took 12 years before the second *PIF* protocol entered into force in 2009.

The delays encountered in the ratification and transposition process of the *PIF Convention* left EU money largely unprotected and this prompted the Commission to submit legal and policy proposals for the enhancement of the EU's criminal anti-fraud policy. Most notably these include: the proposal for a *Directive on the criminal-law protection of the Community's financial interests* (2001c) and the *Green Paper on the criminal law protection of the EU financial interests* (2001b).¹²³

Foreseeing the difficulties that implementing a common criminal law approach based only on PIF instruments would prompt,¹²⁴ in May 2001 the Commission published its first proposal for a *Directive of the European Parliament and of the Council on the criminal-law protection of the Community's financial interests*. By making it plain that the proportion of fraudulent irregularities is estimated to number approx. 20 per cent of the known cases and nearly 50 per cent of the corresponding amounts for 1999, the

¹²³ The Green Paper on criminal law protection of EU financial interests advocated the need for the establishment of a European Public Prosecutor endowed with responsibilities to prosecute fraud affecting the financial interests of the EU. The Green Paper largely linked the draft directive on criminal law protection to the establishment of a new supranational institution dealing with justice matters and home affairs, thus touching upon a sphere viewed as the holy grail of national sovereignty.

¹²⁴ By 2001, *PIF* Convention and its additional protocols were yet not ratified by all Member States and the situation looked largely similar to the ratification hurdles of the *EU Anticorruption convention*.

Commission called for the efficiency of the EU anti-fraud measures to be strengthened significantly. It backed its legislative proposal with the stipulation of art. 280 of the *EC Treaty*, requiring effective and equivalent measures for the protection of the Community's financial interests across the EU. The Commission argued that the poor ratification and enforcement of the PIF provisions would not guarantee such protection because

‘...The lack of a common definition in the substantive criminal law of the Member States of what constitutes unlawful conduct affecting Community financial interests makes prosecution of cross-border fraud and European-level cooperation very difficult, if not impossible. Differences between the Member States as regards criminal penalties, which do not always meet the Court of Justice criteria of being effective, proportionate and dissuasive, provide an opportunity for criminal activity targeting the European Community's assets... .This state of affairs is extremely detrimental not only to the protection of Community financial interests, but also, more generally, to the credibility of the institutions and the Member States as regards their commitment to curb this sort of crime. The need to re-assert this commitment vis-à-vis the citizens of the Union and the countries applying for accession calls for urgent solutions to get things moving again.’ (European Commission 2001c: 2)

Based on these arguments, the proposed draft *Directive* contained provisions for harmonising the criminal legislation of the member states in relation to acts of fraud, corruption and money laundering. It envisioned the mandatory criminalisation of these actions, proposing liability for corporations, criminal liability for heads of businesses, measures to confiscate the proceeds of crime, and an effective system for an exchange of information between the member states, the Commission and third parties. The draft *Directive* also established equal treatment for national and European officials committing crimes against the Community's financial interests.

The proposed draft *Directive* did not aim to establish totally new anti-fraud modalities, but instead hoped to ensure coherence in the measures already agreed by the member states. Thus, the definitions relating to fraud and corruption, along with those

describing the main measures for protecting EU financial interests, largely echoed those in the *PIF Convention*.

The main difference introduced by the draft text (apart from the increased scope of some provisions) was that it suggested a change in how the member states approached matters involving criminal law. Before the *Lisbon Treaty* criminal matters were regulated by intergovernmental method, allowing national governments to agree on measures that could not be controlled later by the Parliament or the EU courts. The key reason for such a preference was the view of some member states ‘that policing and criminal law issues are so central to their sovereignty that the supranational Community method should not be applied’ (Peers 2016: 4). The member states were thus more inclined towards the adoption of conventions which, being instruments of international law (rather than the EU *acquis*) do not have any enforcement mechanism so their implementation is not subject to central judicial review (from the European Court of Justice). The oversight of the implementation was entirely dependent on the member states’ desire – or lack of it. Given such an approach, which cannot guarantee an equal level of protection for EU money across all the member states, the Commission proposed the adoption of an EU directive aimed at guaranteeing the attainment of the treaty objectives, whilst allowing some flexibility for the member states. Like the international conventions, the EU directives provide some flexibility for transposing their stipulations into the national legal frameworks. Unlike the conventions, however, they are supplied with sanctioning mechanisms to use in cases of non-compliance so they do guarantee adherence to the common standard.

The draft Directive was welcomed by the European Court of Auditors, expressing the opinion that ‘a Directive is an appropriate instrument for instituting effective protection of the European Community's financial interests.’ (Court of Auditors 2002:1)

The response of the European Parliament to the Commission’s proposal to enact EU criminal legislation in the anti-fraud area was also largely positive (European Parliament 2001a). Recognising the need to adopt a harmonised EU criminal law framework and arguing that the scope of the proposed directive should be increased, the Parliament introduced 20 amendments to the Commission’s draft directive and included additional offences, such as market rigging, abuse of office and conspiracy. The Parliament made it clear that an EU directive as a legal instrument would be insufficient effectively to protect the EU’s financial interests, and that an EU regulation¹²⁵ would therefore need to be established. It went on to argue that the prolonged ratification of the *PIF Convention* clearly indicated that only a binding EU legal tool, which had supremacy over the national law, could guarantee full legal harmonisation and comprehensive protection for the EU’s financial interests. Considering the importance of ensuring accountability for the EU’s financial expenditure, the Parliament went on to support the proposal for the establishment of an EU Prosecutor’s Office,¹²⁶ entitled to prosecute the embezzlement of EU funds.

In response to the Parliament’s resolution, the Commission amended its proposal and submitted a new draft text to the Parliament and the European Commission in 2002. In its amended proposal the Commission rejected the majority of the Parliament’s

¹²⁵ As discussed in previous chapters, an EU regulation has binding legal powers and has supremacy over national law.

¹²⁶The initiative for the establishment of the European Prosecution Office dates from 2001. The negotiations are still ongoing. In November 2016 the initiative gained strong support from Germany and France, while Sweden, the Netherlands, Poland and Hungary still strongly oppose its creation.

amendments,¹²⁷ arguing that most of the proposals ‘have more political and legal relevance in some other context’ (European Commission 2002b: 2). The Commission noted that the Parliament’s proposal for the adoption of an EU regulation (instead of a directive) is not compliant with art. 280 (4) of the *EC Treaty*. This latter does not allow the EU to adopt binding measures relating to the application of national criminal law or the national administration of justice.

Notwithstanding the disagreement between the Commission and the Parliament on some of its regulatory features, the draft proposal for a criminal law directive was a huge leap forwards in the attempt to ensure criminal law protection for the EU’s financial interests. The Parliament’s push to adopt the ‘hardest’ law instrument that has direct effect and supremacy over the national legislation gave additional viability to the Commission proposal. Even without introducing remarkably new elements (comparing with the *PIF Convention*’s protocols), the adoption of the proposed EU directive as a substitute for the intergovernmental *PIF Convention* would have consolidated the member states’ criminal legal frameworks and would have ensured a uniform approach in their application.

Unsurprisingly, the push to change the intergovernmental mode of regulation did not enjoy the support of the Council. The Council’s Working party on substantive criminal law (comprising national experts) met twice in 2003 and advised COREPER not to go ahead with the adoption of the proposed directive (Council of European Union 2003). While the legal service of the Council confirmed the competences of the EU to adopt the draft directive to protect the EU’s financial interests, 14 national delegations rejected the idea, most of them expressing the view that such an adoption of criminal legislation would

¹²⁷ Out of 20 proposals, only 4 were fully accepted and 1 was partially accepted.

contradict the provisions of the EU treaties and should not be enacted. Several delegations also took the position that adoption of such an instrument was unnecessary, given that the *PIF Convention* had entered into force by 2002¹²⁸ (not so at the submission of the Commission's draft proposal). This sharply expressed national refusal 'killed' the draft directive, eventually forcing the Commission to withdraw it as obsolete in 2013.¹²⁹

6.2.2 Phase 2 (2012–2016): New attempt to adopt a Directive on the fight against fraud to the Union's financial interests by means of criminal law

The outburst of the world economic crisis and the entry into force of the *Lisbon Treaty* gave new impetus to the EU's harmonisation efforts in the anti-fraud criminal arena. Based on the lack of improvement in financial discipline in the execution of EU funds, the Commission issued its *Communication on the protection of the financial interests of the European Union by criminal law and by administrative investigations: an integrated policy to safeguard taxpayers' money* (European Commission 2011b). The communication noted that the protection of the EU's money would require an integrated anticorruption and anti-fraud approach, and exposed the failure of the EU member states to build a coherent, common anti-fraud framework, noting that:

‘Despite the progress made in the last 15 years, the level of protection for EU financial interests by criminal law still varies considerably across the Union. ... Despite the attempts to provide for minimum standards in this field, the situation has not changed noticeably: The Convention of 1995 on the protection of financial interests of the EU and related acts, which contains provisions on criminal sanctions, – albeit incomplete – was implemented fully by only 5 Member States.’ (European Commission 2011b: 3).

¹²⁸ At the time of the discussions, the *PIF Convention* had just entered into force, while its second protocol on cooperation and coordination of the member states' efforts was not yet not in force.

¹²⁹ Following the lack of any action/position on behalf of the Council in 2013 the Commission withdrew its proposal as obsolete (*Official Journal of the European Union*, Vol. 56, 16 April 2013).

In 2012 this communication was followed by a new proposal for a *Directive on the fight against fraud to the Union's financial interests by means of criminal law* (European Commission 2012b). The Commission underlined that the protection of the EU's financial interests depends not only on deterring fraud but also fraud-related activities such as corruption, money-laundering and the obstruction of public procurement procedures. The newly proposed *Directive* aimed to unify the legal patchwork of diverging regulations, closing the gaps that allowed for approximately € 600 million of suspected fraud to be siphoned out of taxpayers' pockets on an annual basis (European Commission 2012b). The *Directive* also intended to stop the 'jurisdiction shopping'¹³⁰ born from the fact that fraud-related sanctions varied from one member state to another – from 6 months to 12 years. The Commission based its proposal on the stipulations of art. 325 (4) of the *TFEU*, which enabled the Parliament and the Council to 'adopt the necessary measures in the fields of the prevention of and fight against fraud affecting the financial interests of the Union with a view to affording effective and equivalent protection in the Member States and in all the Union's institutions, bodies, offices and agencies'. As opposed to the previous *EC Treaty* provisions (art. 280(4)) which explicitly excluded from the EU competences the opportunity to adopt measures that may concern the application of the criminal law or the national administration of justice, the provisions of the *TFEU* (325(4)) did not contain such a restriction, opening the road for the adoption of a criminal anti-fraud directive.

The Commission's renewed attempt to introduce an EU law instrument was welcomed by the Parliament. As it had with the previous draft directive, the Parliament

¹³⁰ Gaps and inconsistencies in the national legal framework of the member states can provide incentives for the perpetrators to move to jurisdiction where the chances of being caught, investigated and prosecuted is less likely and/or the criminal law system is weak (GHK 2012).

increased the scope of the directive's applications by introducing a number of amendments in its legislative resolution (European Parliament 2014a). The resolution was emphatic that VAT (value added tax) investigations should be included in the scope of the *Directive* because the tax evasion of VAT potentially causes a reduction in Union budget.¹³¹ The Parliament also underlined that corruption is a peril that poses a significant threat to EU financial interests and may in many cases be linked to fraudulent activities.

Unlike the first harmonisation attempt in 2002, on this occasion the Council opened the door for discussion. It noted that 'in the context of budgetary austerity and financial crisis, the fight against misuse of EU public money (including both expenditure and revenues) is a priority for the Union.' (Council of the European Union 2012: 1) The Council recognised that 'to overcome certain loopholes and shortcomings of the legislation in place at national and at EU level ... the need for common criminal law rules against fraud to ensure that acts of fraud and illegal activities at the expense of the Union's financial interests are prosecuted evenly across the Union could be advocated' (Council of the European Union 2012: 3). Yet, despite the general agreement regarding the draft Directive's objectives, the vast majority of member states¹³² disagreed with the legal basis chosen by the Commission, and suggested that Article 83(2) *TFEU* would be more appropriate. The main differences between the legal basis proposed by the Commission and the one supported by the member states and the Council's legal service relates to the

¹³¹Each national authority determines the level of its national value added tax. The national rules are, however, guided by a number of EU VAT directives. A standard percentage is levied on the harmonised VAT base rate of each EU country. This percentage is among the EU sources of budget revenues.

¹³² The public transcripts of the conclusions of the Working Party's meetings and COREPER do not contain a list of countries that opposed or supported the proposals made by the Commission.

scope of the directive's offences and sanctions. Using art. 83 (2) *TFEU*,¹³³ as suggested by the member states and the Council's legal service, would mean that instead of establishing fully fledged harmonisation of the criminal offences and sanctions (art. 325 (4) *TFEU*), the Council proposed the adoption of minimal rules for the definition of criminal offences and sanctions. The latter allows the national legal systems to remain flexible in their decision regarding the definition of offences and precise sanctions.

Following a number of meetings of the Working Party on Substantive Criminal Law, the national experts had not reached an agreement on how to proceed with the proposed directive and sent their opinion to COREPER for further deliberation. Major points of disagreement referred to: the inclusion of VAT fraud in the scope of the directive (rejected by the great majority of the delegations); the definition of fraud (some member states requested a narrowing of the definition); criminal penalties and prescription periods; and the legal basis of the proposal (Council of the European Union 2013a). During the COREPER debates the national representatives reiterated the concerns of the Working party and sent the file for voting at the Justice and Home affairs Council. Consensus was reached by the Council at ministerial level on a text that would serve as a starting point of discussion with the Parliament. While agreeing to the general premise of the text, a number of member states noted their reservations about certain issues, flagged as problematic by the Working party and COREPER (Council of the European Union 2013b).

¹³³Article 83(2) prescribes that: 'If the approximation of criminal laws and regulations of the Member States proves essential to ensure the effective implementation of a Union policy in an area which has been subject to harmonisation measures, directives may establish minimum rules with regard to the definition of criminal offences and sanctions in the area concerned. Such directives shall be adopted by the same ordinary or special legislative procedure as was followed for the adoption of the harmonisation measures in question, without prejudice to Article 76.'

Common agreement was reached on most of the subjects after a number of trilogues,¹³⁴ with the extension of the scope of the EU directive to include VAT fraud being the most prominent subject of disagreement. The Commission and the Parliament backed up their position with the fact that losses due to fraud affecting VAT equalled the annual contribution from VAT to the EU's budget (around €18 billion in 2014), meaning that it therefore had to be included in the scope of the EU's criminal law directive. Yet, many member states opposed such an inclusion.¹³⁵ While there are no transcripts publicly available explaining this opposition, a note of written evidence from the report issued by the House of Lords' European Union Committee (House of Lords 2013) provides a hint of the reasoning behind the resistance of those national governments. The House of Lords report contains a quotation from the Secretary of the Exchequer, expressing the view that

‘Government were nervous about this proposal because they fear that it ‘has the capacity to expand the EU’s competence in the sphere of tax.’ In particular, he voiced the Government’s concern that the proposed Directive could encroach on the Member States’ responsibilities to control and operate the VAT system which in his view must remain the responsibility of the individual Member States. The Exchequer Secretary argued that the draft ‘has the potential to expand the EU’s role and competence into this type of fraud work’ and that the UK was not alone in having this concern. He concluded that ‘[I]t has been the long-standing position of this country that we want to defend our sovereignty in this area’ and he did not think that this problem would be easily overcome.’ (House of Lords 2013: 20).

The debate around the inclusion of VAT fraud in the draft directive continued, despite the worrisome statistics about the process of fraud detection (or rather its lack) in the member states. A report from the European Commission (2014a) provided an estimate

¹³⁴Meeting between the Commission, Parliament and the Council.

¹³⁵See the synopsis of the Informal JHA Council of the Ministers of Justice held on 17 July 2015 in Luxembourg. at: <http://www.eu2015lu.eu/en/actualites/articles-actualite/2015/07/info-jai-justice/index.html>. Source last retrieved on 15.06.2016

that it takes on average 2 years and 9 months to detect a fraudulent act and another 15 months before the Commission is notified about the fraudulent activity.¹³⁶ One can easily imagine that a time lapse of four years would severely hamper the ability of any law-enforcement body effectively to investigate and prosecute such crimes in a labyrinth of 28 different criminal legal systems and law enforcement modus operandi. As with the 2001 proposal for *Directive on the criminal-law protection of the Community's financial interests*, which was doomed to obliteration by the reluctance of the member states to extend EU competences in some criminal matters, the renewed proposal for adoption of a unified criminal approach against the mismanagement of EU funds has been overshadowed by the discussions on VAT regulations.

Following a trilogue meeting on 2 June 2015, the negotiation on the adoption of the draft *Directive on the fight against fraud to the Union's financial interests by means of criminal law* was stalled, because the Parliament did not agree on the exclusion of VAT-related fraud from the scope of the directive (Council of the European Union 2016a). In late 2016 the reluctance of the member states to relinquish control over fraud investigation in areas that they considered important for their national interests was finally overcome, following the publication of a judgement¹³⁷ made by the European Court of Justice (ECJ). The ruling explicitly underlined that VAT fraud is included in the PIF definition of fraud and therefore VAT offences constitute cases of serious fraud affecting the financial interests of the European Union. The Court reminded the member states of their specific obligations to adopt effective antifraud preventive measures and concluded that even

¹³⁶ The average is influenced by the huge time lag in the agricultural sector (20 months), whereas the timelag in structural actions is much shorter (about 8 months).

¹³⁷ Case C-105/14 (Taricco).

though the member states are free to choose between administrative and criminal penalties, the latter may be needed for effectively combatting serious fraud cases. This ruling supported the negotiating position of the Parliament and the Commission and served as a strong legal reminder on the obligations of the member states to effectively sanction serious fraud. The ECJ judgement prompted the majority of the member states to agree to the inclusion of cases of serious cross-border VAT fraud in the proposed anti-fraud directive. This position change allowed for the Council and the Parliament to reach preliminary agreement on the common draft text at the end of November 2016. The text is subject to approval by both institutions.

By describing the attempts of the European Commission and European Parliament to introduce a common criminal law protection for crimes committed against EU financial interests, this section presented the prolonged struggle of the two institutions for ensuring accountability in the ways EU money is spent. The section analysed 21 years of inter-institutional debates and described the explicit reluctance of the member states to conclude legally binding agreements in the criminal anti-fraud arena, even when such agreements were aimed at ensuring a common investigative approach and a common prosecution of fraudulent activities against EU money.

6.3 Twenty years of loose protection: results and reasons

This section deliberates on the reasons behind the (so far) unsuccessful attempts to harmonise the EU criminal approach in the anti-fraud area. It seeks to identify the motivations of the different EU institutional actors for supporting or hurdling the adoption of EU anti-fraud directive.

6.3.1 *How effective is the existing intergovernmental regulatory approach?*

Despite the critical importance of the fight against fraud affecting EU financial interests, the establishment of effective policy against mismanagement of EU taxpayers' money took a long while (Szarek-Mason 2010). The lack of a robust common legal approach towards the protection of EU financial interests resulted in a situation, where the EU anti-fraud system was operating in a fragmented network of national legal frameworks; and in which EU financial fraud is investigated and prosecuted under 28 different legal systems, law enforcement methods and coordination practices (Quirke 2010). And while the application of such an approach would have been perfectly justified if it had operated successfully, its inefficiency has been subject to analysis in a number of empirical and theoretical evaluations.

Among the first warning signs that the intergovernmental approach, adopted with the conclusion of the PIF Convention, was not yielding the expected results was the Commission's evaluation of the implementation of the *PIF Convention* in 2004. The report revealed that 'none of the Member States under scrutiny appears to have taken all the measures needed to comply fully with the PIF instruments. Gaps and loopholes in the law which allow offences to go unpunished remain possible.' (European Commission 2004: 7) Four years later, the Commission conducted another similar evaluation and revealed that only 5 of the member states which had ratified the *PIF Convention* and its protocols had managed to action all the necessary measures to ensure compliance. This fact indicated that

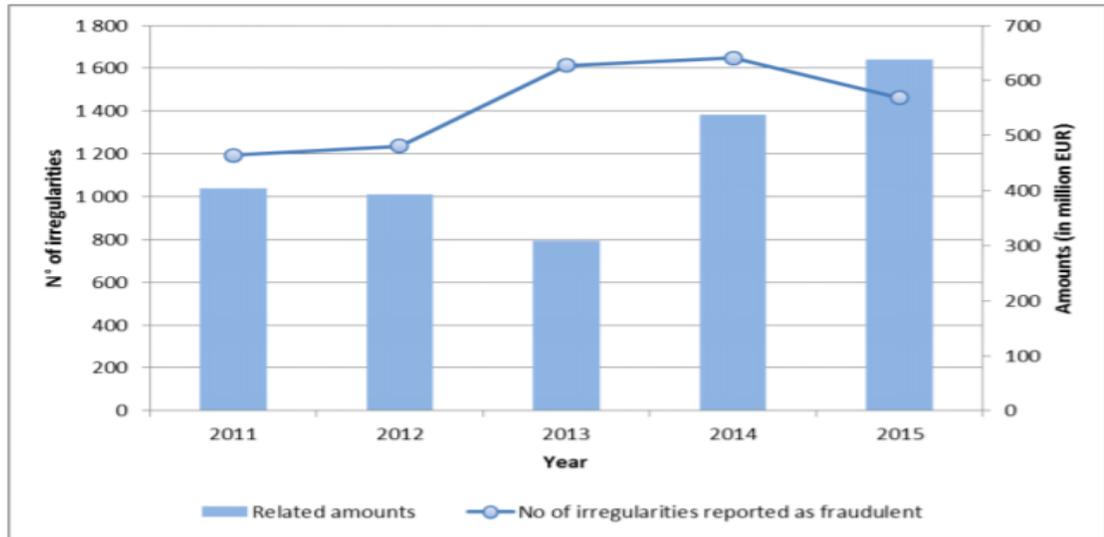
'de facto the current system of protection, based on conventions, creates a multi-speed situation. ... Formally, this situation does not produce the desired effective and dissuasive penal protection. ... The PIF instruments based on the Maastricht Treaty are not an adequate response to the specific need for criminal-law

protection of the European Commission's financial interests' (European Commission 2008c: 4).

These findings were confirmed four years later, by an external assessment of the criminal law protection of EU financial interests. This evaluation looked at the existing legal safeguards against irregularities, fraud, embezzlement, corruption, favouritism and money laundering (GHK 2012). The GHK evaluation asserted that despite the ratification of the *PIF Convention*, significant loopholes still remained in the national legal frameworks of the member states. These mostly referred to: 1) a lack of harmonised definitions of the offences related to the EU's financial interests; 2) the non-criminalisation of offences such as favouritism and obstruction of public-tender procedures; 3) an inconsistency in the provisions defining the responsibility and liability of legal persons and heads of business; 4) divergences in the applicability of criminal law and procedures in the different member states; 5) and an inconsistency of criminal sanctions and penalties. To illustrate the latter, the report revealed that while the maximum punishment for embezzlement in Austria and Malta is 10 and 6 years respectively, in Lithuania the perpetrator will get a maximum of 2 years and in Finland up to one year and six months. As well as discrepancies in the severity of sanctions, deviations in the scope of criminal activities can be also found. The study warned that such an approach actively created opportunities, enabling the perpetrators to choose the most favourable jurisdiction to avoid detection, prosecution and punishment for certain activities, or at least to minimise sanctions as far as possible. The scope of these opportunities is further increased by the cross-border nature of the fraudulent activities and the fact that the 'existing mechanisms for the obtaining and transmitting evidence between jurisdictions with different legal cultures and languages are inadequate.' (Williams 2013: 229). Based on the outlined

deficiencies, the study concluded that without further EU intervention, no major improvements in the current situation might be expected. Quirke (2009) shared the same findings, noting that by retaining the status quo the degree of legal fragmentation and the fragmentation of investigation and monitoring functions would continue to hamper the effectiveness of the available strategies to prevent and counteract fraud committed against EU money. Such effects were also predicted by Paterson (1997: 578), who estimated that the considerable levels of fraud against EU money would remain one of the biggest failures of the EU governance system until ‘the national systems, controls and norms remain beyond reproach, even when they are fundamentally corrupt or wasteful, or make fraud in the use of EU funds inevitable’. Along the same lines, Pujas (2003) states emphatically that the effective fight against fraud and corruption requires closer cooperation and equal standards applicable to all national administrations. All these arguments were also supported by the Commission report of 2016, which outlined the inefficiency of the existing system in relation to the protection of EU financial interests. While the five-year statistical analysis registered a decrease in the overall number of reported fraudulent irregularities (see figure 6.1), it also showed that the amounts involved were steadily increasing (European Commission 2016a).

Figure 6.1 Irregularities reported as fraudulent and the related amounts (2011–2015)



Source: Protection of the European Union’s financial interests. Fight against fraud 2015 Annual Report, European Commission (2016a:21)

These figures in graphic detail once again illustrate the lack of adequate mechanisms of criminal law protection to deter fraud against EU money.

6.3.2 What are the motivations for having a loose regulatory framework?

The systematic attempts over 2 decades to conclude a binding commitment to protect EU financial interests vividly showed that the development of the criminal legal framework in the anti-fraud domain is an endeavour heavily influenced by politics (Abbott and Snidal 2000). It is rather ‘an artefact of political dynamics than the actual nature of the problems which need to be addressed’ (Pujas 2003: 780). The latter makes any investigation of the particular reasons behind the delay in the adoption of an efficient anti-fraud framework particularly difficult.

Yet, some factors can be reasonably suggested. Among the most easily evident is the highly sensitive nature of the anti-fraud arena and its close link to national sovereignty (Ruimschotel 1994, Tupman 1997, Paterson 1997). Then there is the divergence of interests between the EU supranational institutions and the member states. Along these lines, Peterson (1997) argues that, while the EU institutions have an interest in safeguarding EU money, they lack the competences to do so, while the member states have the powers and competences but are demotivated by the lack of a strong incentive. There reasons for the latter have many facets:

The fact that they manage approx. 80 per cent of the EU's funds puts an enormous amount of onus on Member States to expend the same amount of effort on countering fraud against the Union's financial interests as they would against their own financial interests' (Quirke 2009: 523). Such expectation is very problematic, not only because the investigation of EU fraud requires the allocation of substantial national, human and financial resources, but if this is efficient, it may bring more damage than benefit for the country in question. In financial terms, detecting fraud is not highly desirable, as the more fraud is discovered by national authorities, the less money will be allocated to the national beneficiaries, and the more money should be returned to the EU (Paterson 1997, Ruimschotel 1994). The devotion of more national resources to investigating fraud involving EU money will paradoxically lead to less EU money being received from the EU budget (Laffan and Lindner 2015). This paradox inhibits the member states to allocate significant national resources to the investigation of fraud against EU money, which will ultimately harm the financial flows coming from Brussels. Moreover, in many cases the EU money is not seen by the member states as theirs, and therefore they don't see an

urgent need vigorously to detect, prevent and prosecute EU-level fraud (Quirke 2009; Williams 2013). Tupman (1997: 152) contributes to this argument, noting that, despite the fact that fraud against EU money is one of the many cross-border crimes, it is the one that needs a supranational response most urgently, ‘as the Member states are not likely to spare their own scarce resources to investigate ‘crime against ‘a foreigner’ as the Commission or Brussels is perceived’. In the same line of thought, Quirke (2009) suggests that the member states might consider EU fraud as the ‘price’ for the EU membership, calculating that its costs outweigh the economic and political benefits from the latter. Given that ‘EU money is not seen as “our money”, there appears to be an unwillingness to take the necessary initiatives to deal specifically with fraud involving EU funds’ (Quirke 2009:533).

The reluctance of the member states efficiently to detect and investigate fraud against EU money has, however, not only got economic but also political context. Once corruption and fraud is discovered and reported, the country that worked hard to deter EU fraud can easily be labelled as corrupt. The latter harms the country’s image and has a significant impact on the national political arena. Given these externalities, the motivation to detect fraudulent activities is extremely low, a fact that signals that the level of fraud currently reported is just the tip of the iceberg and, in general, fraud will continue to be under-reported (Williams 2013). Williams (2013) explains the latter with a wide mixture of reasons ranging from ‘simple inertia, to a need to maintain business confidence, to a fear of fraudsters and their political allies in Member State administrations (particularly when organised crime is involved), to the feeling that reporting fraud to the authorities is not worth taking the candle to, to the idea that national taxpayers will have only contributed a

proportion of the EU funds defrauded, to the presence of widespread corruption' (Williams 2013: 228).

The clear lack of reporting stimulus when it comes to the member states is sharply contrasted by the EU supranational institutions' interest in reinforcing the EU anti-fraud regulations. The interests of EU supranational institutions derive from their preferences for more European integration (Kelemen and Tarrant 2011) and their efforts to underpin their legitimacy as protectors of the common interests of European citizens. In the case of the EU anti-fraud directive, the campaign for enforcing better fraud and corruption prevention policies has helped the Parliament to reinforce its control competences and build itself the image of 'the guardian of good governance in the European institutions, on behalf of a European public already sensitive of problems of domestic corruption' (Pujas 2003: 778).

For the European Commission, the adoption of a criminal law directive means an expansion of functions and increased European integration. Given that the Commission is ultimately seen as accountable for the ways that EU money is spent, a fact that is hardly backed by many instruments to do so, the adoption of a robust anti-fraud criminal framework has the potential also to increase the Commission's credibility, as the Commission would finally be equipped with tools for monitoring and sanctioning non-compliance.

These conflicting interests create 'tensions between the Commission, whose strategy aims at strengthening supranational institutions, and member states, who want to reinforce intergovernmentalism under the third pillar – the real stake in anti-fraud fighting' (Pujas 2003: 780). In this institutional strain, 'the problem of fraud against the Community

[has become] primarily not a problem of economics, but of political confidence.’ (Tupman 1997: 155).

These issues of intergovernmental control and political confidence are additionally entangled by the fact that the establishment of a common criminal law directive touches upon issues that have long been considered to be strictly reserved for the intervention of the member states. One of them is the sovereignty of the national criminal justice framework. Criminal law builds the framework of the state’s right to impose sanctions, determine penalties and restrict individual human rights. As such, it marks a special relationship between the nation state and its citizens, forming a close link with national sovereignty (Seibert 2008). The same applies to the right of prosecution, which is an indispensable part of the whole criminal justice system. Deriving from this perspective, the ‘continuing diversity in the definition and constituting elements of the offence of EU fraud at the national level cannot be seen separately from the unfortunately continued fragmentation that plagues the whole system and structure of EU criminal law.’ (Xanthaki 2010: 134)

Like all the other anticorruption issues embedded in the justice and home affairs portfolio, the problem of preventing EU fraud bounces back to the sanctity of national sovereignty. This problem is closely related to the EU’s regulatory choice, institutional systems and accountability settings, which are often dominated by political/economic consideration rather than the concerns of good governance. Despite its role as guardian of the treaties, ultimately responsible for the implementation of the EU budget, the Commission has hardly any practical means to control or judge the actual implementation of the commitments of the member states to protect the EU’s financial interests as

vigorously as they protect their own national resources (art. 352 *TFEU*). This has led to an ‘intractability of EU fraud [stemming], above all, from the way in which Member states have pooled sovereignty, or the supreme power to make laws, at the level of the Union, without pooling accountability or effective power to control public authorities, at the same level’ (Peterson 1997: 561).

The notions expressed by Paterson (1997), Pujas (2003), Quirke (2009), Tupman (1997), Williams (2013) and Xanthaki (2010) support Abbott and Snidal's theory (2000) that the legislative process represents a complex economic and political composite that reflects the expectations of the actors involved. When high interests are at stake and the Commission and the Parliament fear opportunistic behaviour, combined with a low probability for detecting non-compliance, they will be prompted to push for the conclusion of commonly agreed enforceable legal standards, whereas the Council will be reluctant to do so, because the latter may bring uncertainties (as to the effects of the adopted framework) and lead to certain costs to sovereignty. In this struggle ‘actors combine and invoke varying degrees of obligation, precision, and delegation to create subtle blends of politics and law’ (Abbott et al. 2002: 419) that reflect the political bargaining powers and preferences. The institutional dynamics that were exhibited once again corroborated the applicability of the theories of Costello and Thomson (2013:) and Helstroffer and Obidzinski (2014) in the anticorruption domain. Looking at the criminal law protection of EU financial interests, the Council used its bargaining powers and expressed its preferences for loosely regulated intergovernmental arrangements. The case study showed, that like the case with the inter-institutional agreement on the operational framework of the EU's decentralised agencies (discussed in chapter 5), the need to impose better accountability and openness (good

governance in general) has been overhauled by national, political and economic considerations, which took precedence over the overall need for the protection of the EU's common good. Unlike the case of the DAs, in the criminal antifraud area, the European supranational institutions finally managed to convince the Council to commit to concluding a legally binding agreement. A crucial role for the change of the Council's preferences was the ECJ judgement, which 'unlocked' the stalled negotiations. The credibility and values attributed to the Court pushed the process forward. Such a development suggests that values can influence preferences, thus echoing the theory of Abbott and Snidal (2002) that, in the anticorruption field, interests and values amalgamate to shape the policy stances in the process of legalisation. While, such a development can be considered a policy success, the fact that the adopted directive embeds standards that are far lower than those proposed by the Commission and preferred by the Parliament, confirms the behaviour model of Helstroffer and Obidzinski (2014) and ultimately indicates that while values can make a difference, interests prevailed in shaping the legal framework. The adoption of the criminal antifraud directive also exhibited that without strong and continuously demonstrated political will, an anticorruption framework can hardly be established. As with the cases examined in the previous chapter, the Commission and the Parliament demonstrated their capacity to become reform agents, asserting their political will for change, by initiating, continuously promoting and pushing for a stronger anti-fraud policy, bound with enforceable sanctioning mechanisms (Brinkerhoff 2000). The Council, on the other side, failed to demonstrate such an anticorruption commitment. These findings refuted hypothesis 2 and proved hypothesis 1 correct.

6.4 Concluding remarks: it is not about anti-fraud, it is about interests

Fraud against the EU financial interest brings significant political and economic risks for the European Union and its member states. It casts doubts over the credibility of EU institutions and national governments to manage public money; questions the fairness of its distribution; and distorts the proper functioning of the common market. Given the gravity of these ramifications, the present chapter investigated the process for establishing an EU criminal law anti-fraud protection system. This latter has a major impact on the overall efficiency of EU fraud and corruption investigations, as it can close up the discrepancies between the existing 28 different legal systems and provide an equal level of protection for EU money, and prevent the creation of ‘safe havens’ for organised criminality.

Keeping in mind that anti-fraud policy forms an indispensable part of the overall anticorruption framework, the EU regulatory approach towards the prevention of fraud can provide valuable pointers for understanding the reasons for the non-existence of robust EU anticorruption regulations.

Starting with the adoption of the *PIF Convention* in 1995, the chapter traced the stances of the Commission, the Parliament and the Council on the subject matter. It followed the EU failure to regulate anti-fraud activities by enacting an international legal tool that has no binding powers for the member states. The chapter deliberated on the dedicated attempts of the Commission and the Parliament to establish a robust EU criminal law regulatory framework and then deliberated on the continuous rebuff of the Council. For all the three institutions, the presented case study outlined an institutional behaviour that is similar to that exhibited in the case and conclusion of the inter-institutional agreement on the European decentralised agencies (discussed in the previous chapter). In

both instances, despite some disagreements, the Commission and the Parliament were pushing for the establishment of a common regulatory framework, aimed at ensuring more transparency and accountability in the EU decision-making and spending processes. The Council exhibited its continuous preference for looser, intergovernmental control, which seemed to be valued more than the implementation of the principles of good governance (and anticorruption) in the EU governance arrangements. Regardless of the reasoning behind Council's strong legislative resistance, this contradicted one of the most fundamental obligations of the EU institutions and member states: the obligation to be accountable for the finances (Bovens 2010, 2007, Behn 2001). The failure properly to safeguard EU public money and prevent fraud effectively exposed the former to high corruption risks and potential losses in terms of both resources and credibility.

Similar to the findings of chapter 5, this chapter demonstrated that the regulatory choices of the member states to be highly influenced by a complex set of economic and political considerations (Abbott and Snidal 2000) which have little to do with the issue at stake. The chapter showed that these considerations may take priority over the common interests of European citizens and may expose the EU main governance system to a variety of economic and legitimacy risks. It also demonstrated that when the status quo is to be changed and this does not coincide with the interest of the Council, the latter will either block or lower the standards to bring them closer to the existing framework, as predicted by Costello and Thomson (2013:) and Helstroffer and Obidzinski (2014).

The findings of the chapter suggest that the non-existence of a common European anticorruption legal framework is not likely to derive from the lack of EU supra-institutional leadership. While the Parliament and the Commission may objectively

'benefit' from the enactment of EU legislation in the EU anti-fraud arena (as their competences will potentially increase), the reluctance of the member states to harmonise their criminal legal systems under the *PIF Convention* and ensure adequate protection of the EU's financial interests was the main reason for the requested change. Had the member states implemented the commitments arising from the *PIF Convention*, the need for additional harmonisation of their criminal legal systems would hardly have existed. The same argument applies absolutely in the need to establish a common anticorruption legal framework and in the member states' adoption and implementation of *UNCAC* and the *CoE Criminal and Civil Law conventions on corruption* (discussed in chapter 3).

Similarly, to the cases described in the previous chapters, the member states demonstrated their general reluctance to conclude legally binding commitments even if such are needed to fight -border crimes and protect the EU taxpayer's money. The inter-institutional struggle over the legal basis of the proposed directive (harmonisation of offence definitions and sanctions (art. 325(4) *TFEU*) as opposed to minimal standards article 83(2) *TFEU*) asserted the theory of Abbott and Snidal (2002: S144), that in the case of anticorruption values and interests have not only motivational effect, but also an impact over the type of legal framework and the strategies chosen by the political actors to achieve their objectives (Abbott and Snidal 2002). The Council's regulatory choices and attempts to decrease the scope of the proposed anti-fraud directive clearly indicated that the Council is the institution that will not welcome the adoption of a mandatory EU anticorruption framework and supranational monitoring mechanisms. The latter supports hypothesis 1, that the lack of an EU anticorruption regulatory approach is rooted in the overall preferences of the member states to conclude non-binding legal commitments. The

findings of chapters 5 and 6 therefore suggest that the answer to the research question about why the EU has not been equipped with a robust anticorruption framework is linked to the institutional resistance of the Council. Once again, the chapter demonstrated that the EU supranational institutions manifested strong political will for pushing the anticorruption reform agenda by initiating the adoption of an efficient and enforceable EU common legal instrument for combating fraud against the financial interests of the Union, gathering support and pushing forward against the blocking power of the Council. These elements, as discussed in chapter 2, form the framework within which the presence/absence of political will can be assessed (Brinkerhoff 2000). Given that the existence of political will is the key precondition for establishing and upholding coherent anticorruption policy interventions (Klitgaard 1998, Brinkerhoff 2000), the chapter refuted hypothesis 2, suggesting that the lack of robust EU anticorruption approach is not an outcome of the lack of institutional leadership of the EU supranational institutions. The chapter explicitly attested that the Council has proven to be the institutional inhibitor which opposes the introduction of stronger transparency and accountability mechanisms in the EU governance arrangements (hypothesis 1). The next chapter tests these findings by exploring the prolonged struggle to introduce obligatory standards for the activities of interest representatives in the European Union.

7. Lobbying Regulations – Time for Change?

Lobbying,¹³⁸ as a form of public participatory practice, is deeply embedded in the constitutional and human rights framework of every democratic state (Chari, Murphy and Hogan 2007). Along with the right to petition, public consultation, interest representation and social partnership, lobbying represents a characteristic democratic tool through which to involve the citizen in the decision-making process (Organisation for Economic Cooperation and Development 2009). By facilitating the sharing of knowledge and an exchange of information among decision-makers and stakeholders, lobbying creates an arena for public dialogue where the voice of all interested parties can be heard. At the level of the EU, such dialogue comprises a win-win collective enterprise, in which the institutions trade influence in exchange for information, citizen support and economic power (Klüver 2013).

In its essence, lobbying represents a typical process through which policy outcomes can be informally influenced (Panke 2012). These characteristics make it a particularly sensitive activity, because, if abused, lobbying can easily ‘link up’ with corruption practices and has the power significantly to harm the institutional integrity and legitimacy of public governance. This link and its subsequent ramifications was brought to public attention by a number of high-profile scandals which revealed the close liaison between lobbying malpractices, bribery, abuse of office/power and conflicts of interest. The cases

¹³⁸ Given the negative connotation that the term lobbying gained in some countries, European institutions substituted the term ‘lobbying’ with the more neutral term ‘work of interest representatives’ in order to avoid negative value judgments (European Parliament 2003b). This chapter uses the terms “lobbying” and “work of interest group representatives” as synonymous (similarly, lobbyists and interest representatives), applying them to all organisations and individuals representing both public and private interests and carrying out activities defined as lobbying by the Commission’s *Green Paper on European Transparency Initiative*.

of Jack Abramoff¹³⁹ and the FIFA corruption scandals¹⁴⁰ (to name but two), prompted extensive debates on role of the lobbyists, their actual contribution to the public policy processes, and the safeguards that are needed to protect the public good against the infiltration of private interests. These scandals also highlighted that lobbying, notwithstanding its positive effects, can, if misused, distort fair competition, erode the foundations of the political system, and lead the taxpayers to lose significant amounts of money. What is more, unethical lobbying practices can in extreme cases ultimately lead to state capture: powerful elites, intertwined in both business and politics, take over the control over the public decision-making and gear it in a way that benefits their own economic interests.

Unethical lobbying and corrupt practices essentially share similar objectives: to influence a public official and/or policy process in such a way that benefits not the public but rather some private interests. This close link, along with its possible ramifications in the overall governance process, makes lobbying a particularly interesting topic for exploration.

EU policy making has a huge impact on the lives of more than 500 million EU citizens. This chapter, then, seeks to identify the institutional mechanisms that have been established to safeguard the integrity of the EU policy-making. The chapter focuses on the EU's policy towards interest representatives and the ways that their interactions with the

¹³⁹Jack Abramoff was considered among the most influential lobbyists in the USA until 2006 when he was convicted guilty for fraud, tax evasion and conspiracy to bribe public officials. He was sentenced to five years and ten months in prison and ordered to pay restitution of more than \$21 million. The federal investigations into his business dealings involved more than 120 FBI agents, thus making it one of the most extensive lobbying scandals in American political history. (<http://www.cbsnews.com/news/jack-abramoff-the-lobbyists-playbook-30-05-2012/>). The source was retrieved on 1 September 2016.

¹⁴⁰In 2015, the chairperson and other high profile FIFA members were accused of taking bribes for favouring certain countries in the football championship bidding process. More information available at BBC website at: <http://www.bbc.com/sport/football/33044932>. Source last retrieved on 17 September 2016.

EU's policy makers are regulated. In so doing, the chapter investigates how the general obligation of the EU institutions to give an account of the ways the EU policies are created, is implemented in practice. (Behn 2001, Bovens 2007, 2010). This obligation is a key element underpinning the democratic legitimacy of the institutions of the EU (Héritier 2003) and forms the foundations of good governance practices, free from corruption.

The chapter recognises that safeguarding the integrity of the legislative/policy process is a complex endeavour requiring the establishment of certain rules and restrictions on both sides: the one trying to influence the policy/legislative process and the other, which has the capacity to change the policy/legislative outcome. The standards that control the behaviour of the policy/legislative makers are already described extensively in the UN and CoE anticorruption legal instruments, so this present chapter will focus on investigating the rules that govern the behaviour of the external actors who strive to steer public decision-making.

By researching the policy stances of the Parliament, the Commission and the Council, the chapter deliberates on the application of the principles of accountability and transparency in the overall EU decision-making process and offers suggestions about which institutions are the more likely to inhibit or enable the adoption of a robust anticorruption framework in EU. In contrast to earlier chapters, however, this chapter focuses not on a policy/legal process that aims to establish general obligations for the member states but pinpoints instead mechanisms of accountability and transparency that are aimed at creating binding commitments for the EU institutions. Such an approach allows the thesis to reveal whether the member states are *generally* reluctant to enhance the current transparency and accountability standards per se, or whether it is only when these

standards create obligations for the national administrations that they are not eager to do so. The insights of such findings will contribute to assessing the political will of the main EU institutional players as described by Brinkerhoff (2000) and to answering the research question on why EU has not adopted a robust anticorruption framework. By examining the policy stances of the three institutions on adopting a regulatory framework for interest representatives, the thesis also tests the applicability of the legalisation theories of Abbot and Snidal (2000; 2002) and Kahler (2000) and the notions of Costello and Thomson (2013) and Helstroffer and Obidzinski (2014) on political bargaining powers and institutional policy dynamics in the anticorruption field.

Considering the above, the chapter analyses the policy stances of the Parliament, Commission and the Council on the introduction of a joint framework for the work of interest representatives at EU level. It reveals that the Council, unlike in the previous case studies, where it was actively resisting the proposals of the Commission, adopts the role of silent observer, rather than an interested stakeholder, when it comes to lobbying. The chapter further examines the positions of the Parliament and the Commission (which will be affected by the new framework), and argues that, in a similar way to the cases discussed in chapters 5 and 6, these two EU institutions took a proactive stance, promoting the principles of EU good governance.

The remainder of the chapter evolves as follows. The next section looks closely at the concept of lobbying and explains why lobbying activities should be regulated. Then there is a section that focuses on the existing lobbying frameworks; it presents their strengths and weaknesses and gives an overview of the existing regulatory approaches in the member states. The third section analyses the development of the EU's regulatory

policies and examines the attitudes of the Parliament, the Commission and the Council towards the creation of a mandatory register for interest representatives. The fourth section looks at the reasons behind the different institutional approaches towards the establishment of a mandatory registration regime for lobbyists. And the final section 5 summarises the chapter's findings and links them to those discussed in the previous chapters.

7.1. What is lobbying and why it is important to regulate it?

This section deliberates on the concept of lobbying and its role in the EU's decision-making process. It discusses the benefits that lobbying can bring to the EU's policy making and argues that, if not properly regulated, lobbying abuses may facilitate corruption and may result in the infiltration of vested private interests in the creation of public policy.

7.1.1 What constitutes lobbying?

Lobbying can be broadly defined as an 'informal pathway to influence policies in arenas or bodies in which lobbyists themselves have no formal decision-taking competencies' (Panke 2012: 130). It can take any form of direct or indirect communication with policy makers and can be carried out by individuals, interest groups, corporate representatives and even entire countries. By influencing policy creation through the supply of information and expertise (Coen and Katsaitis 2015), lobbying bridges the information gap between citizens and policy makers, enabling the latter to adopt well-informed decisions, 'as openly as possible and as closely as possible to the citizen' (art. 1 *TEU*). In so doing, lobbying also facilitates the participation of the business community in the development and delivery of EU policies, thus ensuring that the interests of all relevant stakeholders are taken into

account (Coen 2009; Quittkat and Kotzian 2011). These characteristics place lobbying among those practices considered to be absolute preconditions for the existence of any representative government, because ‘without information, perspectives and proposals flowing from those who are governed, elected and appointed officials can often only dimly guess at what policies will advance the interests of those whom they are duty-bound to serve.’ (Holman and Luneburg 2012: 78)

In its consideration of the wide variety of actions and actors that might potentially be involved in influencing EU policy outcomes, the European Commission adopted a broad definition on what might constitute lobbying. The latter included ‘all activities carried out with the objective of influencing the policy formulation and decision-making processes of the European institutions’ (European Commission 2006: 5). These activities may take the form of ‘contacting members or officials of the EU institutions, preparing, circulating and communicating letters, information material or argumentation and position papers, organising events, meetings or promotional activities (in the offices or in other venues) in support of an objective of interest representation...’¹⁴¹ They involve persistent tracking of the policy-making processes and constant engagement with political institutions aimed at ensuring that the lobbyists’ opinions are taken into consideration and that the information supply, coming from the respective lobbyists or lobbying organisations is valued (Quittkat and Kotzian 2011).

Recognising the positive effects that lobbying may bring to policy creation in general, EU institutions have, as a rule, been receptive to input from external stakeholders

¹⁴¹The ‘Frequently asked questions’ section on the Commission’s register for interest representatives provides explanations on the activities that are considered to constitute lobbying (available at: http://ec.europa.eu/transparency/docs/reg/FAQ_en.pdf). Source last retrieved on 27 July 2016.

and have established multiple levels of access points and a wide network of opportunities for the voice of citizens and businesses to be heard (Klüver 2013). While such networks enable the citizen actively to participate in the policy making, importantly, they also supply the EU institutions with valuable sources of information, that facilitate the legislative, and policy creation process.

7.1.2 Corrupt lobbying: the intertwined connections between corruption and unethical lobbying

As discussed in the previous section, lobbying activities have a positive impact on the functioning of every democratic system. They stimulate wider participation in the decision-making process and provide public bodies with better access to expert information, which is required for informed political decision-making. Yet, given their specific aim – to influence policy creation – these interactions between public institutions and lobbyists can raise questions about the extent to which public interests are safeguarded and fairness and objective policy-making is preserved (Behn 2001, Bovens 2010, 2007). This is so because lobbying practices, if misused,¹⁴² ‘can significantly impair the operations and undercut the perceived legitimacy of a governmental system, producing monetary enrichment or other private benefits for public office holders and skewing governmental decision-making in ways that undercut attempts to serve the perceived broader public interests at stake in law making and administration.’ (Holman and Luneburg 2012: 78) The risks of possible lobbying misuse are expanded by the inherent absence of genuine democratic

¹⁴²Lobbying abuses or misuse of lobbying practices refer to activities that aim to influence the decision-making process, creating collisions between public and private interests, and resulting in public decisions for private gains.

accountability and transparency in the work of interest representatives. The latter ‘may cause suspicions of political corruption and further damage the image of, and public confidence in, political institutions.’ (Council of Europe 2010: 2).¹⁴³

A brief look at the sheer number of lobbyists represented in Brussels, their lobbying interests and the amount of money spent on lobbying activities, makes it easier to understand the doubts of the general public regarding the positive role of lobbyists in the public decision making. A simple comparison between the number of EU officials working for the Parliament and the Commission¹⁴⁴ and the estimated number of lobbyists shows that the ratio of lobbyists to public servants is almost 1:1. With 25,000¹⁴⁵ full-time lobbyists deployed in Brussels, with a budget of €1.5 billion per year, the EU lobbying landscape forms a significant factor in the EU decision-making process – one that should not be underestimated (Transparency International 2016). Concerns about possible infiltration of business interests in EU policy-making are further fuelled by the fact that more than 50 per cent of all Brussels-based lobbyists, have ‘big private interest constituency’ (Coen and Katsaitis 2015: 39) because they represent businesses with dominant interests in market creation, integration and regulation portfolios.¹⁴⁶

¹⁴³ CoE uses the term ‘extra institutional actors’ as a more neutral form of the term ‘lobbyists’.

¹⁴⁴The total number of permanent and temporarily employees working for the Commission in 2016 is 24,034. For the same year, the Parliament employed 6,762 permanent and temporary staff. These figures also include support staff and staff with purely technical functions. Information provided in the EU 2016 General Budget. More information available at: <http://eur-lex.europa.eu/budget/data/General/2016/en/GenRev.pdf>. Source last retrieved on 9 March 2017.

¹⁴⁵The number of 25,000 is TI’s conservative estimate on the total number of lobbyists operating in Brussels. The number is indicative, including, as it does, the ‘shady practices’ which did not register officially as lobbyists in the EU Transparency Register. The number of officially registered interest representatives’ organisations and individuals in the EU Transparency Register is 11,294. More information available at: <http://ec.europa.eu/transparencyregister/public/homePage.do>. Source last retrieved on 04 March 2017.

¹⁴⁶ The work in these portfolios is covered by the Directorates-General for Competition, Internal Market, Enterprise, Economic and Financial Affairs.

And while these figures are not yet an indicator of any wrongdoing, the high-profile lobbying scandals that have frequently filled the media over the past 20 years demonstrate how easily lobbying can be transformed into a corruption brokerage. Notable examples are: Gerhard Schröder's transfer to Gazprom, the 'cash for-amendments scandal', 'Dalligate', and the recent appointment of the Commission's former president José Manuel Barroso at Goldman Sachs. These scandals revealed how easily private interests can infiltrate the public decision-making process and inevitably shaped the general public's perception that lobbying is mostly related to 'undue influence peddling, in which special interest groups exercise too much sway over government for self-serving purposes' (Holman and Luneburg 2012: 75).

The appointment of Gerhard Schröder, the former German Chancellor, as a chairman of the supervisory committee of the North European Gas Pipeline Company (responsible for building the gas pipeline under the Baltic Sea), was among the major national scandals that erupted in 2005. Schröder's job move raised many questions on the possible infiltration of foreign private interests in German foreign and economic policies. These questions were particularly fuelled by the fact that in September 2005, days before the general elections, Schröder endorsed a \$6 billion deal between representatives of the Russian state gas monopoly Gazprom and the German companies E.ON and BASF for building a gas pipeline under the Baltic Sea, linking Germany and Russia. Just a few months after the elections, on 9 December, Schröder assumed his new position as a private manager of North European Gas Pipeline Company with a annual salary of €250,000.¹⁴⁷ Schröder's job move was a typical example of the 'revolving doors phenomenon', where

¹⁴⁷ More information available at: <https://www.wsws.org/en/articles/2006/04/schr-a14.html>. Source last retrieved on 12 December 2016.

he exploited his work connections and discretionary powers to gain lucrative employment in private sector.¹⁴⁸ While Schröder's job transfer was among the most notorious national high-level lobbying/corruption scandals, the latest appointment of the former president of the European Commission, José Manuel Barroso at Goldman Sachs¹⁴⁹ has also cast shadows over the integrity of EU public policy creation. A petition signed by more than 152 000 EU citizens, calling the transfer 'morally reprehensible' contested the morality of his job transfer to the US banking firm.¹⁵⁰ Although the appointment of Barroso was made after the end of the 'cooling-off' period¹⁵¹ prescribed by the Code of Conduct for Commissioners (European Commission 2011d) and was cleared by the EU Ethics Panel, suspicions that Barroso had closer (unregistered) contacts with Goldman Sachs during his 10-year term in office continue to flood the media.¹⁵²

Two further prominent examples, this time focusing on the liaison between unethical lobbying and corruption are the 'cash for amendments scandal' and the 'Dalligate' tobacco affair. The 'cash for amendments scandal' which shook the European

¹⁴⁸The revolving door phenomenon refers to any move of individuals between public and private sectors. To prevent such behaviour, the CoE Model Code of Conduct explicitly stipulates that the public servants cannot take improper advantage of his/her public service position to gain employment opportunity outside the public service (art.26). As a preventive measure, a certain period of time, also called a cooling off period, is envisioned. Art. 26 (3) of the CoE Model Code of Conduct for public officials prescribes that '... for an appropriate period of time, the former public official should not act for any person or body in respect of any matter on which he or she acted for, or advised, the public service and which would result in a particular benefit to that person or body.'

¹⁴⁹ Goldman Sachs Group, Inc. is a global investment banking, securities and investment management firm, providing financial services to corporations, financial institutions, governments and individuals.

¹⁵⁰ The text of the petition can be found at: <https://www.change.org/p/for-strong-exemplary-measures-to-be-taken-against-jm-barroso-for-joining-goldman-sachs-international>. Source last retrieved on 5 March 2017.

¹⁵¹ The Code of Conduct for Commissioners prescribes that if former Commissioners intend pursue a job during the 18 months after they ceased to hold office, they should inform the Commission. If their planned job is related to the content of the portfolio they used to have as Commissioners, they should get the approval of the Ad Hoc Ethical Committee before taking their new position. During the 18 months period the former Commissioners are not allowed to lobby or advocate the Commission's staff and members of the Cabinet for matters they have been responsible for.

¹⁵² More information available at: <https://euobserver.com/institutional/135227>. Source last retrieved on 12 December 2016.

Parliament and EU public in 2010, illustrated the intertwined relations between unethical lobbying, law-making and corruption. In 2010 UK journalists posed as lobbyists and approached 60 Members of the European Parliament (MEPs), inviting them to join the advisory board of a fictitious lobby consultancy to assist in gearing some EU decisions in the interests of their clients. The MEPs were offered remuneration of €100,000 per year for this service. Of the 60, 14 MEPs agreed to meet with the fake lobbyists and 4 MEPs accepted the offer,¹⁵³ revealing the huge vulnerabilities of the law-making processes at the level of the European Parliament. Even at the level of the European Commission, the abrupt departure of John Dalli (European Commissioner for Health and Consumer Policy) over allegations about improper contacts with tobacco lobbyists came to show how it may be possible for lobbyists to infiltrate the EU executive. Dalli was suspected of attempting to influence the EU's ban on snus (a moist powder tobacco product) on behalf of the European Smokeless Tobacco Council and Swedish Match. Dalli, for his own part, accused the European Commission President Barroso of coercion.¹⁵⁴

These cases vividly show the close relationship between breaches of ethics, corruption and misuse of lobbying practices. They demonstrate how different forms of corruption-related behaviour (bribery in the 'cash for amendments' scandal and Dalligate;

¹⁵³The MEPs who accepted the offer were Erns Strasser (former Minister of the Interior, Austria), Zoran Thaler (former Foreign Affairs Minister, Slovenia), Pablo Zalba Bidegain (Spain) and Adrian Severin (former Minister of Foreign Affairs, Romania), Following the publication of the media investigation, Thaler and Strasser resigned, while the remaining two claimed they did not commit any crime. Thaler, Strasser and Sevrein were convicted for corruption by their national respective courts in the period 2013-2016. More information can be found on the BBC website: <http://www.bbc.com/news/world-europe-12880701>. Source last retrieved on 15 July 2016.

¹⁵⁴ The Barosso-Dalli tobacco lobbying scandal led to the resignation of Commissioner Dalli and court hearings concerning the President of the Commission. More information available at: <http://www.politico.eu/interactive/dalligate-tobacco-lobbying-eu-timeline/>. Source last retrieved on 1 July 2016.

conflict of interests and revolving doors in Barroso's and Schroeder's appointments)¹⁵⁵ can exploit the open channels for communication, which are available to interest representatives.

The risks associated with the transformation of lobbying into corrupt activities derive from their overlapping objectives. While lobbying aims to influence the policy process by information provision and awareness raising, corrupt activities have the same aim, but it is attained through the provision of undue advantages to the policy-makers (Campos and Giovannoni 2008). Given that the process of offering or giving such advantages requires access to the policy makers and an environment for the corrupt negotiations to take place, lobbying can be used as a convenient tool, facilitating the promotion of private agendas. The innocent umbrella of public consultation, for example, designed to allow interest representatives to be heard and have their say in shaping the policy process at the EU level, can enable the corrupt parties to meet and negotiate. The business of lobbying thus supplies them with multiple entry points and communication channels.

The risk exposure of the EU system to lobbying abuses is further broadened by the nature of EU policy-making. The latter represents a typical environment in which monopoly power (to adopt decisions and legal frameworks) is combined with discretion (on how to do it) and a high degree of reliance on external information provision (from interest representatives). Such environments are particularly vulnerable to corruption if vigorous accountability mechanisms are not set in place (Klitgaard 1988).

¹⁵⁵ Political party and political campaign financing, and the appointment of relatives are also activities that can offer unethical opportunities and can be associated with corruption related crimes.

The likelihood for corruption to occur is also increased by the very nature of lobbying. As a typical information-influence brokerage practice, in which institutions seek (and need) information and citizen support, lobbying provides the information needed to influence the decision process. In this equation, lobbying can substitute or complement corruption because it can be ‘both an activity that makes bribing irrelevant if it succeeds in influencing policy and an activity that makes bribing easier if it succeeds in undermining law enforcement’ (Campos and Giovannoni 2006: 1).

Along with corruption-related crimes, unethical lobbying can also be associated with other criminal behaviour such as trading in influence, concealment, misuse or meddling with information for private gain. Given that the ultimate aim of business lobbyists is to influence the EU policy in a direction favourable to their clients, it is easy to assume that in cases where the economic gains outweigh the losses,¹⁵⁶ business lobbyists may be tempted either to conceal aspects that may damage their own interests, or to manipulate information in their own interest (Broscheid and Coen 2007). Such concerns have been repeatedly voiced by public activists, the media and academics (Campos and Giovannoni 2006, Harstad and Svensson 2008, Mazey and Richardson 1993, Transparency International 2012) and ‘apply not only to practices which are clearly unlawful (fraud and corruption) but also to other improper lobbying methods which abuse the EU institutions’ policy of openness or are plainly misleading’ (European Commission 2006: 5).

Such abuses at EU level are most commonly manifested by either obtaining information in a dishonest way, by abusing the privileged access to EU institutions and/or

¹⁵⁶ A typical example of such a case is the MasterCard campaign against the Commission’s proposal for regulation of interchange fees, setting a cap on levels for the transactions for debit and credit cards. In order to avoid economic losses, MasterCard conducted highly-biased campaign, full with false information (Barnier 2013).

by bribing EU officials to influence EU decision-making in a favourable way for the bribe-giver (European Parliament 2003b). Given that 75 per cent of the economic and social measures concerning European citizens are determined at EU level (European Parliament 2008c), the intertwining relations between lobbying and corruption can yield extremely dangerous results, such as ‘cases of environmental degradation, financial collapse, human rights abuse, and the endangerment of public health and safety’ (Mulcahy 2015: 18).

If the 2008 world economic crisis was caused (among others) by corrupt and unethical lobbying practices, as some studies note, it is a distinct example of the repercussions resulting from unethical lobbying practices such as: exchanging favours between public servants and private entities, ‘buying’ legislative amendments for the loosening of financial and banking regulations and financial oversight mechanisms; provision of incorrect information, influence peddling. Weisman and Donahue (2009) estimate that over a period of 10 years (1998–2008) around \$5 billion were spent to loosen the USA financial market regulatory framework. They argue that this purchasing of political influence contributed significantly to the tumble of the American economy and subsequently the world’s financial collapse. Igan et al. (2009: 225) come to similar conclusions with regard to the effect of unethical lobbying in the financial sector, suggesting that ‘prevention of future crises might require a closer monitoring of lobbying activities by the financial industry and weakening of their political influence.’ Charlie McCreevy, European Commissioner for Internal Market and Services at the time, built upon the same argument, stressing that the EU should not allow itself to become a captive of the rich lobbying organisations, and should remember that ‘it was many of those same lobbyists who in the past managed to convince legislators to insert clauses and provisions

that contributed so much to the lax standards and mass excesses that have created the systemic risks.’ (McCreevy 2009: 5)

In particular, these systemic risks have materialised in Greece, Spain, Portugal and Italy, where unethical lobbying and corrupt practices contributed significantly to the deepening of their national fiscal crises (Mulcahy 2012). The absence of any regulatory framework as regards the interactions between decision-makers and lobbyists magnified the above menaces. It diminished public accountability, led to the unequal access of the citizen/business to public affairs, and distorted information flows to and from policy makers (Chari, Murphy and Hogan 2007).

Based on the overview of the benefits and perils that lobbying activities can bring to public decision-making, this section argued that the activities of interest representatives should be regulated if the transparency, accountability and integrity of policy-making is to be preserved. The following section examines how this can be done, by surveying the main characteristics of the existing lobbying regulatory approaches and deliberating on the elements that make lobbying regulation successful.

7.2 Lobbying regulatory regimes and modalities: a snapshot

This section presents the different approaches in regulating the activities of interest representatives. While recognising that the right of every citizen to express his or her opinion is a deeply embedded democratic right, the section deliberates on the regulatory framework established for organised citizens/business groups and paid agents to influence the legislative process on behalf of their clients (Tilberry 1950). Lobbying regulations are established with the view to balance two opposite interests: preventing lobbying abuses

and honouring the right of citizens to express their opinions and address them to the legislators and policy makers. Lobbying abuses in such cases may either: 1) encompass presentation of inadequate, false or unbalanced information, based on which decisions are taken; or 2) be linked to corrupt or coercive activities (Tilberry 1950).

The prevention of such practices (similarly to corruption prevention) may be significantly boosted by deploying open and transparent decision-making processes, in which the boundaries between ethical and unethical lobbying are clearly defined in a normative framework that brings lobbying into the light of public scrutiny.¹⁵⁷ Such a framework is built to ensure that citizens and policy makers are aware of: what constitutes lobbying, who is lobbying and for what purposes, who is financing the lobbying activities, and how they take place.

The answers to these questions create clarity and transparency not only in the work of the interest representatives, but also in the overall policy process, because they provide data on lobbyists and financial resources deployed in the attempt to influence one or another piece of legislation/policy direction. Such knowledge enables the general public to hold the policy makers to account if the adopted decisions are contrary to public interest and benefit specific individuals or groups of individuals.

The remainder of this section presents an overview of the different lobby regulatory regimes, along with the practices established in the EU member states.

¹⁵⁷ Apart from transparency and accountability regulations that aim to bring more light to the work of interest representatives, the public interests are safeguarded also by explicit restrictions governing the behaviour of legislators and policy-makers. These include: gifts and hospitalities restrictions, financial disclosure procedures, conflict of interest declarations, cooling off periods. The latter are extensively described by the *UN convention against Corruption* and policy documents adopted by the CoE such as *Model Code of Conduct for public officials*. For more information: Kuyumdzhieva A., Dell G. and Foldes A. (2015) *Analysis of International Norms and Standards relating to Integrity of Public Officials in the EU and its member states*, Berlin: Transparency International.

7.2.1 Voluntary and mandatory approaches in regulating lobbying: brief overview

Mulcahy (2015: 18) argues that ‘without a robust ethical firewall between the public sector and lobbyists, decisions can be taken that do not serve the public interest but rather a narrow set of private interests.’ Opheim (1991: 405) adds to this argument, asserting that the ‘most straightforward measure of legislative independence from interest group pressure is the rigor of the state's formal regulation of lobbyists.’ In this framework, the choice of lobbying regulatory regime depends on its particular aims. Some regimes are geared towards avoiding corruption practices; some are aimed at regulating access and interactions with political institutions; and some are directed towards ensuring the pluralistic democratic outcomes of policy-making (Greenwood 2011). The difference between these regimes depends on the rigour of the requested data and registration provisions.

Chari, Murphy and Hogan (2007) cluster the existing lobbyist regulatory regimes in three distinct categories, depending on their thoroughness: 1) loosely regulated systems, with Germany and the European Parliament as typical examples; 2) medium regulated regimes, as can be found in Canada, at USA federal level and in some USA states; and 3) highly regulated systems, with Washington state being the most distinct example, along with half the USA states. This typology is not strictly delineated, however, as individual elements of the different regimes may coexist in combination in a single national framework.

The loosely regulated regimes are characterised by their voluntary nature and their reliance on the honesty of lobbying interactions. In such environments, individual lobbyists and/or lobbying companies are invited to join public registers and submit a standard set of

generic data, covering their names, general activities and interests' portfolios. No specific data on lobbying expenditure and lobbying 'targets' is disclosed, and there are no ramifications for those companies that choose not to register. Such regimes seek to stimulate registration by creating and offering incentives and certain privileges for the interest representatives who have decided to bring their activities into the open and adhere to a common set of ethical standards. Rather than regulating and imposing penalties, loosely regulated systems aim at encouraging openness and transparency in the work of interests' representatives. Despite the scarce information requested from the lobbyists, such as approach provides a minimum standard for registration and is not high maintenance in terms of costs. Yet, because of its non-obligatory character and limited information requirements 'both transparency and accountability are less likely to be ensured in the loosely-regulated systems when compared to either medium or high regulatory systems' (European Commission for Democracy through Law 2013: 17). This is so, because the voluntary approach does not provide a comprehensive picture of all the lobbying activities that may take place in a policy field. This latter allows for non-ethical lobbying to flourish and distorts the level playing field by creating competitive disadvantages for those who decide to register.

The medium-regulated systems, representing the 'middle ground' between the loose- and highly regulated environments take another step towards defining the boundaries of lobbying activities. Such systems usually have wider data disclosure requirements and, while presenting a more elaborate definition of lobbying, offer less comprehensive and less rigorous systems for compliance. Yet, given that they provide flexibility to the registering organisations and do not require full data disclosure, they

cannot provide a detailed overview of all lobbying activities and spending¹⁵⁸ linked to the policy-influencing processes (Chari, Murphy and Hogan 2007).

The systems that offer ‘the most comprehensive solution to ensuring that lobbyists cannot unduly influence elected representatives or public officials’ are the highly regulated ones (European Commission for Democracy through Law 2013: 19). They are tailored to frame as much as possible the activities of interest representatives and entail full transparency in their operations. Typically, such systems require full mandatory disclosure on: who is lobbying, who is lobbied and for what purposes, and how much money is spent on such activities (both in terms of salaries and other expenditures). The disclosed information is publicly available via online systems, which also allow for the scrutiny of the ‘cooling-off periods’¹⁵⁹ of the former political appointees. The obligatory nature of such regimes means that they are supplied with monitoring tools and penalties for incomplete, false or late filing of information.¹⁶⁰ Although such highly regulated systems have proved to be costly and sometimes burdensome, they provide the optimum solution for safeguarding the public’s interests, whilst ensuring at the same time efficient public involvement in the decision-making process. As such, they contain all the components, defined by Holman and Luneburg (2012), OECD (2013b) and CoE (2010) as the cornerstones on which successful lobbying disclosure regimes are built: mandatory registration for lobbyists, appropriate monitoring and sanctioning mechanisms, precise

¹⁵⁸A typical example is the requirement for individual lobbyists to disclose their spending, while such an obligation is not imposed on the lobbyist companies.

¹⁵⁹ ‘Cooling-off periods’ refer to those periods of time during which the former public officials are banned from working in private companies they have interacted with in their public capacity.

¹⁶⁰In some states of the USA, the failure to comply with lobbying regulations may lead to criminal and civil liability of up to \$200,000.

definitions of lobbyists and lobbying activities; and disclosure of lobbying targets, areas or legislative acts that are lobbied and money that is spent for this purpose.

And although the establishment of a tight regulatory regime is not the ultimate panacea, the ‘pursuit of lobbying rules may serve as a framework to establish a paradigm within which all policy-makers can effectively function. This paradigm ultimately promotes the long-term goals of accountability and transparency while it potentially serves as a deterrent, if not an antidote for corrupt practices.’ (Chari, Murphy and Hogan 2007: 433) Such a pursuit not only promotes accountability but ensures that the views and interests of citizens are more equally considered in the decision-making process (Flavin 2015).

7.2.2 EU member states’ lobbying regulatory approach

The lobbying patterns and lobbying regulatory frameworks throughout the EU combine to create a vibrant lobbying landscape, characterised by informal practices that take place outside the formal public participation channels and are thus invisible to the general public (Mulcahy 2015). Many of these practices are based on direct communication in informal settings, and in the case of small and medium-sized countries are primarily based on family, social and class networks. Yet, ‘more sophisticated indirect lobbying techniques are also gaining traction in countries across Europe, some of which are questionable and give cause for concern. These include the mobilisation of the public through advertisements, public relations campaigns, funding advocacy organisations or think-tanks, and the use of grassroots campaigns.’ (Mulcahy 2015: 16) Yet, irrespective of the wide spread and variety of lobbying practices, most of the member states have not introduced

any mandatory reporting mechanisms for the work of lobbyists and are not equipped with systems for registering the contacts between lobbyists and policy makers (Mulcahy 2015). Mulcahy's study of the lobbying practices of 19 member states¹⁶¹ reveals that only 2 of them have some kind of legislative footprint requirements¹⁶² (Latvia and Poland), 10 countries have some form of lobbying register (but they are largely ineffective), and only Lithuania has an oversight body that publishes the names of individuals or organisations that have violated their lobbying obligations. Such a patchwork of loosely regulated lobbying activities makes it impossible either to reveal the true scale and magnitude of the lobbyists' influence in national policy-making or to hold the policy makers to account if private interests (rather than public ones) are favoured in the decision-making.

Despite the high risks inherent in the nature of lobbying practices for the emergence of corruption and the wide advantages to governance that their regulation might bring, until 20 years ago the topic of lobbying and its regulation did not occupy the EU or the policy agendas of the member states. In contrast to the highly-regulated lobbying environment in the USA, the issue is still largely neglected by the EU member states¹⁶³ (Holman and Luneburg 2012, Lehmann and Bosche 2003, Mulcahy 2015). If any efforts are made to regulate lobbying, their scope is either limited or is based on the premise of voluntary registration. Such systems contain very limited information, are often difficult to access by the general public, and usually avoid disclosure of any information on the

¹⁶¹The study does not cover Romania, Malta, Croatia, Denmark, Sweden, Luxembourg, Finland, Greece and Belgium.

¹⁶²The legislative footprints oblige the policymakers and legislators to record and list the names of all organisations that they have consulted during the preparation of a legal document or policy.

¹⁶³ A majority of the member states has put in only modest efforts (e.g. Germany, Poland and Lithuania), if any at all, to establish lobbying regimes.

lobbyists' financial activities. This approach prompted Holman and Luneburg (2012: 90) to argue that for 'the most part, these regulatory regimes focus more on providing business interests with access to lawmakers than on reducing the potential for corruption.' Mulcahy (2015: 7) comes to similar conclusions, noting that with just 7 EU member states¹⁶⁴ having some kind of loosely regulated lobbying environments, lobbying regimes in the EU are 'woefully inadequate' and bring higher risks for regulatory and policy capture by allowing undue influence to flourish. Mulcahy (2015: 22) argues that the regulatory framework adopted across the EU member states is to 'varying degrees, flawed or unfit for purpose and there are also serious problems with implementation and enforcement of rules.' Holman and Luneburg (2012: 86) go further by asserting that such loose regulatory regimes 'value transparency only secondarily, if at all' and raise concerns over the legitimacy of the decision-making process, topping up the public's mistrust in it, and undermining the foundation of the democratic processes (Héritier 2003).

This section presented the weaknesses and strengths of the different approaches in regulating the activities of interest representatives. It argued that while the establishment of strongly regulated systems is not a panacea, it does serve as a 'firewall', deterring the infiltration of private interests into the decision-making process. The section examined the existing lobbying approach in the EU member states and revealed that notwithstanding the significant corruption risks associated with lobbying activities, the latter are not vigorously regulated at the national level.

¹⁶⁴Until 2015, these were Austria, France, Germany, Lithuania, Poland, Slovenia and the UK. Hungary revoked its law in 2011, and the attempts to regulate lobbying proceeded unsuccessfully in Bulgaria, Latvia and Romania.

7.3 Regulating lobbying activities at EU level: the struggle for better transparency

Given that the member states are primary sources of blueprints when it comes to introducing EU regulatory regimes, their approaches towards lobbying regulations have been for a long while reflected in the ways that the EU dealt with the issue. The non-existent debate on how interest representatives should interact with the EU institutions was also predefined by the low lobbying interest in the institutions' work. Because of their limited competences, until the late 1990s, the Commission and the Parliament were not subject to much lobbying attention.

The series of treaty reforms, which expanded the EU institutions' competences in over 75 per cent of economic and social policies (European Parliament 2008c), brought significant change in the EU's lobbying landscape and turned Brussels into an overly populated lobbying arena (Coen and Richardson 2009). The steadily increasing EU competences brought the need for wider and more comprehensive expertise, conveniently offered free of charge by a variety of individual lobbyists or lobbying companies. Gradually, the activities of interest representatives became an important segment of the EU decision-making process, supplying necessary information and giving the process the legitimacy it needed for its operations.

This information broker role gave to the lobbyists strong influencing powers that were not subject to any internal or external public scrutiny. And this lack of scrutiny triggered a series of initiatives aimed at preventing the possible infiltration of private interests in public decision-making. These initiatives transformed Brussels into 'the single greatest, yet clearly reluctant, driving force behind transforming the focus of lobbying

regulation from facilitating influence peddling to strengthening the transparency of the legislative process' (Holman and Luneburg 2012: 91).

Acknowledging the lack of policy guidelines at member-state level, the next section explores how the EU institutions have defined the boundaries of lobbying interactions. It describes the responses of the three major institutional players on the long ramble towards the establishment of a mandatory framework for EU lobbying.

7.3.1 The first EU steps in regulating lobbying at the EU level: the voluntary approach, 1992-2008

Following the expansion of EU competences¹⁶⁵ and the growth in lobbying interests represented in Brussels, EU institutions started to craft their regulatory approach towards lobbying. The first significant attempt to establish some kind of regulatory framework dates back to 1992 and the so-called Galle report.¹⁶⁶ The report proposed the creation of a 'code of conduct' with respective sanctions for non-compliance, parliamentary zones free from lobbyists, and the registration of lobbyists on an annual basis. It also proposed the establishment of a register for the financial interests of the MEPs and their assistants.

The proposed report was never discussed in the Plenary for 'substantive and circumstantial reasons. These included: attempts by the Commission to pre-empt the proposals by seeking self-regulation by lobbyists; resistance from the College of Quaestors ... and the EP elections of June 1994. The most substantive problem, however, was that the

¹⁶⁵ The most significant EU competences' expansion were introduced by the *Treaty of Maastricht* (1992), *Treaty of Amsterdam* (1999) and *Treaty of Lisbon* (2009). The *Treaty of Maastricht* introduced the co-decision procedure, giving to the Parliament the competences to co-legislate jointly with the Council in some areas of EU competence. The *Treaty of Amsterdam* and *Treaty of Lisbon* further extended the areas of co-decision procedure and EU competences.

¹⁶⁶ In May 1991 the Parliament's Committee on Rules of Procedures and the Verification of Credentials and Immunities appointed Marc Galle (MEP) to prepare a proposal for a Code of Conduct and register of lobbyists accredited by the Parliament.

Galle report became embroiled in definitional controversies as to what constituted a 'lobbyist'.¹⁶⁷ (Greenwood 1998: 589) The debate in the Parliament on how to define the lobbying boundaries resumed right after the elections. And in 1997, following a series of intense debates, the European Parliament, adopted – by absolute majority – provisions for the establishment of the Parliament's lobbyist accreditation system.¹⁶⁷ This represented a typical case of a loosely to medium regulated system, whereby the lobbyists' registration is voluntary, but their access to the Parliament premises is dependent on whether they have signed up in the Parliament's register. In addition, the new provisions required all lobbyists to state their interests when communicating with Members of Parliament and their staff; and to confirm their compliance with the ethical and professional requirements of the specially created *Code of Conduct governing lobbyists* (European Parliament 1997). The threat of sanctions, such as denial of access to the Parliament's premises for non-compliance ensured adherence to the *Code of Conduct*. Although the introduced accreditation system enhanced the Parliament's transparency by making the names of the lobbyists publicly available, it failed to disclose other information related to their financial activities and lobbying interests. This insufficiency significantly weakened the drive of the initiative towards transparency: rather than a transparency flagship it became more of a useful tool for lobbyists and parliamentarians (Holman and Luneburg 2012). Despite all these weaknesses, however, the adoption of this mandatory registration system marked the first successful attempt of the Parliament to introduce some transparency and demand some level of integrity in the work of interest representatives.

¹⁶⁷ The new system was introduced by amending the Rules of Procedure of the Parliament.

At the level of the Commission, the first major attempt to enhance transparency in the activities of interest representatives was the Commission's communication *Towards a reinforced culture of consultation and dialogue - General principles and minimum standards for consultation of interested parties* (European Commission 2002c). The Communication established rules, obliging those who wished to contribute to EU policy development to state clearly which interests they represented and how inclusive their representation was. Despite having more the nature of an administrative manual, explaining how the Commission should conduct its public consultation procedures, the document paved the way for the establishment of a comprehensive framework, regulating the interactions between the Commission and all stakeholders wishing to influence its policy directions.

In contrast to the Parliament's mandatory approach, however, the Commission clearly expressed its preferences for not imposing strict regulatory requirements on the work of interest representatives. Such an approach was based on the understanding that interest representatives bring to the Commission 'a solution to its problems of democratic deficit, management capacities, and lack of information and expertise' (Greenwood 1998: 590). Given its broad area of competences, the comprehensiveness of the policy portfolios and the need for specialised expertise, the information and expert advice provided by the lobbyists represented a major support in the execution of the Commission's policy tasks. Moreover, this information and expert advice ensures the inclusiveness of EU policies and serves as a tool for bridging the gap between EU decision-making and the citizens of the EU. These particular needs of the Commission prompted its understanding that lobbying activities should not be restricted by a specialised framework, but rather should be

encouraged by the establishment of an incentive system of self-registration. The Commission's policy on the work of interest representatives was clearly spelled out in the *Green Paper on the European transparency initiative* (European Commission 2006). Among other objectives this initiative specifically targeted the development of a new comprehensive approach towards lobbying activities. At the core of the European transparency initiative (ETI) was the creation of:

- A voluntary, publicly available, web-based registration system, containing the names of the lobbyists and their mission, their clients, and the source of their funding;
- A common code of conduct for all registered lobbyists;
- A monitoring and sanctioning system in case of breaches of the code or incorrect/false registration (e.g. the Commission can publicly invite the registrant to correct the false data/behaviour or, in cases of last resort, to exclude the lobbyists from the databases).

Recognising the need for a common institutional approach, the Commission invited the Parliament, the Committee of the Regions and the European Economic and Social Committee to consider creating a 'one-stop shop' registration system for interest representatives.

The ETI proposal received mixed responses from the interested stakeholders. Notwithstanding the positive feedback for initiating a structured debate on the work of interest representatives, the proposed framework was heavily criticised by the non-governmental sector, speaking mainly through the Alliance for Lobbying Transparency

and Ethics Regulation (ALTER-EU)¹⁶⁸ and the Corporate Europe Observatory (CEO).¹⁶⁹ The organisations associated with ALTER-EU and CEO considered the proposed registration regime to be too weak and incapable of guaranteeing integrity in the decision-making process. ALTER-EU explicitly noted that it will be a ‘missed opportunity if the [European transparency initiative] fails to move beyond the voluntary approaches that have been in place in Brussels for almost a decade. These have patently not delivered external transparency around EU lobbying.’ (ALTER-EU 2006: 1)

The main criticisms of the ETI related to the voluntary character of registration which allows those who do not want to register to continue to work in the shadows. The requirements regarding financial disclosure were also considered unsatisfactory: they provided no information about how much money is spent on lobbying for a particular case or how much funding the interest’s group representatives are getting from their donors or clients (Corporate Europe Observatory 2006, ALTER-EU 2006).

The European Parliament response to the ETI was framed in a *Resolution on the development of the framework for the activities of interest representatives (lobbyists) in the European institutions* (European Parliament 2008b). In its resolution, passed by simple majority, the Parliament welcomed the Commission’s initiative but expressed the opinion that a mandatory system would be the better and only option capable of ensuring comprehensive coverage and utmost transparency in the lobbying interactions. The Parliament joined forces with the non-governmental sector and expressed strong concerns

¹⁶⁸The Alliance for Lobbying Transparency and Ethics Regulation is a coalition of more than 160 public interest groups, trade unions, academics and public affairs firms. More information at: www.alter-eu.org. Source last retrieved on 5 March 2017.

¹⁶⁹Corporate Europe Observatory is a research and campaign group working to expose and challenge the privileged access and influence enjoyed by corporations and their lobby groups in EU policy-making. More information at: [www.http://corporateeurope.org](http://corporateeurope.org). Source last retrieved on 5 March 2017.

that a ‘purely voluntary system will allow less responsible lobbyists to avoid compliance’ (European Parliament 2008b: 4). These concerns were explicitly voiced by one of the most heavily lobbied structures in the Parliament: the Environment Committee. Based on their own experiences of heavy lobbying pressure and lobbying abuses, the Committee members noted that the proposed voluntary approach could never meet its objectives. Guided by this understanding, the Parliament proposed the establishment of a mandatory public lobbyist register, requiring full financial disclosure from those wanting to influence the EU’s decision-making processes. The Parliament also introduced the concept of the voluntary use of a ‘legislative footprint’¹⁷⁰ and strongly advised both the rapporteurs from the Parliament and the Commission to use it as a tool for enforcing greater transparency and accountability in the EU’s decision-making. The legislative footprint aimed at revealing the names of all external stakeholders who had been consulted and who had provided input in the drafting of policy texts. Such information would enhance the transparency of the policy-making and would ensure its balanced approach, accountability and inclusiveness.

Recognising the need to strengthen the efficiency of the lobbying regulations, the Parliament called for the conclusion of an inter-institutional agreement between the Council, the Commission and the Parliament on a common mandatory register. The Parliament suggested that such a mandatory system should be supplemented with strong monitoring and sanctioning tools, along with ex-ante controls for data verification and a common code of conduct.

The Parliament’s proposal for an inter-institutional agreement was discussed at by the Working Party on General Affairs in the Council (Council of European Union 2008a).

¹⁷⁰Legislative footprint is a list, attached to the policy proposal/report, of the registered interest representatives who were consulted and had significant input during the preparation of the policy proposal/report.

The Working party advised COREPER that the Council should not engage, for the time being, in the proposed initiative because ‘the issue of lobbyists is of less relevance to the Council than to the European Parliament and the Commission. In addition, considering the fact that the Commission ... will conduct a review in spring 2009 to examine whether the new system (i.e. the non-compulsory registration) has produced the desired results, it seems to the Council in any case premature to start discussing a broader inter-institutional approach.’ (Council of European Union 2008a: 2)

Meanwhile, despite the Parliament’s and NGOs’ calls for a mandatory joint approach, in May 2008 the Commission launched its own voluntary lobbying register (European Commission 2008d). Individuals and lobbying organisations were invited to sign as interest representatives¹⁷¹ and join the publicly available on-line system. Cautious in its desire not to hinder voluntary registration, the Commission requested disclosure of only basic data, such as the name of the organisation; lobbying interests and clients, and overall lobbying turnover. The provision of incentives, such as notifications and alerts for policy or legal actions in the relevant areas of interests for those registering, was used to encourage registration. At the same time, by enabling the Commission publicly to request a non-compliant lobbying organisation to correct its practices – ‘naming and shaming’ – some compliance with the Code of Conduct was ensured. If even this failed, the Commission reserved its right to de-register the company from the register.

¹⁷¹ The term ‘interest representatives’ has been chosen to avoid the negative connotation that the term ‘lobbying’ has in some languages.

The launch of the register was vehemently criticised¹⁷² by civil society organisations, which continued to express heavy scepticism on the efficiency of such a soft approach. Hopes were expressed that the ‘Commission’s flawed register will quickly be replaced by a better one that ensures real transparency’ (ALTER EU 2008). This pessimism of the civil society sector was underpinned by concerns already expressed in 2006: the voluntary nature of registration, a lack of effective sanctions in case of inaccurate data inputting, and the insufficient data disclosure requirements (such as money spent on lobbying for a particular case and the amount of the clients’ funding). The non-governmental sector argued that all these features led to the creation of an incomplete and inefficient framework that could not serve its transparency purposes and identify the true level of lobbying activities in Brussels.

A year later, this scepticism was reinforced by an assessment report, revealing that the Commission’s transparency register managed to attract only 1,488 out of a roughly estimated 25,000 lobbyists and lobbying organisations operating in Brussels (ALTER EU 2009). Analysing the data available from the Commission’s register, the report noted that the quality of the data input was questionable, a fact that jeopardised the whole purpose of the registration. Low registration levels and the inaccuracy of the data provided served to reinforce the legitimate concern that lobbyists working on the ‘edge’ and beyond the allowed practices, would not be willing to register, while those who did register might suffer damages caused by the distortion arising from the unregistered lobbyists being able potentially to benefit from commercially sensitive information regarding their

¹⁷² For more information: <https://euobserver.com/political/26378> and <http://www.euractiv.com/section/public-affairs/news/commission-launches-lobbyists-register/>. Sources last retrieved on 5 March 2017.

competitors. The tension within the sector was additionally increased by the overwhelming majority of legal practices, which choose not to register despite providing lobbying services to their clients. The Chairperson of the European Public Affairs Consultancies' Association (EPACA)¹⁷³ described the voluntary system as a situation in which some are suffering because they have registered, and some are suffering because they have not registered (Lalloum 2007). The debate on the need for the mandatory registration of lobbyists brought stakeholders with traditionally opposing views onto the same side of the table. The EPACA and the ALTER EU, representing the majority of the interest representatives' organisations from the commercial and the NGO sectors, agreed that a mandatory lobbyist register should be the prerequisite for the creation of a level playing field and for regaining the trust of the general public in the integrity of lobbying activities.

7.3.2 The following steps: establishing a common inter-institutional register, 2008–2016

Despite the outlined vulnerabilities of the Commission's non-mandatory approach, ETI marked a new step in lobbying regulations and focused the institutional efforts on boosting transparency and public confidence in EU policy-making (Holman and Luneburg 2012). These efforts led to the establishment in 2010 of a high-level group between the Parliament and the Commission, tasked with negotiating the creation a common inter-institutional regulatory framework for interest representatives. The launch of joint talks coincided with the deepest financial crisis to have haunted Europe since the World War II. The crisis additionally underscored the need for joint actions, in order to reveal the 'real and full'

¹⁷³The EPACA is the trade body for public affairs consultancies working with EU institutions. Its membership comprises 34 companies with over 600 staff and represents a high proportion of professional EU Public Affairs service providers. More information on: <http://www.epaca.org/>. Source last retrieved on 5 March 2017.

picture of the lobbying activities, their integrity and the role they play in European policy-making.

The Council welcomed this initiative but rejected¹⁷⁴ the invitation to join the common negotiations. Its reasons were the same as those expressed in 2008: lobbying activities continue to be of less relevance to the Council than they are to the Parliament and the Commission (Council of the European Union 2010).

Despite the Council's rejection, in 2011 the inter-institutional Working group's discussions resulted in the *Inter-institutional agreement on the establishment of transparency register for organisations and self-employed individuals engaged in EU policy making and policy implementation* (European Parliament and Commission 2011). The inter-institutional agreement (IIA) included provisions on the creation of a joint code of conduct and a joint voluntary register, built on the systems already operating in the Parliament and the Commission. The newly established register merged the Commission's Register for Interest Representatives and the Parliament's Register of Accredited Organisations, and created a secretariat entitled to monitor the quality of data disclosure.

The Parliament's consent to participate in the joint voluntary register reflected an understanding that common regulatory actions were needed, rather than the Parliament's conviction that such an approach was the correct one. In its resolution on the adoption of the common approach, the Parliament (2011a: 2) called the Commission to undertake the 'necessary steps ... in the framework of the forthcoming review process in order to prepare for a transition to mandatory registration'. Given the Parliament's strong stance on the

¹⁷⁴Similar to the case in 2008, the Working Party on General affairs advised COREPER not to join the inter-institutional Working group on a mandatory register.

issue, the two institutions agreed to re-examine the efficiency of the voluntary approach after two years.

Following the agreement on the establishment of the joint lobbying register, the Commission and the Parliament renewed their proposal to the Council to join their common efforts. The two institutions proposed to the Council that it should join the inter-institutional agreement or, in case the Council sought to establish different modalities of its participation, to start tri-party discussions. The Commission and the Parliament emphasised that the lobbying register regulates only the activities of interest representatives aiming to influence the EU institutions themselves and, as such, does not create any obligations for the national administrations of the member states (European Commission and the Parliament 2011).

The renewed proposal of the Commission and the Parliament was discussed again by the Working Party on General Affairs of the Council. This time, the Working party advised COREPER that tri-party discussions could be initiated with a view to exploring the possibilities for Council involvement in the transparency register. The Working party explicitly reiterated the assurance of the Commission and the Parliament that ‘the activities falling under the scope of the Register do not relate in any way to the member states’ authorities, structures, institutions or activities.’ (Council of the European Union 2011b: 2)

Meanwhile, the work of the register was closely scrutinised by both civil society activists and academia. Two consecutive assessment reports on the efficiency of the Transparency Register (Aurazo et al. 2012; 2013) described it as unsustainable, misguided and not credible. Partly the identified weaknesses related to: unreliable financial data/underreporting of lobbying expenditure, and numerous incomplete or outdated data

entries; as well as weak oversight and the lack of investigative capacities of the secretariat to detect non-compliance and fraud. Partly the criticism stemmed from the fact that major lobbyists such as Adobe and Amazon, who vigorously lobby EU institutions in regard to the new data protection legislation, had failed to register in the Transparency Register.

The assessments concluded that the implemented voluntary system allows those who wish not to be transparent to lobby in the shadows and prevents citizens from enforcing their right to know who is influencing their laws. Greenwood and Dreger (2013) outlined similar flaws, although noting that, notwithstanding its weaknesses, the EU Transparency Register is in the vanguard of a new wave of strong lobbying regulations in Europe, if compared with the existing (or non-existing) lobbying framework at the level of individual EU member states.

Taking into consideration the outlined frailties (also noted in the Parliament and the Commission 2013 review of the register), in 2014 the two institutions amended their inter-institutional agreement from 2011. The amendment aimed to: facilitate correct data entries; increase the speed and efficiency of monitoring of quality of the data; strengthen the Code of Conduct; and provide more incentives to encourage registration and introduce a level playing field for all those registering/signatories (European Commission 2014c). In parallel, the Commission introduced new lobbying requirements, which obliged the Commissioners, their Cabinets and Directors-General to meet only with registered lobbyists. This measure alone contributed to a more than doubling of the number of names in the Transparency Register (Secretariat General of the European Parliament and the European Commission 2015).

And yet, the number of registered lobbyists in July 2015 was only 8,071,¹⁷⁵ a number far below the estimated figure of around 25 000 individual lobbyists and lobbying companies operating in Brussels on a full-time basis (Transparency International 2016). The low registration levels prompted the ALTER-EU coalition to send a letter to the European Commission, signed by 117 non-governmental organisations and trade unions, urging the Commission to introduce a compensatory, high-quality, legally binding EU register for all lobbyists (ALTER-EU 2014).

The persistently low registration levels gradually led to a change in the Commission's approach. In an attempt better to 'feel the pulse' of the interested stakeholders and the society at large, in May 2016 the Commission launched a public consultation on a future mandatory transparency registering system, applicable to all EU institutions. The outcome of this consultation showed that 'there was general support for further interactions between the EU institutions and interest groups to be conditional upon prior registration and strong support for the Commission's view that the Council of the EU should participate in the new Inter-institutional Agreement on a mandatory register.' (Floyd et al 2016: 90) The received feedback indicated a growing recognition of the need to promote more transparent and more open policy-making, free of undue influence, thus also marking the momentum for the adoption of comprehensive lobbying regulations at both national and EU level.

After 8 years of intense debate, the Commission and Parliament finally reached consensus on the need to establish a mandatory register for all EU institutions. In September 2016 the Commission submitted to the Parliament and the Council a draft

¹⁷⁵ Information provided on the Transparency Register website of the European Commission: <http://ec.europa.eu/transparencyregister/public/homePage.do>. Source retrieved on 30 July 2015.

proposal for the conclusion of the inter-institutional agreement on the establishment of a mandatory transparency register.¹⁷⁶ In its scope, *IIA* covers all ‘activities which promote certain interests by interacting with any of the three signatory institutions, their members or officials, with the objective of influencing the formulation or implementation of policy or legislation, or the decision-making process within these institutions, unless an exception defined in paragraph 2 or in Article 4 applies’ (European Commission 2016b: 3).¹⁷⁷ The *IIA* establishes detailed criteria for information disclosure and classification of lobbying organisations; a different level of access to the three institutions for the lobbyists or lobbying organisations which are eligible to be registered. All registered lobbyists were obliged to adhere to a joint Code of Conduct. A management board and secretariat were established with to monitor, investigate and sanction lobbyists non-compliant with the principles and standards established by the Code. The draft *IIA* also invited member states’ permanent representations, along with other institutions and EU bodies, to use and voluntarily apply the framework of the *IIA* agreement.

Following the submission of the draft *IIA*, the Commission invited the Council to nominate its representatives to the high-level working group on the future negotiations relating to the conclusion of the proposed inter-institutional agreement. In November 2016, following the discussions held in the Working Party on General Affairs, the Council confirmed its decision to join the triparty dialogue and nominated its presidency to

¹⁷⁶ The proposed *IIA* is aimed at substituting the existing *IIA* from 2014.

¹⁷⁷ The exceptions cover the certain cases of legal and other professional advice in the context of a client-intermediary relationship; submissions made as a party or a third party in the framework of a legal or administrative procedure established by EU law or by international law; activities of the social partners as participants in the social dialogue; submissions made in response to direct and specific requests from any of the three institutions, communication of citizens, acting solely in their personal capacity. Political parties, churches and religious associations, member states’ and third countries’ authorities, along with intergovernmental organisations, are also exempt from the scope of the *IIA*.

represent it in the high-level working group (Council of the European Union 2016b). This move enabled the start of the inter-institutional negotiations and gave hope that a coherent regulatory framework defining the boundaries in the lobbyist-EU institutional relations will be established in 2017.

This section followed the serpentine route towards the establishment of an EU regulatory approach towards interest representatives. From a purely voluntary and scattered framework, the EU institutions have eventually moved to a more consistent mandatory regulation that is expected to ensure better transparency and accountability in the ways decisions are taken at EU level. The section exhibited Parliament's firm conviction regarding the need to establish a robust and inclusive regulatory regime. It also showed the evolution of the Commission's view on the topic and its policy shift from self-regulatory to mandatory approach. The section also described the Council's gradual commitment to a joint register.

7.4 What shaped the approaches of the EU institutional actors?

The question of what shaped the different responses of the EU institutions may have different answers, linked to the external environment and diverging political preferences. Yet, most of them are associated with their need for external specialised information supply and credibility deficiencies.

The hesitancy of the European Commission's role in shaping a mandatory regulatory framework was predetermined by its historical interest and a need of external expertise (Greenwood 1998). The variety of tasks that the Commission has to implement requires technical expertise in almost all areas of governance while the diverse political

preferences of different stakeholders put an immense pressure on Commission officials (Richardson, 2005). This pressure is somewhat released by the interest representatives, who play a vital role in helping the Commission to perform many of its tasks, thus creating a certain dependence on the private actors (Broscheid and Coen, 2003, Dur 2008, Hauser 2011). In contrast to the lobbying landscape at national level, where the key to successful lobbying may be political patronage or campaign contributions, successful lobbying at EU level involves the provision of high-quality information (Broscheid and Coen 2007). This is vital for the Commission, whose bureaucratic machine does not ‘seek funds for re-election but rather looks for a policy community that may provide a source of grass-roots and European-level information.’ (Broscheid and Coen 2007: 349) The need for increased information provision is a possible explanation on the Commission's preferences for voluntary lobbying registration, which provides flexibility and does not restrict the involvement of the broadest range of interested stakeholders. The Commission’s shift from non-obligatory to mandatory registration in 2016 can also be explained by its need for ensuring the credibility of its actions. Bending under the pressure coming from the non-governmental sector and the Parliament, the Commission responded to the stakeholders’ demands, ensuring that its actions are aligned with the expectations of the broad sectors of European society. This change of policy stance demonstrated the validity of Abbott and Snidal's (2002) theory that values play an important role in legalisation and that value actors (in this case the non-governmental and business organisations) may influence the policy preferences of the political actors.

And while the Commission has gradually shifted its policy orientation, the Parliament’s standpoint on the need for open, transparent and mandatory registration of

lobbyists has been unambiguous. The reasons behind this position may be different, and can have largely contributed to the nature of the Parliament and its lesser need for external expertise and credibility reinforcement. As an institution that is directly elected by European citizens, the Parliament ‘carries a public mandate that by default requires smaller input by NGOs and similar public interests’ groups, in sharp contrast to the executive institutions such as the Commission.’ (Coen and Katsaitis 2015: 25) This position makes the Parliament more comfortable in requesting stricter lobbying regimes, because its ‘public mandate provides the institution with enough (input) legitimacy to place more demand on private interest input’ (Coen and Katsaitis 2015). It enables the Parliament to request the adoption of a regulatory framework that is capable of changing the behaviour attitudes of the lobbyists and ensuring the legitimacy of the adopted rules. The cost of violation of these rules is reputational loss (Abbott and Snidal 2000) which, in the case of the work of interest representatives is among the most important prerequisites for their successful operations. The Parliament’s stance on the need to establish a mandatory framework for the work of interest representatives can also be explained by the theory of Abbott and Snidal (2000), who argue that in cases where non-compliance is difficult to detect, international actors seek to establish legally binding agreements.

The Council did not oppose or express any negative position towards the establishment of a better regulatory environment for lobbying, in contrast to its position described in previous case studies. However, it did not actively push towards its creation either. The chapter showed that the Council’s policy preference to stay away from the topic mirrors the member states’ attitudes towards lobbying regulations at the national level. It also showed that while, in the initial stages, the Council was reluctant to join forces with

the Commission and Parliament, after the explicit statement from the two institutions that the intended lobbying regulation would not affect in any way the work of the national authorities or create any obligations for them, the Council's policy position changed, in favour of potential engagement. The observed attitude supported the arguments developed in the previous chapters that the reluctance of the Council to conclude legally binding commitments in the area of transparency and accountability of EU governance has more to do with a complex set of political, economic and sovereignty considerations, than with the topic in question (Abbot and Snidal 2000; 2002; Kahler 2000). When such considerations do not exist (because the proposed lobbying regulation does not apply at national level), the Council is likely to change its preferences and support the introduction of regulatory regimes, establishing a robust good governance framework.

The same tendency has already been spotted in chapter 3, which noted that by the time the Council ratified *UNCAC* on behalf of the EU (thus making it obligatory for all EU institutions), one-fifth of the member states had not actually ratified the convention. This recurrent attitude for advocating transparency at EU level, while keeping 'low' when the same standards should be applied to the member states, suggests that the Council is expected to support anticorruption frameworks (in their different variations) and make them mandatory only if they do not enter the reserved domain of the national states and create binding commitments for them.

Such a position strongly contradicts the EU's principles of good governance (as stipulated in the *White Paper on European Governance* and the *EU Treaties*) and the general obligation of the member states to give account for the ways that EU policies are crafted. The failure to fulfil such a basic precondition increases the possibility of

infiltration of corrupt interests in EU decision-making and weakens the democratic legitimacy of the bodies entitled to safeguard the public's interests (Héritier 2003). Such a position, however, reconfirms Abbott and Snidal's theory (2000) that international legalisation is an inevitable result of complicated political preferences which reflect the cost-benefit analysis made at national level. The adoption of legally binding norms is therefore only possible when the countries measure the benefits that such framework will bring as being greater than the losses. In the case of lobbying regulations, the Council has remained a mere observer because the measures prescribed for regulating the work of interest representatives concerned only the EU institutions and did not touch upon the member states' interests.

7.5 Concluding remarks: the winding path towards the establishment of the regulatory framework for the work of EU interest representatives

Acknowledging that lobbying can be a positive democratic practice which reinforces public participation, this chapter argued that if lobbying is not properly regulated, it can easily be abused and transformed into corruption practices. Lobbying abuses can lead to the infiltration of private interests in the public policy domain, thus distorting both the fairness of public policy-making and the transparency of policy creation (Behn 2001, Bovens 2010, 2007).

While deliberating on what lobbying is and why it should be regulated, the chapter presented the existing lobbying regulations at EU and member state level and suggested that they do not provide satisfactory safeguards against the infiltration of private interests. Further on, it focused on the regulatory efforts of the three EU decision makers in protecting the integrity of EU policy-making. In doing so, the chapter presented a case

study which, although similar to those in previous chapters (in terms of objectives), introduced a different policy perspective. It did so by analysing the standpoints of the main EU institutional players on transparency and the accountability regulations that directly affect their work (and interests) rather than those of the member states. The chapter focused its efforts on analysing the EU's regulatory approaches to the work of interest representatives at EU level, a sphere that does not require the national administrations to conclude binding commitments and limit their ability to decide on national policy frameworks.

Recognising that lobbying regulations are either weak or non-existent at national level, the chapter followed the winding road that led to the creation of a common mandatory Transparency Register in the EU. The chapter revealed that, unlike the earlier case studies, in which the Commission and the Parliament had a strong joint stance regarding transparency and accountability, and the Council was the institution to cause the good governance push to stall, in the current case study, the Parliament, the Commission and the Council played different roles. Despite finally acting together, the Commission and the Parliament drifted apart on a major policy point: the establishment of mandatory registration for lobbyists interacting with EU institutions. In the end, however, the two institutions demonstrated their joint will to change the status quo and reinforce the existing accountability and transparency standards. Albeit favouring different regulatory approaches, the Commission and the Parliament were the joint driving force behind the introduction of a robust regulatory regime, set to define the boundaries of lobbying interactions. By doing so, the Parliament and the Commission indicated their strong political will and potential for providing leadership in the anticorruption portfolio as

defined by Brinkerhoff (2000). This policy outcome supports the findings of the previous case studies and refutes hypothesis 2 that the lack of a robust anticorruption framework is a result from a lack of EU supra-institutional leadership.

The shift in the Council's approach (from indifference to inclusion) when the Parliament and the Commission explicitly committed not to impose any mandatory requirements on the member states, indicated that the Council is willing to join inter-institutional agreements that do not affect the interests of the member states. And vice versa: if these inter-institutional agreements tend to change or even threaten the political balance of the status quo, the Council will be reluctant to endorse them. Given that the adoption of anticorruption commitments will significantly limit the national decision-making powers in the area of anticorruption, and considering the strong bargaining and vetoing powers of the Council when it comes to the change of the status quo (Costello and Thomson 2013, Helstroffer and Obidzinski 2014), the non-existence of a legal anticorruption framework can reasonably be attributed to the member states' resistance both to allow anticorruption interference in their national political and legal frameworks and to expose themselves to a standard set of regulations that can be monitored and sanctioned. The member states reluctance to commit to legally binding anticorruption rules was suggested by hypothesis 1 as the reason behind the lack of robust EU anticorruption framework and has been proved correct by the findings of chapter 5 and 6. The latter attested that the Council is the institution that inhibits the adoption of mandatory common EU anticorruption requirements, while the Commission and the Parliament exhibited political will to become the flagships for change in anticorruption strategy in the EU. The findings of chapter 7, along with those of the previous empirical chapters, suggest that if

change to the current EU anticorruption approach is to be achieved, it is the Council which should be heavily lobbied and pressured to agree on the adoption of a common anticorruption framework establishing an equal level of anticorruption compliance throughout the EU.

8. Conclusion: Two Institutional Enablers and One Inhibitor

‘Corruption erodes trust in public institutions and in democracy, it undermines our internal market, it hampers foreign investment, it costs tax payers millions, and in many cases, it helps organised crime groups do their dirty work.’
(Commissioner Malmström 2014)

The direct and indirect cost of corruption to the EU varies between €179 and €990 billion¹⁷⁸ per year (Hafner et al. 2016). Apart from these significant economic losses, corruption also distorts the proper functioning of the internal market, exposes EU citizens to security threats and jeopardises their freedom, security and access to justice. Yet, despite this obvious menace, the EU has not yet developed a robust common anticorruption legal framework that seeks to counteract and prevent corruption at member state and EU level. In seeking to explain this puzzle, the thesis explored the role of the three main EU policy-making institutions – the Council, the Commission and the Parliament – in three areas of EU governance that highlight the need to strengthen the EU’s mechanisms of transparency and accountability. The main conclusion of the thesis is that the Council’s reluctance to adopt legally-binding anticorruption tools is the chief obstacle preventing the creation of a common EU legal anticorruption framework.

This chapter begins with a summary of the theoretical outline of the thesis and its principal empirical findings. This is followed by a discussion as to why the EU still needs a common legal framework and what it should, or could, look like. The third section explains the significance of the research findings for the development of a future EU

¹⁷⁸ The estimates depend on the scenario applied and the benchmarking of the countries. These numbers represent direct calculated losses and the indirect effects of corruption to the overall performance of the EU in all economic and social sectors.

anticorruption policy. And the final part identifies areas for future research, including the means by which a basic level of EU-wide anticorruption standards might be established.

8.1 Summary of the research and its findings

Any explanation on why there is no common European anticorruption legal framework must begin with an in-depth understanding of the issues of corruption and good governance, anticorruption policy development, EU institutional dynamics and EU policy-making. Based on this understanding, chapters 1, 2, 3 and 4 were dedicated to the establishment of the theoretical foundations of the thesis, exploring in turn different theories of corruption, good governance, EU institutional competences and EU policy-making.

Chapter 1 began with a brief outline of the corruption phenomenon and the reasons for counteracting it. It then provided a snapshot of the existing European anticorruption framework and explained why it is important to research the area of anticorruption policy development. The chapter argued that despite the large volume of political and economic science literature dedicated to corruption and good governance, studies focused on the EU anticorruption policy creation are largely missing. Further, the chapter presented the analytical framework and methodological approach, guiding the research and outlined the plan of the thesis.

Chapter 2 outlined the main theoretical framework pertaining to corruption and good governance. It deliberated on the main elements defining the corruption phenomenon and contemplated the notions adopted by political scientists and development practitioners. The chapter further presented the two main schools of thought, perceiving corruption either

as a principal-agent (Klitgaard 1988, Mungiu-Pipiddi 2013, Rose-Ackerman 1978) or a collective action problem (Persson, Rothstein and Teorell 2013). It argued that these two academic directions are not mutually exclusive but are rather complementary to each other, as they provide explanations for the corruption phenomenon and its facilitating factors both at individual and collective levels. Irrespective of their differences, the two schools assert that weak governance structures, lack of transparency and accountability, weak civil society and inefficient law enforcement and judicial structures are the underlying factors that allow corruption to flourish. The lack of good governance plays the role of both corruption cause and consequence, thus making the fight against corruption a difficult endeavour. In this framework, the presence of political will is key for the success of the latter and the manifestation of its various components serve as an indicator of the willingness of the political agents to bring anticorruption change. These components are used in the empirical chapters as assessment tools, revealing the institutional inhibitors and enablers. Further, the chapter justified the need for coherent anticorruption interventions by outlining the destructive nature of corruption and its negative effect on diverse dimensions of the economic, political and social life of European citizens. Chapter 2 further argued that good governance is the antithesis of corruption; explained the EU concept of good governance; and deliberated on how the principles of transparency and accountability can be utilised in achieving corruption-free governance. By doing so, the chapter laid the theoretical foundations for subsequent empirical chapters, which examined how these two principles have been applied in the ways that: 1) EU decentralised agencies are managed; 2) EU money is spent; and 3) EU decisions are taken. These three aspects of EU governance represent the classical manifestation of transparency and accountability,

expressed by the general obligation of the EU institutions and member states to account for their finances, fairness and performance (Behn 2001). By looking at the application of the principles of good governance as the antithesis of corruption, the chapter framed the research in a wider context, going beyond a narrow focus on anticorruption law enforcement and prevention measures to encompass elements of the broader governance perspective.

While chapter 2 focused on the ‘content’ of the policy, chapter 3 examined the main anticorruption policy developments during the past 25 years. It showed how international organisations such as the United Nations and the Council of Europe have enacted intergovernmental conventions in an attempt to unify international anticorruption legal efforts. The EU, in contrast, has played no such role and has generally pursued a non-binding voluntary approach in its struggle against the corruption within its jurisdiction. This approach was largely mirrored in the ways that EU member states adhere (or rather, do not) to their international commitments. The case of Germany was presented as a peculiar example of the latter. The delay shown by many member states in adjusting their national frameworks to the UN’s and CoE’s anticorruption standards clearly demonstrates resistance at a national level towards the adoption of binding anticorruption commitments. It also accords with the disinclination of some member states to surrender national sovereignty to the EU in the area of justice and home affairs. Next, the chapter demonstrated that the observed reluctance of member states to comply with their international anticorruption commitments sharply contrasted with their strongly proclaimed desire to fight corruption. Based on these observations, the chapter argued that the elements of political will, as described by Brinkerhoff (2000),) are largely missing in the

anticorruption policy behaviour demonstrated by some member states. In search of the reasons behind the lack of a joint robust anticorruption approach, the chapter identified two likely key hypotheses: the resistance of the Council to agree on the adoption of legally binding anticorruption commitments (hypothesis 1); and the absence of leadership on behalf of the EU institutions (hypothesis 2). The former mirrors the member states' behaviour in adoption of a commonly agreed international anticorruption framework, while the latter reflects the institutional arrangements of EU policy creation. These hypotheses are built on the understanding that the establishment of the EU legal framework is dependent on a complex set of political and technocratic interests, expressed by the Commission, the Parliament and the Council. It is also contingent on the presence of EU supra-institutional leadership and on the drive of the Council to change the status quo and support the proposed regulatory acts. If any of these components is lacking, no legal act can be adopted. These hypotheses were further tested in the empirical chapters.

Chapter 4 looked at the EU's institutional structure and the EU's institutional role in anticorruption policy-making. While analysing the evolution of the competences and roles of the European Commission, the European Parliament and the Council in the anticorruption domain, chapter 4 concluded that there are no legal constraints that prevent the adoption of a common anticorruption legal framework. The chapter argued that, while the EU founding treaties do not specify unequivocally that the EU actors are responsible for the anticorruption policies, nor do they explicitly prohibit the adoption of an effective anticorruption legal framework. The latter meant that the barriers for undertaking anticorruption initiatives are internal to the EU system and are created either by an unwillingness to support such initiatives or by a lack of institutional leadership in this

regard. The chapter further presented the theories of Costello and Thomson (2013) and Helstroffer and Obidzinski (2014), which suggest that in shaping the legislative outcomes, the two supranational institutions may have fewer de facto than de jure powers, as in situations where the Council's opinion is closer to the status quo, the Council has a greater prevailing bargaining power. The institutional predictive behaviour model of Helstroffer and Obidzinski (2014) was presented as a tool, outlining the predicted policy stances of the main institutional players in the co-decision procedure. The applicability of this model in the anticorruption domain was further tested in the empirical chapters. Further on, reflecting on the explicit reservation of the Council to invest more competences in the EU supranational institutions, the chapter drew parallels between the EU's competition and anticorruption policies. It outlined the similarities between the two, in terms of political sensitivity and economic impact, and the sharp contrast between the regulatory approaches chosen by the member states in these two cases. By doing so, the chapter demonstrated that the EU can act as a strong single player in a politically and economically sensitive domain if the member states empower it to do so and leadership at the level of supranational institutions exists. Yet, this seems not to be the case in the area of anticorruption policy, where the degree of competence delegation is highly dependent on a complex set of political considerations. The chapter therefore contemplated the legalisation theory of Abbott and Snidal (2002), who argue that legalisation is a process both reflecting and influencing the interests and values of political actors. The strong causal effects between the legalisation choices and the political costs and benefits play a crucial part in the strategies chosen by the political players in pursuing their specific agendas. This notion was further tested throughout the rest of the thesis.

Building on the notions established by the first 4 chapters, the second half of the thesis explored the policy stances of the Commission, the Parliament and the Council on strengthening the arrangements regarding transparency and accountability in the ways that the EU decentralised agencies are managed, EU money is safeguarded, and EU decisions are taken. Chapters 5, 6 and 7 each focused on a different aspect of good governance as described by Behn (2001): accountability of performance (EU decentralised agencies); accountability for finances (anti-fraud measures); and accountability of fairness (transparency in the EU decision-making). The selection of the empirical case studies was premised on the idea that adherence to good governance standards is an indicator of the readiness of institutional actors to conclude legally-binding anticorruption commitments.

Following this logic, chapter 5 looked at the procedures for the establishment and management of the EU decentralised agencies. It revealed significant accountability and transparency loopholes in the creation of the agencies as well as in their operational activities. The chapter argued that these gaps exist because of the Council's ongoing resistance to conclude an inter-institutional agreement which spells out the standards for DAs' operations. The chapter suggested that such standards would have brought consistency, transparency and accountability to the agencies' modus operandi, and would have ensured the proper application of the principles of good governance. For the Council, however, the endorsement of such standards would have meant limiting its discretionary powers to decide on whether, how, when and in what ways the agencies would be established and operate. The chapter further demonstrated that the evident need for improved accountability and transparency was being ignored in favour of the current patchy framework which allows the Council to monitor the agencies' performance on

political rather than evidence-based grounds. The fact that the principles of accountability and transparency are key attributes of European governance, and hence should be observed in the management and regulatory activities of the EU, did not prevent the Council from bluntly opposing them. In contrast to the Council's stance, the chapter revealed the commitment of the Commission and the Parliament to defend the EU principles of good governance and engrain them in the DAs' management practices. These stances suggested that the two institutions have the potential to bring change to the EU anticorruption policy. The policy process, traced by the chapter fully corroborated the applicability of the theories of Helstroffer and Obidzinski (2014) and Costello and Thomson (2013) in the anticorruption domain. The concluded non-binding joint statement on the management framework of the decentralised agencies, which was clearly not the preferred choice of the Commission and the Parliament, came to demonstrate the huge bargaining power of the Council. The policy outcome also illustrated that the legalisation theory of Abbott and Snidal (2000; 2002) is fully relevant to the EU anticorruption legalisation process, which is dominated by a complex set of political and economic considerations on the potential benefits and losses that the new legislative proposal may bring. The policy preferences of the three decision makers clearly attested that the absence of accountability and transparency procedures in the ways DAs are established and managed is a result of member states resistance towards adoption of transparent and legally binding rules, thus suggesting that the lack of robust anticorruption framework in EU is an outcome of the Council's reluctance to adopt enforceable commitments in the anticorruption area (hypothesis 1).

Chapter 6 presented additional evidence in this regard, by tracing the Commission's and Parliament's prolonged struggle for the adoption of an EU criminal anti-fraud legal framework. The chapter showed that despite the huge economic and credibility ramifications that fraud against EU financial interests may have, the Council strongly opposed the Commission's and Parliament's attempts to create a unified understanding of what constitutes EU fraud and how it should be investigated and punished. Until 2016 the Council had refused to endorse the adoption of an EU anti-fraud directive, which would have empowered the EU institutions closely to scrutinise the implementation of EU anti-fraud standards at the national level and would have limited the member states' powers in some areas of criminal justice. This refusal explicitly demonstrated that in the antifraud criminal law protection area, national sovereignty interests prevailed over the need to safeguard the European common good and ensure a corruption-free environment throughout the EU. Unlike in the case presented in the previous chapter, on this occasion, the Commission's and the Parliament's efforts rendered success, yet only following a judgement from the European Court of Justice. Yet, the fact that the draft directive, accepted by the Council, has significantly lowered the standards for enforcement, suggests that interests prevail in the EU legalisation process. This asserted the legalisation theory of Abbott and Snidal (2000) that politics and law are intertwined in complex cost-benefit calculations. It also corroborated the Costello and Thomson (2013) and Helstroffer and Obidzinski (2014) theories about the prevailing bargaining influence of the Council. These findings suggest that the reason behind the lack of common EU anticorruption framework is the Council's reluctance to conclude legally binding agreement in the anticorruption domain (hypothesis 1). In parallel, they demonstrated that the Commission and the

Parliament have exhibited strong political will, as explained by Brinkerhoff (2000), thus refuting hypothesis 2 (suggesting lack of political will of the supranational institutions) and indicating their political will and potential of becoming anticorruption flagships.

Chapter 7 investigated the attempts to conclude an inter-institutional agreement on the work of EU interest representatives. Unlike the previous case studies, where the legislative efforts of the Parliament and the Commission were directed towards creating mandatory standards for the member states, chapter 7 tested the transparency and accountability stances of the supranational bodies on adoption of a regulatory framework that directly affected their work. It also investigated the position of the Council in a case where the proposed accountability and transparency tools had no direct effect on the national administrations. The chapter revealed that although both the Commission and the Parliament acknowledged the need to regulate the activities of interest representatives, the Commission insisted on a voluntary approach right up until 2016, while the Parliament proposed the mandatory registration of all lobbyists. Despite the differences in the preferred approaches, the two supranational institutions demonstrated political will to regulate a sphere that directly influences their work, thus showing their potential for becoming anticorruption flagships. These findings proved hypothesis 2, suggesting the lack of political will on behalf of the supranational institutions, wrong.

In contrast to its actions relating to the previous case studies, the Council did not oppose the establishment of such a register. It decided to join tri-institutional talks, however, only after it had been assured that the proposed lobbying regulations would not create any binding obligations for the member states. The case study illustrated that when the national interests of the member states are not directly affected, the Council is more

willing to endorse the attempts to install better and more robust transparency and accountability mechanisms. In so doing the chapter reconfirmed the notion of Abbott and Snidal (2000; 2002) that the establishment of an EU legal regime is dependent on a variety of political, economic, sovereignty and value-influenced considerations rather than on the insurgency of the topic of discussion. It also suggested that the lack of a robust EU anticorruption framework is an outcome of the resistance of the Council to adopt legally binding anticorruption standards.

The empirical chapters attested the strong potential of the European Commission and European Parliament for pursuing the establishment of a common EU robust anticorruption framework. In all the three case studies, the supranational institutions manifested the elements of political will, as described by Brinkerhoff (2000). They demonstrated clearly the locus of initiative, in-depth understanding of the problem at stake, willingness to impose sanctions for non-compliance; and the ability to support and continuously pursue the transparency and accountability reform agenda. The thesis acknowledged that due to their supranational character, both the Commission and the Parliament are naturally inclined towards more integration and have a profound interest in acquiring more competences from the member states. Yet, in all the analysed cases, the grounds for requesting a unified EU approach were rooted in the inefficiency of the national policies and the need to enforce the principles of accountability and transparency in European and national policy-making. Chapters 3, 5 and 6 explicitly showed that had the member states followed their commitments under international law (chapters 3 and 6) and their good governance commitments (chapter 5), the need for a mandatory EU framework would not have existed. By revealing the reluctance of the member states to abide by their

international anticorruption commitments and the continual resistance of the Council to endorse the establishment of more transparent and accountable mechanisms in the ways the EU decentralised agencies are managed, and EU money is protected, the thesis concludes that the Council is the institutional anticorruption inhibitor. The evidence presented by the thesis suggests that the Council's decisions resulted from a complex set of political, economic and sovereignty considerations that had little to do with the issue at stake. They also demonstrated the relevance of the theories of Abbott and Snidal (2000; 2002), Helstroffer and Obidzinski (2014), and Costello and Thomson (2013) in the anticorruption domain.

Unlike the Council, the initiatives of the Parliament and the Commission – to promote transparency and accountability in the management and establishment of the European decentralised agencies; better protect the EU tax payers' money via a criminal law anti-fraud directive; and create a mandatory framework for the work of EU interest representatives – clearly demonstrate their leadership potential in the transformation of the current patchy approach into a more robust anticorruption framework.

Taken together, the empirical findings suggest that the lack of leadership on behalf of the European supranational institutions should be excluded from the possible explanations on why the EU has not established a robust anticorruption framework. The continual resistance of the Council to endorse the transparency and accountability initiatives proposed by the EU supranational institution, combined with its powers of veto over the adoption of all legal instruments in the EU, suggests that the Council is the institution that is inhibiting the adoption of a mandatory anticorruption framework applicable to all EU member states.

8.2 Does the EU actually need a common anticorruption legal framework and what should it look like?

The European Union represents a unique political and economic endeavour, which oversees the interests and social wellbeing of more than 500 million people and connects the economies, public services and administrations of 28 independent states.

Over the years, the freedom of movement of people, goods, services and capital have created valuable opportunities for stimulating regional development and sustainable economic growth across the EU. These freedoms, however, have inevitably created a complicated network of interdependent economic, social and political systems, where the strength of the entire network is contingent on the individual strength of each system. A flaw in the system of a single member state can have a negative impact on the lives of millions of EU citizens and can jeopardise their security, financial stability and wellbeing.

Such a flaw can be easily triggered by corrupt activities which do not only distort the political, social and economic wellbeing of the individual member states but also question the founding premise of the EU: that the *acquis* is both correctly implemented by the national authorities and properly enforced by the national judicial system (Szarek-Mason 2010). Controlling corruption and building a level anticorruption playing field throughout the entire European Union is therefore of crucial importance, not only for the individual prosperity of each national state, but also for the proper operation of the European internal market, monetary union and the Area of Freedom, Security and Justice. This is so, because corruption spreads from one country towards its neighbours and into the wider region, when those countries have a common political culture (Becker et al. 2009). When applied to the EU, such findings mean that if corruption is not deterred by all

EU member states, it may spread to those countries that may, historically, have been relatively free of corruption.

A vivid example of the political, economic and anticorruption interconnectedness of the EU member states was the world economic crisis in 2008. It questioned the stability of the EU financial system and brought into the spotlight the huge corruption differences in different parts of the EU. The crisis came to show that corrupt practices at national level can undermine both national economies and the overall EU financial balance. It also revealed that the current EU anticorruption approach, which relies on the member states' national political commitment to fight corruption, is highly inefficient. The economic crisis demonstrated that because there was no one to oversee the member states' anticorruption interventions (or non-interventions), 'corruption black holes' that threaten the functioning of the entire EU were created. So far, the non-existence of a common anticorruption regulatory approach has exposed the internal market, the euro area and the Area of Freedom, Security and Justice to various political, economic and security threats.

The establishment of a robust EU anticorruption framework, applied equally in all member states, is therefore necessary to uphold the main objectives of the Union. Such a framework will ensure a level anticorruption playing field throughout the entire EU and will guarantee that key anticorruption commitments are not neglected by national governments.

Given that the inefficiency of the current anticorruption policy of the EU is caused by the uneven implementation of existing international obligations and a lack of sanctioning and monitoring mechanisms (European Commission 2011a), the success of the future EU anticorruption approach depends on the establishment of a binding

anticorruption framework, complimented by strong oversight and sanctioning mechanisms. Such an approach will ultimately diminish discrepancies in corruption levels across the EU and will promote accountability and transparency in national and European policy-making.

A common anticorruption framework should spell out the main standards and principles to be followed by all member states and should provide the main criteria for determining their compliance with the commonly established standards. Such a framework might take the form of an EU directive or regulation (or any other legally binding form) and should be supplied with monitoring and sanctioning tools. These would ensure that in cases of non-compliance, the member states would become subject to the standard EU infringement procedure or any other regulatory pattern set to guarantee the observance of an EU law. The regulatory powers given to the Commission in the case of the EU's competition policy are a good starting point for an analysis of how an anticorruption policy might be properly regulated.

At the institutional level, the adoption of a robust EU anticorruption framework would require the European Commission, the European Parliament and the Council to support its creation within their competence frameworks determined by the treaties. The Commission would be required to initiate and draft the new anticorruption framework. Given their powers of veto, the unequivocal support of the Parliament and the Council is *conditio sine qua non* for changing the direction of the EU's anticorruption approach. While, from earlier evidence, it is reasonable to expect that the Commission and the Parliament will play their role by initiating and supporting the establishment of a common framework, that evidence also points to the fact that the support of the Council may be

more problematic, because the member states are generally reluctant to conclude legally binding anticorruption agreements

The investigated case studies revealed that the general obligation of the EU institutions and member states to explain and justify their conduct (Behn 2001, Bovens 2010, 2007) is not reinforced if such an obligation distorts the established institutional power-balance and contradicts some specific national interests. In the area of anticorruption, the legislative reluctance of the member states was vividly expressed by the slow ratification of the *UNCAC*, the *CoE Civil and Criminal Law Conventions on Corruption*, the *EU anticorruption convention*, *PIF Convention* and its protocols. It was also reflected in the rejection of the inter-institutional agreement on the operational framework of the decentralised agencies, the prolonged resistance to the adoption of the EU criminal anti-fraud directive, and the Council's approach in the establishment of EU lobbying regulations. The findings of the thesis reconfirmed the presence of a close and direct link between the domestic politics and the EU legislative choices of the member states (Abbott and Snidal 2000, Kahler 2000). They vividly demonstrated the complex set of political and sovereignty factors that shape the legalisation preferences expressed by the Council (Abbott and Snidal 2000, Pujas 2003). The findings of the thesis also reasserted that the Council has a substantive bargaining power over the Parliament, when its position is closer to the status quo than to that of the Parliament (Costello and Thomson 2013; Helstroffer and Obidzinski 2014). These empirical findings suggest that if a robust EU anticorruption framework is to be adopted, the Council should be heavily lobbied and convinced that the benefits brought to the EU and to the national administrations by

anticorruption regulations will far exceed the ‘inconveniences’ caused by the restrictions to national flexibility inherent in such regulation.

8.3 What has been achieved by the current research and how can these findings be utilised?

The findings of the current thesis have significant implications for the process of redefining the common European response to the problems of corruption faced by the EU. By analysing the EU institutional competences and the positions of the three main EU decision makers when it comes to establishing stronger accountability and transparency mechanisms in the EU governance arrangements, the thesis argued that the reasons behind the lack of a common EU anticorruption framework are rooted in the Council’s reluctance to support the establishment of legally binding anticorruption agreements. These findings are of significant importance for future research in the EU anticorruption policy domain, because, at present, despite a vast political science literature dedicated to corruption and its various manifestations, very few studies have discussed the EU’s efforts to build common standards and enforce anticorruption compliance among the member states (e.g. Mungiu–Pipiddi 2008; Szarek-Mason 2006). Even when this has been done, the majority of studies have either focused on specific countries or regional dynamics or looked at specific glitches in attempts to promote anticorruption compliance. Anticorruption policy creation, on the other hand, has been largely neglected, notwithstanding the EU’s own recognition that its present anticorruption approach is failing (European Commission 2011a; 2014b).

The thesis addressed this gap and provided some suggestions for policy improvement. By focusing on the main institutional players that are responsible for defining the EU’s strategic anticorruption vision, the thesis looked at the ‘machinery’ of

anticorruption policy-making and outlined the institutional enablers and inhibitors for the adoption of a common EU anticorruption approach. The thesis demonstrated that the creation of common anticorruption standards has no legal barriers, thereby establishing that the current non-binding approach reflects the preferences of the Council, rather than any restrictions imposed by the EU treaties. The member states' preferences, expressed by the Council, corroborated the applicability of the theories of Abbott and Snidal (2000) in the anticorruption domain. They attested that the development of anticorruption legal commitments is a highly politicised process that is more dependent on a wide spectrum of political and economic considerations than the actual problem at hand. The empirical confirmation of these theories suggests that current anticorruption policy-making is not a highly rational process but is rather driven by different national policy dynamics. These findings should be reflected in the ways the anticorruption practitioners and policy-makers shape their anticorruption reform strategies and build their anticorruption alliances. Along with these findings, those of the institutional bargaining power theories of Helstroffer and Obidzinski (2014) and Costello and Thomson (2013) are also fully applicable in the anticorruption domain and have also significant implications for further anticorruption policy development. Given that the Council is the institution that possesses the greatest bargaining power in the co-decision process, and is also the institution most likely to stall the reform process if the latter is not reflecting the member states' preferences, overcoming the resistance of the Council and bringing it at a position closer to that of the Commission and the Parliament is the key towards the adoption of a stronger EU anticorruption framework.

Here, it should be noted that the Council's observed intransigence does not mean that all the member states oppose the adoption of an anticorruption framework per se. The stances of the Council may reflect the views of a blocking minority or may be driven by national political factors. Yet, if a common legal anticorruption approach is to be adopted by the EU, the institution that should be most heavily lobbied is the Council. This could involve active lobbying of permanent representatives in Brussels and advocacy campaigns to raise public and media support at the national and European levels.

Furthermore, the finding that the European Commission and the Parliament are heavily inclined to support a stronger and more vigorously applied anticorruption approach in the EU is also significant because it makes them natural partners of anticorruption non-governmental organisations and advocacy groups. Although the likelihood that the EU will adopt a common anticorruption legal framework, ensuring common anticorruption compliance throughout the EU, is currently only a pale hope, such a framework is surely needed for the long-term sustainable political and economic development of the EU. The current political and economic challenges faced by the EU, such as the migration crisis, the rise of nationalism, deep economic problems in some member states such as Greece, the crisis in the rule of law in Poland, and Brexit, are major disruptive forces that shift the attention from the necessities of EU anticorruption to emergency response measures and strategies. The same factors are, however, among the main triggers for the adoption of a robust anticorruption mechanism that is capable of safeguarding the freedom, security and justice and the internal market of the EU.

The findings of this thesis have also important political and academic implications, fostering as they do the debate on the EU anticorruption future. By questioning the notion

that the EU and its member states are strongly committed to fighting corruption in a unified manner, the thesis puts into doubt the existence of a real political will to do so. Given the numerous declarations and joint statements made on behalf of the member states and the Council, their political will to fight corruption has usually been taken for granted. For this reason, past debates have evolved around topics such as: corruption and anticorruption doctrines, anticorruption good practices, institutional arrangements and so on. This debate, however useful it may be, is superfluous if there is no political will or desire to adopt and implement strong anticorruption measures. Getting the discussion back to its roots and emphasising the centrality of political commitment are among the main prerequisites for changing the EU's current anticorruption policy approach. Further research into how political commitments to anticorruption should be implemented at national and EU levels, and who is responsible if this is not done, may help civil society groups and the media to exert more effective pressure on national political elites. Such pressure should come from the combined efforts of grass-roots and national advocacy organisations, along with cross-border campaigns and lobbying efforts.

The findings of this thesis can also support the establishment of an effective EU anticorruption framework. Despite the leading role taken by the EU in advocating good governance and anticorruption standards abroad, its current anticorruption approach does not provide any means for requesting compliance and ensuring adherence to a minimal set of anticorruption standards across all EU member states. What is more, the existing framework does not provide a clear picture of the division of responsibilities between the EU institutions and the member states. As a result, and having no tools for legislative enforcement, the EU supranational institutions have been often blamed for their inability to

deal with corruption in the member states, or for being corrupt themselves. While the current thesis does not look at the last issue, it presents clear evidence that when the EU supranational institutions wanted to promote accountability and transparency in EU governance, the Council did not give them the opportunity to do so. The lack of a clear division of competences creates murky lines of accountability which in turn diminish public trust in both national governments and EU institutions and questions the integrity of policy processes.

The findings of the thesis can also contribute to an even broader debate on how to reconcile the natural desire of the member states to protect their national sovereignty with the need to establish a common EU approach. These conflicting interests are particularly visible in the case of anticorruption. On the one hand, corruption threatens the sustainable economic development, democracy and rule of law at both EU and national levels. On the other, anticorruption measures, falling under the justice and home affairs portfolio, are part of the area considered to be the ‘holy grail’ of national sovereignty and hence ‘untouchable’. Despite these huge contradictions, the thesis demonstrated that if there is a will, there is a way. The EU’s competition policy, arguably one of the biggest success stories of the EU, is a good example of how these incompatible interests can be reconciled. The challenges of an increasingly integrated world economy have helped the EU member states to overcome their national resistance and outsource some of their sovereign rights to the European Commission, thus creating one of the strongest competition regulators in the world. Based on the identified similarities in anticorruption and competition policies, this thesis has suggested that anticorruption issues can be tackled in a similar manner. It has

thus sought to open the debate on the possible form and modus operandi of a future joint EU anticorruption framework.

The findings that the legalisation theories of Abbott and Snidal (2000; 2002) and the institutional bargaining power theories of Helstroffer and Obidzinski (2014) and Costello and Thomson (2013) are applicable in the anticorruption domain also may be used as a foundation for investigating if the same factors that inhibited the adoption of common EU anticorruption framework do not serve as barriers in other sensitive areas, including the justice and home affairs portfolio.

Finally, the findings of the thesis have a broader relevance that goes beyond the policy process at EU level. They support the general theoretical and empirical quest to identify the reasons for the inefficiency (and even failure) of the anticorruption interventions of many national governments and donor-funded programmes. The identification of the institutional actors which can potentially become engines of change, along with the institutional anticorruption inhibitors and their motivational factors, can significantly strengthen the advocacy strategies of the civil society sector and international donor organisations working in the area of anticorruption.

8.4 Future research on the process of EU anticorruption policy creation

This thesis has focused on identifying why the EU has not adopted a common robust anticorruption framework by researching the enabling or inhibiting role of the main EU decision makers. The thesis examined the Commission, the Parliament and the Council as unitary institutions and did not elaborate on the internal processes that led to the establishment of their official positions. The rationale behind this approach is bound to the

understanding that the preferences for the adoption of anticorruption regulations are expressed by the officially stated institutional positions, adopted by the three main EU decision-makers. Moreover, identifying the institutional proponents and opponents of the status quo is, by default, the first step in the analysis of the reasons behind the feebleness of the current anticorruption approach.

The discovery that the Commission and the Parliament actively support the establishment of more robust transparency and accountability mechanisms in the EU governance arrangements, while the Council has been reluctant to conclude any binding commitments, sheds important light on the reasons behind the lack of a common EU anticorruption framework. It also points the way to further research focused on the internal processes and motivations that contributed to these outcomes. Research on the policy preferences and voting behaviour of the individual member states when it comes to anticorruption decisions would be of particular interest. Such research could better help to explain the reasons behind the Council's positions and help to predict its future policy stances. It could also help to identify those member states that might be the natural supporters of the Commission and the Parliament in building obligatory anticorruption standards, as well as those that might be expected to strongly oppose their adoption. The insights provided by a study of this kind might increase awareness among anticorruption advocates and practitioners about how best to approach and better influence the formation of policy opinions at national and EU levels.

The analysis of individual voting preferences in the Council could be further supplemented by a study of how EU member states have reacted to global security, political and economic threats, and what common policies they have set in place (if any). It

may focus in particular on the global threats that require the establishment of a joint EU approach and the outsourcing of additional competences to the EU institutions. Such a study might reveal valuable information on how to build successful EU interventions in other cross-cutting areas, such as anti-terrorism, the fight against organised crime and migration. Knowledge of the drawbacks and enablers in addressing such global challenges might support European policy makers in the adoption of an efficiently crafted approach for dealing with perils threatening the existence of the entire EU and its values.

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